

COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

**Marco Picariello and Gabrielly's
Cleaning Service, LLC,**
Petitioners

v.

Docket Nos. LB-23-0325

**Commonwealth of Massachusetts,
Office of the Attorney General,
Fair Labor Division,**
Respondent

Appearance for Petitioners:

Marco Picariello, *pro se*

Appearance for Respondent:

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

Administrative Magistrate:

Timothy M. Pomarole, Esq.

SUMMARY OF DECISION

The Petitioners appeal three citations issued by the Fair Labor Division of the Massachusetts Attorney General's Office ("AGO").

The first citation's determination that the Petitioners failed to keep true and accurate wage and hour records is affirmed. The civil penalty of \$2,500 is remanded to the AGO for recalculation because it is not clear from the record whether or how the AGO's penalty assessment was informed by considerations inconsistent with findings in this decision related to the other two citations.

The second citation correctly determined that the Petitioners failed to pay wages to three employees. The determination that the Petitioners acted with specific intent is reversed. The record indicates that the Petitioners were prepared to pay the wages, but believed that before they did so, they needed tax identification information that the lead complainant declined to provide. Even if that belief was unreasonable, the Petitioners did not act with the “goal” of depriving the complainants of their wages. Because the restitution amount is adjusted and the specific intent finding is reversed, the civil penalty assessed for this citation is remanded for recalculation consistent with this decision.

The third citation, for retaliation, is reversed. The allegedly retaliatory conduct occurred in the context of a text exchange in which the lead complainant demanded payment of unpaid wages but declined to provide tax identification information. One of the Petitioners wrote that his attorney can “run an immigration status.” Whatever threatening force the comment may have had when first made was dissipated by the rest of the exchange and the overall context, which made it clear that the comment was intemperate bluster and not a statement of intent or a warning. It was thus not an adverse action capable of grounding a retaliation claim. Moreover, the comment was not made in specific response to protected conduct, the demand for wages, but rather in response to the refusal to provide information that the Petitioners believed they had been promised and which they thought they needed to pay the demanded wages.

DECISION

Petitioners Gabrielly’s Cleaning Service, LLC (“Gabrielly’s”) and Marco Picariello appeal three citations issued by the Attorney General’s Office, Fair Labor Division (“AGO”), for violations of wage and hour statutes. On November 17, 2023, I held a hearing via the WebEx teleconferencing platform. The hearing was recorded. I admitted Exhibits 1-10 into evidence. Investigator Cindy Molina testified on behalf of the AGO. Marco Picariello and Darliene Picariello testified on behalf of the Petitioners.¹

¹ At the hearing it became apparent that English is not Ms. Picariello’s first language. No party requested an interpreter, but it would have been better practice if I had offered to suspend the hearing and secure an interpreter for Ms. Picariello. Nevertheless, I believe that the basic gist of her testimony was reasonably clear and that I may reasonably rely upon it.

On January 17, 2024, the AGO filed a post-hearing brief, whereupon the administrative record was closed. The Petitioners did not file a post-hearing brief.

FINDINGS OF FACT

Based on the evidence presented by the parties, along with reasonable inferences drawn therefrom, I make the following findings of fact:

1. Marco Picariello and Darliene Picariello own Gabrielly's, which is no longer in operation, and they both were responsible for the operation of the business, including hiring and payment of wages. (Exhibit 3; Molina Test.; M. Picariello Test.).
2. Gabrielly's was the Picariellos's first business. (Exhibit 8).
3. Gabrielly's functioned as a cleaning service. (Exhibits 1, 3; Molina Test.; M. Picariello Test.).
4. Gabrielly's provided house cleaning services during the day and restaurant cleanings at night. This became too much for the Picariellos to handle, so they decided to hire someone to take over the restaurant cleanings. (M. Picariello Test.).
5. Ms. Picariello posted an advertisement on a WhatsApp group. (Exhibit 5).
6. The Picariellos hired Sueli Santos. (Exhibits 1, 5; Molina Test.; M. Picariello Test.; D. Picariello's Test.).
7. The arrangement was that once a week Ms. Santos would clean three restaurants. The cleanings would take about two to three hours each. Ms. Santos would be paid \$600 per week. She could bring others to help her and

pay them out of the \$600 as she saw fit. The plan was for Ms. Santos to work initially alongside the Picariellos so that she could learn about the restaurants and what they needed. (M. Picariello Test.; Exhibit 5).

8. Although Ms. Santos could bring whomever she chose to work with her, the Picariellos understood that she would bring her cousin, Ms. Oliveira. Ms. Santos would receive the payment and make disbursements to Ms. Oliveira because Ms. Oliveira lacked certain documentation. (Molina Test.; Exhibit 8; Exhibit 6).
9. In early/mid-March 2022, Ms. Santos performed cleaning work. On the first day, Ms. Santos brought Ms. Oliveira to work alongside her. Ms. Santos and Ms. Oliveira performed about three hours of work that day. (Molina Test.; Exhibit 5).
10. Ms. Oliveira did not continue after that first day because she was pregnant and found the work too physically demanding. (Molina Test.; Exhibit 5).
11. The next day on which Ms. Santos performed cleaning for the Picariellos she brought her father, Jose Pareira dos Santos, along with her. (Exhibit 5).
12. Ms. Santos and Mr. dos Santos performed cleaning work that day and one other day. On one of the two days, they performed two cleanings together, for a total of three cleanings. (Exhibits 2, 5).
13. None of the cleanings performed by Ms. Santos, Mr. dos Santos, or Ms. Oliveria took more than six hours. (Exhibit 2; M. Picariello Test.).
14. Ms. Santos and Mr. dos Santos ceased working for the Picariellos after these

cleanings. (Exhibits 1, 5, 8).²

15. Neither Ms. Santos, Ms. Oliveira, nor Mr. dos Santos were paid for their work. (Exhibits 1, 7, 8; Molina Test.; M. Picariello Test.).
16. At some point in the first half of March, Ms. Santos spoke with Ms. Picariello over the telephone and demanded payment. Ms. Picariello said that she and her husband needed her social security number or her Individual Taxpayer Identification Number (“ITIN”) in order to pay her. She also stated that before she was hired, Ms. Santos had agreed to provide this documentation. (M. Picariello Test.; Exhibit 8).³
17. A heated exchange of text messages between Ms. Santos and the Picariellos followed. Toward the beginning of the text exchange, Ms. Santos stated that she did not have any contract with the Picariellos, evidently in response to Ms. Picariello saying over the phone that she had agreed to provide documentation. Mr. Picariello responded to Ms. Santos’s comment:

Hey genius if you want to get paid we need your information so there for you would be a employee and part of the contract but again your a genius all your text messages before so you verbally said you work and we replied it's a verbal contract! You're not gonna win with me. Deal with my attorney now do not contact us period. My attorney is able to run an immigration status for us so you deal with him now. Darliane do not answer just block the number now.

² I make no findings regarding the reason Ms. Santos and Mr. dos Santos stopped working for the Picariellos.

³ An Individual Taxpayer Identification Number is a 9-digit number issued by the IRS for individuals who need an identification number for federal tax purposes, but who do not have a social security number.

(Exhibit 8).⁴

18. Notwithstanding Mr. Picariello's statement that there was to be no more communication, the text exchange continued. Mr. Picariello repeatedly told Ms. Santos that he and Ms. Picariello needed taxpayer identification information to pay her. Mr. Picariello used insulting and demeaning language, including the following:

- "Hey genius if you want to get paid we need your information."
- "Hello send me your ITEN OR SOCIAL SECURITY SO YOU CAN GET PAID ARE YOU DUMB!!!"

(Exhibit 8).

19. Notwithstanding the insulting language, the Picariellos were prepared to pay Ms. Santos her wages if she provided taxpayer identification information. They believed they needed the information to comply with their tax reporting obligations. (M. Picariello Test.; Exhibit 8). Their willingness to pay the wages if they received the information was conveyed repeatedly over the course of the text exchange, including in the following passages:

- "Send me your address I will mail out a check today and need your ITEN for taxes." (M. Picariello).
- "I'm telling you I will 100% pay you but I need the information period you want your money send me the info I will send your check immediately." (M. Picariello).
- "You want your money im telling you give me your information and I will send out the check today! But you know a company cannot pay under the table period. We hire you because you told us you have documents now you don't? So you want your money its simple send

⁴ Misspellings and other such errors have been retained.

me the address and ITEN number and I will send you the check I can't pay you any other way." (M. Picariello).

- "Suely, I never left anyone without payment. And you are not going to be my first one. We are only asking you for your information to [...]." (D. Picariello).⁵

(Exhibit 8).

20. For her part, Ms. Santos repeatedly declined to provide the information. In response to Mr. Picariello telling her he needed her ITIN to pay taxes, for example, Ms. Santos replied: "I just want my money that's all[.] I'm not paying taxes i want my money thats It." (Exhibit 8).⁶

21. Ms. Santos's text messages make reference to performing cleanings on three days. For example, Ms. Santos complains of the "turbulence to pay for the 3-day cleaning." She also writes: "You were there TDS the 3 days, so you who didn't clean before" and "You know why it was 3 days at all the restaurants in the Boston area." (Exhibit 8).

22. On or around March 16, 2022, Ms. Oliveira sent a message (via a messaging platform or similar application) to Ms. Picariello:

Hi, good afternoon. My name is Cecilia. I work with Sueli and I would like to solve my work situation of my days working with you. She is at the moment at the hospital with her son. The amount is \$600 dollars.

(Exhibit 6).

⁵ The text message cuts off at that point. The next text message reads "Where we do not pay people here?" (Exhibit 8). This passage was translated from Brazilian Portuguese into English by an AGO intake officer who speaks Portuguese.

⁶ I make no findings regarding why Ms. Santos did not want to share her information.

23. Ms. Picariello responded with a voicemail:

Hello, is everything fine? So let me tell you, we have to work it out with Sueli, but Sueli has to pass on her information, like her Itin number or social security number. When I made my post, I said that I needed someone who had an Itin or social number, and she said she had all the documents. I have her messages, I have all the conversations I had with her and now that it's time to make a payment, she said that she won't give us the information and that she doesn't pay taxes and that she won't give us the information, so there's no way we can pay her in cash, our company only pays by check and that's why we only take people who have documents and she said she did, so how are you going to do it? She needs to give me the document so we can fill it out. Who will pay her taxes? I won't pay. Do you agree with me? So, we are waiting for this.

(Exhibit 6).⁷

24. Ms. Picariello followed up with an additional voicemail message:

Now, if she doesn't want to give me the information or she lied to get the job, which is not my problem, I can send the check to the address she gave me and I will discount her taxes, because I'm not going to pay her taxes. I'll discount it, then I sent it to her. And her father burned my vacuum of \$400 dollars, but I'm not going to discount that. But taxes, unfortunately, it's not me. This is the obligation of all of us here to pay taxes.

(Exhibit 6).

25. On or around April 4, 2022, Ms. Oliveira and Ms. Santos completed

timesheets on a form bearing the letterhead of "Brazilian Worker Center, Inc." (Exhibit 2).

26. Ms. Santos's timesheet recites the following dates, locations, and hours.

- 3/6/2022: Chestnut Hill (3 hours)
- 3/10/2022: Boston (6 hours)
- 3/11/2022: Chestnut Hill and Burlington (12 total hours)

⁷ This voicemail and the following voicemail were translated from Brazilian Portuguese into English by an AGO intake officer who speaks Portuguese.

(Exhibit 2).⁸

27. Ms. Oliveira's timesheet recites the following dates, locations, and hours:

- 3/10/2022: Boston (6 hours)
- 3/11/2022: Chestnut Hill and Burlington (12 hours)

(Exhibit 2).

28. On November 11, 2022, Ms. Oliveira and Ms. Santos filed wage complaints with the AGO. (Exhibit 1).

29. In Ms. Santos's wage complaint, she states that she worked for the Picariellos from March 6, 2022 to March 15, 2022. Ms. Santos states that her pay was \$150 and that this was a "Piece Rate" (that is, \$150 per cleaning). She states that she is owed \$600.00. She writes: "I complained and they said that they had paid everything. They took away from my salary because of a broken vacuum. They were very mad, both Marcos and Darliene." (Exhibit 1).

30. In Ms. Oliveira's wage complaint, she states that she worked for the Picariellos from March 6, 2022 to March 9, 2022. Like Ms. Santos, she states that her pay was \$150 and that this was a "Piece Rate" (that is, \$150 per cleaning). She states that she is owed \$450.00. She also writes: "I complained to them that they did not pay me, but they said they had paid

⁸ On Ms. Santos's timesheet, there is a handwritten notation next to the hours for March 10 and March 11 that reads "de duos pessoas." Next to the hours for March 6, there is a different notation that is difficult to read. Ms. Oliveira's timesheet also has handwritten notations, "por 2 pessoas" and "de 2 pessoas," for the March 10 and March 11 entries.

me the amount minus broken vacuum.” (Exhibit 1).

31. The AGO opened an investigation of the complaints. (Exhibit 1, Molina Test.).

32. On December 7, 2022, Ms. Molina spoke with Ms. Santos, who told her that she had responded to an online post stating that she would be paid \$150 to clean restaurants. (It is not entirely clear whether Ms. Santos told Ms. Molina that she would be paid \$150 per cleaning or \$150 per day.)⁹ Ms. Santos stated that she worked for the Picariellos for seven days and that she thought “she worked from 5PM-2AM approximately.” She told Ms. Molina that “when [she] attempted to ask Marco for her wages, Marco threatened her with deportation to Brazil and asked for either an SSN or green card. [She] only had a tax ID number to provide Marco with, but Marco told [her] that if she did not exist, then she did not need to be paid.” (Exhibit 5).

33. Ms. Santos also told Ms. Molina that while she was on site with Mr. Picariello, a vacuum got broken, which (according to Ms. Santos) resulted in Mr. Picariello threatening her with deportation. (Exhibit 5).

⁹ Ms. Molina’s notes state that Ms. Santos reported that she had “responded to a post online which stated that for every restaurant she cleaned she would be paid \$150 a day.” (Exhibit 5). This note somewhat confusingly combines a piece rate and a daily rate. (Under this formulation, it is not clear what payment Ms. Santos would receive if she cleaned more than one restaurant on a particular day). Ms. Santos’s wage complaint recites a piece rate. (Exhibit 1). In her testimony, Ms. Molina stated that Ms. Santos had told her that she would be paid \$150 per day. (Molina Test.). Ms. Santos’s wage complaint recites a piece rate of \$150 per cleaning. (Exhibit 1). This lack of clarity highlights the problem of hearsay testimony; had Ms. Santos testified, she would have been able to provide direct testimony regarding her arrangement with the Picariellos.

34. On April 6, 2023, Ms. Santos told Ms. Molina that her father, Mr. dos Santos, had worked with her during the same hours, except for the first day, when Ms. Oliveira performed work. (Exhibit 5).
35. On April 12, 2023, Ms. Molina spoke with Ms. Oliveira over the telephone. Per Ms. Molina’s notes, Ms. Oliveira reported that she only worked one day for the Picariellos and stated that she recalled “working about three hours, but isn’t really sure.” (Exhibit 5).¹⁰
36. On December 20, 2022, the AGO issued a records demand, requiring the production of payroll records, timekeeping records, personnel policies and other such documentation. (Exhibit 4, Molina Test.).
37. In an email dated January 18, 2023, Mr. Picariello told Ms. Molina that the only documentation the Petitioners had were text messages between him, his wife, and Ms. Santos. (Exhibit 8, Molina Test.).
38. The AGO determined that because the Petitioners did not have any documentation, it could not determine how many employees Gabrielly’s had or the size of its payroll. (Molina Test.).¹¹
39. The AGO determined that it had not issued any prior citations to Mr. Picariello or Gabrielly’s. (Molina Test.).

¹⁰ The AGO did not speak with Mr. dos Santos. During the course of its investigation, Mr. dos Santos was in the hospital and eventually died. (Exhibits 5-6).

¹¹ The record does not indicate that the Petitioners had any employees other than Ms. Santos, Ms. Oliveira, and Mr. dos Santos.

40. On May 24, 2023, two days before the citations were issued, the Assistant Attorney General assigned to the matter informed Mr. Picariello via e-mail that the AGO had determined that he had violated wage and hour laws. In response, Mr. Picariello asked how he could appeal the determination and stated, among other things, that Ms. Santos had refused to provide him with documentation. In response, the Assistant Attorney General noted: “In Massachusetts, if a worker performs a service for an employer, the employer has to pay.” (Exhibit 8).

41. On May 26, 2023, the AGO issued three citations against Marco Picariello, Darliene Picariello, and Gabrielly’s:

- Citation No. 22-11-61175-001 – for “Failure to keep true and accurate payroll records from 3/6/2022 to 3/12/2022, without specific intent,” in violation of G.L. c. 151, §§ 15, 19(3). A civil penalty of \$2,500.00 was assessed;
- Citation No. 22-11-61175-002 – for “Failure to make timely payment of wages owing and due from 3/6/2022 to 3/12/2022, with specific intent,” in violation of G.L. c. 149, § 148. Restitution of \$1,923.75 and a civil penalty of \$1,000.00 was assessed; and
- Citation No. 22-11-61175-003 – for “Retaliatory action taken against an employee for making complaint under c. 151, from 3/6/2022 to 3/12/2022, with specific intent,” in violation of G.L. c. 151, § 19(1). A civil penalty of \$5,000.00 was assessed.

(Exhibit 10).

42. The \$1,923.75 restitution amount assessed in Citation 002¹² is based on the

¹² For ease of reference, the citations will generally be identified by their three trailing digits.

AGO's determination that Ms. Santos and Mr. dos Santos worked seven nine-hour shifts for Gabrielly's (for a total of 63 hours of work) and that Ms. Oliveira worked one nine-hour shift. It applied a rate of \$150 per day, but concluded that this would yield an hourly rate that was less than the minimum wage in effect at the time the work was performed. The AGO therefore multiplied the hours worked times the applicable minimum wage (\$14.25) to reach its restitution calculation.¹³

43. On June 6, 2023, Mr. Picariello and Gabrielly's timely appealed the citations.¹⁴

DISCUSSION

An employer who appeals a citation issued by the AGO bears the burden of proving by a preponderance of the evidence that the citation was erroneously issued. G.L. c. 149, § 27C(b)(4).

The maximum civil penalty that may be assessed a first-time violator who acted without specific intent is \$7,500.00; the maximum penalty for a first-time violator who acted with specific intent is \$15,000. G.L. c. 149, § 27C(b)(2).

¹³ The AGO did not explain its conclusion that applying the \$150 per day amount would yield an hourly wage that would be less than \$14.25, the applicable minimum wage. \$150.00 divided by nine hours yields an hourly rate of \$16.66 per hour. Perhaps the AGO's calculations assumed that the \$150 would be divided between Ms. Santos and one of her co-workers, which would have been consistent with Mr. Picariello's testimony that the arrangement was that the Petitioners would pay the wages to Ms. Santos, who would then disburse some portion of those wages to the individuals she brought with her to perform the cleaning work.

¹⁴ No appeal was filed by Ms. Picariello.

In assessing the amount of a civil penalty, the AGO must consider: (1) any previous violations of G.L. c. 149 or G.L. c. 151; (2) whether the violation was intentional; (3) the number of employees affected; (4) the monetary extent of the violation; and (5) the total amount of the payroll involved. *Id.* The statute does not state how these factors are to be weighed or that these are the only factors that may be considered. *Briggs v. Office of the Attorney General – Fair Labor Division*, LB-09-1022, 09-1074, at 21 (Div. Admin. Law App. Feb. 26, 2013).

In the following discussion, Ms. Santos, Ms. Oliveira, and Mr. dos Santos will be collectively referred to as “the complainants.”¹⁵

Citation 001

The AGO issued Citation 001 for failure to keep true and accurate payroll records, from March 6, 2022 to March 12, 2022, in violation of G.L. c. 151, § 15. It assessed a civil penalty of \$2,500.

The Massachusetts Wage and Hour Law requires employers to keep true and accurate records of the following information:

the name, address and occupation of each employee, of the amount paid each pay period to each employee, of the hours worked each day and each week by each employee, and such other information as the [Director of the Department of Labor Standards] or the attorney general in their discretion shall deem material and necessary.

¹⁵ Mr. dos Santos is perhaps not technically a complainant because he did not file a wage complaint with the AGO or otherwise communicate with the office. Ms. Santos informed the AGO that she was seeking to recover not only her wages, but those owed to her father as well. Regardless, the collective term “complainants” is serviceable shorthand here.

G.L. c. 151, § 15. Regulations promulgated by the Department of Labor Standards also require employers to keep true and accurate records of employee social security numbers, vacation pay, deductions made from wages, and fees or amounts charged to the employee by the employer. 454 CMR 27.07(2). Employers must keep all such wage and hour records for at least three years. *Id.*

The Wage and Hour Law also requires all employers to permit inspection of their records by authorized individuals and to provide copies of those records upon demand “at any reasonable time”:

Such records shall be maintained at the place of employment, at an office of the employer, or with a bank, accountant or other central location and shall be open to the inspection of the commissioner or the attorney general, or their authorized representatives at any reasonable time, and the employer shall furnish immediately to the attorney general, commissioner or representative, upon request, a copy of any of these records . . . An employer shall allow an employee at reasonable times and places to inspect the records kept under this section and pertaining to that employee.

G.L. c. 151, § 15.

There is no dispute here that the Petitioners did not maintain any documents regarding the brief period of work performed by the complainants. Although the employment relationship was short-lived, that fact does not excuse the Petitioners from complying with the law. Accordingly, the AGO was warranted in determining that the Petitioners violated G.L. c. 151, § 15.

Turning to the civil penalty assessed, the AGO provided little information regarding how it assessed a penalty of \$2,500 for a first-time violation, without specific intent, for a failure to keep and maintain records for three employers over a period of approximately one week. Specifically, it did explain how its determination was affected

by “the monetary extent of the violation.” Perhaps not at all – because the recordkeeping violation is not, itself, a monetary violation (like a failure to pay wages would be, for example). On the other hand, a colorable argument could be made that the seriousness of a recordkeeping violation might, in some circumstances at least, be correlated with the size of an accompanying monetary violation.¹⁶ The issue is relevant here because I have found, for the reasons explained below, that the amount of restitution owed to the claimants is lower than that assessed by the AGO.

Because the AGO’s assessment of the civil penalty may have been informed by the restitution owed the claimants for the wage violation and I have arrived at a lower figure, I remand the penalty to the AGO for recalculation.

In sum, Citation 001 is affirmed to the extent it asserts a violation of G.L. c. 151, § 15, but I remand the penalty for recalculation consistent with this decision.

Citation 002

The AGO issued Citation 002 for failure to make timely payment of wages owing and due from March 6, 2022 to March 12, 2022, with specific intent, in violation of G.L. c. 149, § 148. It assessed a restitution amount of \$1,923.75 and a civil penalty of \$1,000. The following discussion will address: (a) the scope of the violation and restitution owed; (b) the AGO’s specific intent determination; and (c) the civil penalty assessed by the AGO.

A. The Scope of the Violation and Restitution Owed

¹⁶ I note that the civil penalty assessed for the violation in Citation No. 002, which the AGO determined was with specific intent and which involved monetary loss to employees, was only \$1,000.

Although there is no dispute that the Petitioners did not pay any wages to the complainants, there is considerable disagreement about how much work Ms. Santos and Mr. dos Santos performed for the Petitioners and whether Ms. Oliveira performed any work at all.

The Petitioners' failure to maintain any employment records is an obvious obstacle to resolving some of these issues. The picture is further confused by the inconsistencies in the evidence submitted by the AGO. For example, Ms. Oliveira's time sheet indicates that she worked on two dates, first for six hours and then for twelve hours, but Ms. Molina's notes of her conversation with Ms. Oliveira indicate that she worked only one day for about three hours. As to Ms. Santos, the AGO's evidence conveys conflicting information as to the number of days and hours worked. Because neither Ms. Santos nor Ms. Oliveira testified, it was not possible to ask follow-up questions or receive testimony that might have helped clarify when they worked.

Nevertheless, there is one point on which the evidence converges: Mr. Picariello's testimony, Ms. Oliveira's March 16 text message, and Ms. Santos's wage claim all refer – with some differences and qualifications discussed below – to a \$600 figure:

- Mr. Picariello testified that the plan was to pay Ms. Santos \$600 per week to clean three restaurants and that Ms. Santos would then divide that payment with whomever she brought to help her clean.
- Ms. Oliveira's message stated that "[t]he amount is \$600." Based on the context, I infer that Ms. Oliveira was seeking a collective payment of \$600, encompassing Ms. Santos's, Ms. Oliveira's, and perhaps also

Mr. dos Santos's work.¹⁷

- Ms. Santos's wage complaint stated that she was owed \$600 for cleaning four restaurants. It is not clear whether she intended her claim to be owed \$600 to encompass compensation to Ms. Oliveira and Mr. dos Santos as well.

I credit Mr. Picariello's testimony that the \$600 was to be a collective payment. The testimony is corroborated by Ms. Molina's understanding, based on her conversations with Ms. Santos and Ms. Oliveira, that the Petitioners would remit payment to Ms. Santos because Ms. Oliveira lacked the necessary documentation. It is also corroborated by Ms. Oliveira's text message, which appears to be a demand for wages on behalf of Ms. Santos as well as herself.

Based on Mr. Picariello's understanding, the \$600 amount for three restaurant cleanings results in an effective piece rate of \$200 per cleaning. Crediting Mr. Picariello's testimony on this subject, I conclude that the complainants were entitled to a collective effective piece rate of \$200 per cleaning, and not \$150 per cleaning (as referenced in the wage complaints). The question then becomes how many cleanings the complainants performed.

I begin with Ms. Santos. I do not credit Mr. Picariello's testimony that Ms. Santos worked for the Petitioners for only one day and performed two cleanings. First, the text messages between Ms. Santos and the Picariellos contain references to three

¹⁷ I say "perhaps" as to Mr. dos Santos because there is no evidence concerning Ms. Oliveira's understanding of the work he performed or how he would be compensated.

days.¹⁸ These references come from Ms. Santos's side of the text exchanges, but the Picariellos do not take issue with these references in the course of their texts with Ms. Santos, notwithstanding the fact that the texts reflect disagreements about several topics, such as a missing squeegee and how much cleaning the restaurants required. Moreover, Ms. Picariello's testimony indicated that some combination of Ms. Santos, Ms. Oliveira, and Mr. dos Santos performed multiple days of work. Finally, Ms. Santos's timesheet indicates that she worked three days.

As for the number of restaurants she cleaned, Mr. Picariello's testimony confirms that Ms. Santos performed two cleanings on at least one day, which is consistent with Ms. Santos's time sheet, which indicates that she performed four total cleanings over the course of three days. On balance, I conclude that she cleaned four restaurants.

Turning to Ms. Oliveira, I cannot credit Mr. Picariello's assertion that Ms. Oliveira performed no work for the Petitioners and that the Picariellos did not even know who she was. In the text exchange with Ms. Santos, Ms. Picariello wrote: "From the beginning I said that we needed 2 people, the other being your cousin." (Exhibit 8). And in an e-mail to the AGO, Mr. Picariello wrote: "[W]e tried to hire a woman by the name of Sueli and her relative and I have all text messages with her[.]" (Exhibit 8). Moreover, the text and the voicemails between Ms. Oliveira and Ms. Picariello suggest that Ms. Oliveira had at least some connection to the work. Ms. Oliveira's text message stating

¹⁸ Ms. Santos complains of the "turbulence to pay for the 3-day cleaning." (Exhibit 8). She also writes: "You were there TDS the 3 days, so you who didn't clean before" and "You know why it was 3 days at all the restaurants in the Boston area." (*Id.*).

that she would like to resolve “my work situation of my days working with you,” (Exhibit 6), elicited no reaction or surprise from Ms. Picariello in her voicemails.

Based on the record before me, I conclude that Ms. Oliveira cleaned one restaurant with Ms. Santos.

As for Mr. dos Santos, I credit the evidence that after the first day, when Ms. Oliveira decided she could not continue performing the work, Mr. dos Santos worked alongside his daughter. Accordingly, I find that he performed the remaining three cleanings alongside his daughter.

Utilizing a \$200 per cleaning rate, I conclude that Ms. Santos and Ms. Oliveira are collectively owed \$200 for the single cleaning they performed on the first day and that Ms. Santos and Mr. dos Santos are collectively owed \$600 for the three cleanings they performed on the other two days. There is no evidence regarding how Ms. Santos and her co-workers had agreed to divide the payments they received. Without such evidence, the most reasonable way of allocating the wages owed is by dividing the payment for each cleaning between the two workers who performed them.

Accordingly, I conclude that Ms. Santos is owed \$400 in restitution, Ms. Oliveira is owed \$100 in restitution, and Mr. dos Santos is owed \$300 in restitution.¹⁹

One additional topic related to restitution requires discussion. The complainants were entitled to be paid at or above the minimum wage for their work. The AGO contends that Ms. Santos, Mr. dos Santos, and Ms. Oliveira put in nine-hour shifts each

¹⁹ Mr. dos Santos has died. How the restitution owed to Mr. dos Santos should be disbursed is not before me.

day they worked. If that were correct, and if only a single restaurant was cleaned on any of the days worked, the restitution calculation above would result in an effective hourly rate that was less than the minimum wage applicable at the time.²⁰ The assertion that the complainants put in nine-hour shifts is based on Ms. Molina's notes of her conversation with Ms. Santos. No other evidence reflects nine-hour shifts and it does not fit well with the rest of the record. I do not credit this estimate.

Although I make no exact finding regarding how many hours the cleanings took, I do find that each cleaning took no more than six hours. Mr. Picariello expected that they would take between two to three hours; and the timesheets submitted by Ms. Santos and Ms. Oliveria indicate that each cleaning took no longer than six hours. Assuming for the sake of discussion that each cleaning took six hours, a payment of \$200 per cleaning, split evenly between two complainants, would result in an effective hourly rate of \$16.66. That would be more than the then-applicable minimum wage of \$14.25 per hour. Accordingly, the restitution determination outlined above would meet the minimum wage requirement.

In sum, the AGO correctly determined that the Petitioners violated G.L. c. 149, § 148. The amount of restitution owed is: \$400 to Ms. Santos, \$100 to Ms. Oliveira, and \$300 to Mr. dos Santos.

B. Specific Intent

²⁰ There is no dispute that the applicable minimum wage at the time was \$14.25 per hour. If a complainant performed nine hours of work cleaning one restaurant on a given day and split the \$200 piece rate payment, the result would be an effective hourly rate of \$11.11, far below the minimum wage.

Citation 002 asserts that the Petitioners acted with specific intent in failing to pay the complainants the wages they were owed.

The term “specific intent,” in this context, has the same meaning as it does in criminal law. *Watsop v. Office of Atty. Gen.*, LB-20-0462 and 0463, at *11 (Div. Admin. Law App. Dec. 23, 2021). To act with specific intent requires that the actor “must not only have consciously intended to take certain actions, but that he also consciously intended certain consequences.” *Id.* (citing *Commonwealth v. Gunter*, 427 Mass. 259, 269 (1998)). To put it another way, the actor must have acted with “the goal of causing a particular result.” *DeLuca’s Market, Inc. v. Office of Attorney General*, LB-18-0235 – 0237, at *6 (Div. Admin. Law. App. Oct. 8, 2019) (citation omitted). Violations arising from confusion or lack of due care do not, generally speaking, indicate specific intent. *Watsop, supra*, at *13 (determining that “considerable sloppiness” by the employer and confusion about the records requested did not indicate specific intent to not produce all of the responsive records requested by the AGO).

Here, Mr. Picariello was prepared to pay Ms. Santos, but believed that before he could do so, he needed taxpayer identification in order to comply with his tax reporting obligations. His belief that he could not lawfully pay the wages under the circumstances, even if unreasonable, is not the same as having the “goal” of withholding wages from the complainants.

I acknowledge the AGO’s argument that Mr. Picariello refused to pay even after he was “informed by the Attorney General that he was required to pay wages with or without the provision of a social security number by his workers.” (AGO Post-Hearing

Brief, at 4 (citing Exhibit 8 at pp. 63-64)). The May 24, 2023 e-mail upon which the AGO relies does not quite say that, however. It states: “In Massachusetts, if a worker performs a service for an employer, the employer has to pay.” The e-mail does not address Mr. Picariello’s concerns about tax reporting or provide him with guidance about how to proceed. I do not fault the AGO for this because Mr. Picariello did not clearly indicate the precise nature of his concerns. The point, however, is that this e-mail does not transform Mr. Picariello’s continued failure to pay between the May 24, 2023 e-mail and the May 26, 2023 issuance of the citations into a violation committed with specific intent.

The specific intent determination reflected in Citation No. 002 is reversed.

C. Civil Penalty

Because I have concluded that the total restitution owed is \$800, not the \$1,923.75 assessed by the AGO, and that the Petitioners did not act with specific intent, I remand the penalty amount to the AGO for recalculation consistent with this decision.

Citation 003

Citation 003 was issued for “[r]etaliatory action taken against an employee for making complaint under c. 151, 3/6/2022 to 3/12/2022, with specific intent,” in violation of G.L. c. 151, § 19(1). (Exhibit 10). Chapter 151 is the minimum wage statute and contains provisions concerning minimum wages and overtime pay. Ms. Santos made no complaint regarding minimum wages or overtime pay, but rather complained that she had not been paid her wages at all, a complaint perhaps falling more squarely under Chapter 149.

Even assuming for the sake of argument that the statutory citation is inapt, such errors are not grounds for vacating a citation unless the error “prejudicially misleads” the Petitioner. *James v. Office of Attorney General*, LB-25-0020, at *10 (Div. Admin. Law App. July 24, 2025) (citations omitted). Here, if there was an error, it did not prejudicially mislead the Petitioners. Whether cast as a violation of Chapter 149 or a violation of Chapter 151, the factual crux of the citation is that Mr. Picariello threatened that he would involve immigration authorities when Ms. Santos demanded her wages. The record contains no indication that the Petitioners would have proceeded differently in prosecuting this appeal had Chapter 149 been cited. Nor can I discern a relevant difference between the legal standards for evaluating claims for retaliation under Chapter 149 and those under Chapter 150.²¹

To establish retaliation, the claimant must show (1) “protected conduct”; (2) an “adverse action”; and (3) that a “causal connection existed between the protected conduct and the adverse action.” *Mole v. Univ. of Mass.*, 442 Mass. 582, 591-92 (2004) (quoting *Mesnick v. General Elec. Co.*, 950 F.2d 816, 827 (1stCir. 1991), *cert. denied*, 504 U.S. 985 (1992)). Although claims of retaliation most frequently arise in the context of

²¹ Claims of retaliation under Chapter 151 are assessed under the more widely ligated and fully developed framework for analyzing retaliation claims under G.L. c. 151B. *Jing Sky, LLC and Jing Hong Su v. Office of the Attorney General – Fair Labor Division*, LB-20-0377 & LB-20-0378, at *8-9 (Div. Admin. Law App. Nov. 7, 2022) (citing *Wilson v. Entergy Nuclear Operations, Inc.*, 2019 WL 4417771, at *5 (D. Mass. 2019) and *Smith v. Winter Place LLC*, 447 Mass. 363, 364 n.4 (2006)). Retaliation claims under Chapter 149 have also been evaluated under standards based on Chapter 151B case law. *See, e.g., Karatihy v. Commonwealth Flats Development Corp.*, 84 Mass. App. Ct. 253, 255 (2013). For purposes of this decision, I see no relevant differences between Chapter 150 and Chapter 149.

an ongoing employment relationship, retaliation claims can result from conduct occurring after the employment relationship has ended. *Jing Sky, LLC and Jing Hong Su v. Office of the Attorney General – Fair Labor Division*, LB-20-0377 & LB-20-0378, at *8-9 (Div. Admin. Law App. Nov. 7, 2022) (citing *Psy-Ed Corp. v. Klein*, 459 Mass. 697, 707 (2011) and *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)).

With respect to the first element, Ms. Santos’s demand for wages is a protected activity for purposes of grounding a retaliation claim. *Smith*, 447 Mass. at 367; *Ricker and The Luxury Box Restaurant Corp. v. Office of the Attorney General – Fair Labor Division*, LB-12-32 – 36, at *12 (Div. Admin. Law App. Aug. 27, 2013).

The second element is more problematic. Although courts have held that threats bearing on an employee’s (or former employee’s) immigration status can ground a claim of retaliation, *see, e.g., EEOC v. Global Horizons, Inc.*, 7 F.Supp.3d 1053, 1069 (D. Hawai’i 2014) (deportation threats constituted adverse actions for purposes of grounding retaliation claim), the Supreme Court has advised that in determining whether an action is adverse, “[c]ontext matters.” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006). The “significance of any given act of retaliation will often depend upon the particular circumstances.” *Id.*; *see also King v. City of Boston*, 71 Mass. App. Ct. 460, 470 (2008) (observing that determining whether an employer’s conduct constitutes “an adverse employment action often cannot be answered in the abstract”). Accordingly, a “statement that literally appears to be threatening is not necessarily a materially adverse action.” *Gaujacq v. EDF, Inc.*, 601 F.3d 565, 578 (DC Cir. 2010).

For example, in *Gaujacq*, the D.C. Circuit considered the following statement: “your career is dead in [company] if you file a claim.” *Id.* Although those words conveyed a threat if considered out of context, the D.C. Circuit concluded that the statement was not a materially adverse action because it was a “brief, fleeting, and unadorned verbal statement” and both before and after the statement, the employer went out of its way to accommodate the plaintiff’s requests, notwithstanding her increasing insubordination and refusal to consider options that did not meet her precise demands. *Id.*

Here, Mr. Picariello’s statement was an isolated, unrepeated remark in the context of an emotionally charged text exchange. This is not to suggest that a statement made in anger or exasperation cannot constitute a retaliatory threat, only that, in this case, a reasonable person in Ms. Santos’s position would have recognized the statement to be intemperate bluster and not a reflection of Mr. Picariello’s actual intent. Among other context, although Mr. Picariello purported to cut off communication so that Ms. Santos would be left to “deal with” his attorney, he and his wife continued to engage with her. Accordingly, whatever threatening force the statement might have possessed when it was first made was quickly diluted by the torrent of other remarks, which plainly conveyed that the Picariellos intended to address their dispute in a vitriolic text exchange rather than through their attorney making immigration queries.²²

²² I make no findings regarding the immigration status of any person mentioned in this appeal.

The third element, a causal relationship, is also lacking. Causation in this context requires a “retaliatory motive.” *Psy-Ed Corp. v. Klein*, 459 Mass. 697, 707 (2011) (citation omitted). In other words, “[t]he employer’s desire to retaliate against the employee must be shown to be a determinative factor in its decision to take adverse action.” *Id.* As I construe the case law, the retaliatory motive must be to punish or deter the employee’s protected conduct, rather than some other factor or circumstance related to the protected conduct.

Here, Mr. Picariello’s comment about immigration did not spring from a desire to deter Ms. Santos from, or punish her for, seeking her wages, which the Picariellos were – in principle, at least – prepared to pay. Instead, it arose from Mr. Picariello’s irritation that Ms. Santos would not furnish information she had previously told the Picariellos that she possessed and which he believed he needed to comply with his tax reporting requirements. Mr. Picariello’s comment was unprofessional and inappropriate, but he did not retaliate against Ms. Santos for engaging in protected conduct.

Citation 003 was issued in error.

Conclusion and Order

For the foregoing reasons, (1) the AGO’s issuance of Civil Citation No. 22-11-61175-001 is affirmed insofar as it asserts a violation of G.L. c. 151, § 15, but the civil penalty assessment is remanded for recalculation consistent with this decision; (2) the AGO’s issuance of Civil Citation No. 22-11-61175-002 is affirmed insofar as it asserts a violation of G.L. c. 149, § 148, but the restitution amount is adjusted to reflect \$400 owed to Ms. Santos, \$100 owed to Ms. Oliveira, and \$300 owed to Mr. dos Santos, and

the civil penalty assessment is remanded for recalculation consistent with this decision;
and (3) the AGO's issuance of Civil Citation No. Civil Citation No. 22-11-61175-003 is
reversed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Timothy M. Pomarole

Timothy M. Pomarole, Esq.
Administrative Magistrate

Dated: February 25, 2026