

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 12 August 2014

Case Nos.: 2013-TAE-00002
2013-MSP-00002

In the Matter of:

FISH FARM, a Partnership and
JIMMY FISH, an Individual
CHRISTINE FISH GILLIAM, Individual; and
KRYSTAL FISH, Individually,

Respondents.

DECISION AND ORDER APPROVING CONSENT FINDINGS

This matter arises under the Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 et seq., as amended by the Immigration Reform and Control Act of 1986 (“IRCA”), 8 U.S.C. § 1101(a) (H) (ii) (a) (“H-2A”) and the Regulations promulgated thereunder. This matter also arises under the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”) 29 U.S.C. §1801, et seq.,¹ which repealed or replaced the Farm Labor Contractor Registration Act of 1963 (“FLCRA”), 7 U.S.C. § 2041, et seq, and its implementing regulations found at 29 C.F.R. Part 500.

PROCEDURAL HISTORY

The Administrator, Wage and Hour Division, United States Department of Labor, issued a Determination Letter dated January 24, 2012 (in the Parties’ jointly filed Consent Findings, there was a typographical error stating that it was January 24, 2014 rather than 2012), pursuant to the Migrant and Seasonal Agricultural Worker Protection Act (“MSPA”) (29 U.S. C. section 1801 et seq.) to Fish Farms, a partnership and Jimmy Fish, assessing civil monetary penalties for the following described violations of the MSPA: failing to disclose employment conditions to workers (\$100.00), failing to make/keep employer records (\$400.00), failing to provide wage statements to workers (\$100.00), failing to post housing conditions (\$50.00), and interfering with

¹ The MSPA which repealed and replaced the Farm Labor Contractor Registration Act of 1963 (FLCRA), 7 U.S.C.A. § 2041, et seq, effective April 14, 1983.

a Department of Labor official during the investigation (\$1,000.00). The total civil money penalties assessed pursuant to MSPA Section 503(a) and 29 C.F.R. Part 500 were \$1,650.00.

On February 22, 2012, the Respondents Fish Farms and Jimmy Fish filed a Request for an Administrative Hearing to “review the Assessment of Civil Money Penalty for MSPA Violations against Fish Farms dated January 24, 2012” in the MSPA determination since Fish Farms acted in good faith to comply with MSPA and its regulations and the penalties were improperly assessed and/or excessive in nature.

In the Order of Reference filed on October 23, 2012, the U.S. Department of Labor averred the civil money penalty assessed was \$1,650.00 for violations during the period from April 13, 2009 through October 31, 2010 in Newport, Tennessee.

The Administrator, Wage and Hour Division, United States Department of Labor also issued a Determination Letter dated January 24, 2012 pursuant to 20 C.F.R. Part 655 under the H-2A provisions of the Immigration and Nationality Act (“INA”) to Fish Farms, A Partnership, assessing civil monetary penalties for the following described violations: (1) failure to provide housing that meets the applicable housing standards (20 C.F.R. § 655.104(d)(1)(i))(\$69,700.00); (2) failure to timely request a preoccupancy inspection of the housing or failure to obtain certification that housing meets the applicable standards (20 C.F.R. § 655.104(d)(6))(\$7,700.00); (3) failure to provide for or secure housing for those workers who are not reasonably able to return to their permanent residence at the end of the work day, without charge to the worker that complies with applicable housing safety and health standard (20 C.F.R. §§ 655.104(d)(1)(ii), 655.105(e)(2))(\$600.00); (4) failure to comply with transportation to place of employment/daily subsistence requirements (20 C.F.R. § 655.104(h)(1))(\$1,500.00); (5) failure to comply with transportation from last place of employment/daily subsistence to home country requirements. (20 C.F.R. § 655.104(h)(2)) (\$1,000.00); (6) failure to comply with the Three-Fourths Guarantee Requirements under 20 C.F.R. §655.104(i)(1))(\$37,100.00); (7) failure to comply with Earnings Records Requirements under 20 C.F.R. § 655.104(j)(1) (20 C.F.R. § 655.104(j)(1)) (\$4,000.00); (8) failure to comply with pay statement requirements per 20 C.F.R. § 655.104(k) (\$3,200.00); (9) failure to comply with the requirement that a copy of the work contract be provided (20 C.F.R. § 655.104(q)) (\$2,400.00); (10) failure to comply with unlawful deductions per 20 C.F.R. § 655.104(p) (no civil money penalty assessed for this violation); (11) the investigation disclosed that Jimmy Fish sought to have covered workers waive rights conferred under Sec. 218 of the INA, regulations at 20 C.F.R. § 655, or regulations at 29 C.F.R. § 502 (29 C.F.R. § 502.4) (\$10,400.00); (12) failure to comply with applicable Federal, State, and local employment-related laws and regulations, including employment-related health and safety laws (20 C.F.R. § 655.105(e)(1)) (\$1,000.00); and (13) the employer (or a person acting on behalf of the employer) intimidated, threatened, restrained, coerced, blacklisted, or in some other manner discriminated against a person who has with just cause, engaged in protected activity under 20 C.F.R. § 655.105(k). The employer discharged persons for engaging in activities protected under 20 C.F.R. § 655.105(k). (20 C.F.R. § 655.105(k) and (l) and 29 C.F.R. § 502.3)(\$65,000.00). Civil penalties in the total amount of \$203,600.00 were assessed for these violations.

The U.S. Department of Labor also determined that 59 non-immigrant workers hired by Respondents under the H-2A program during the period from April 13, 2009 through September

15, 2009, and the period from April 5, 2010 through October 3, 2010, had unreimbursed utility/housing costs (\$236.00), unreimbursed inbound transportation costs (\$600.00), unreimbursed outbound transportation costs (\$200.00), unpaid portion of required ¾ guarantee wage payment (\$48,960.18), and reimbursement for transportation to town and/or supplies (\$731.00) in a total amount of \$50,727.18.

On February 22, 2012, Respondents Fish Farms and Jimmy Fish filed a request for an administrative hearing “to review the Notice of Determination of Wages Owed and Assessing Civil Money Penalties dated January 24, 2012” in the H-2A determination since Fish Farms acted in good faith to comply with the Fair Labor Standards Act; MPSA; INA and their regulations and the penalties were improperly assessed and/or excessive in nature. Further, Fish Farms did not intimidate, threaten, coerce, blacklist, or discriminate against any persons claimed to have engaged in protected activities nor seek to have workers waive any rights conferred by statute or regulations. It made all employment decisions for legitimate, non-retaliatory, and non-discriminatory reasons.

The Administrator Wage and Hour Division, United States Department of Labor thereafter issued a Determination Letter dated June 13, 2012 pursuant to 20 C.F.R. Part 655 under the H-2A provisions of the Immigration and Nationality Act (INA) to Fish Farms, A Partnership, Jimmy Fish, Christine Fish Gilliam, and Krystal Fish, assessing the same civil monetary penalties for the same described violations set forth in the January 24, 2012 Determination Letter.

On July 11, 2012, Respondent Fish Farms filed a request for an administrative hearing to “review the Notice of Determination of Wages Owed and Assessing Civil Penalties dated June 13, 2012,” noting that the June 13, 2012 Notice of Determination appeared to improperly identify Christine Fish Gilliam and Krystal Fish as partners in Fish Farms and seeking review for the same reasons set forth in Respondent’s February 22, 2012 request for administrative hearing.

CONSENT FINDINGS

On July 21, 2014, the Parties jointly filed Consent Findings and thereby stipulate, agree, and consent, pursuant to 29 C.F.R. § 500.232 and 29 C.F.R. § 501.40, to entry of findings as follows:

1. The Respondents dispute that they willfully violated MSPA or the H-2A worker program requirements as set forth in 20 C.F.R. § 655.1304 and 1305 or treated any worker unlawfully or unfairly in any way. Respondents enter into settlement with the U.S. Department of Labor in the spirit of cooperation and to bring closure to Respondent’s disagreement with the U.S. Department of Labor.
2. Respondent Kristal Fish is dismissed with prejudice as a named Respondent in this cause of action. She is thus not responsible for compliance with the terms of this Consent Order.

3. The Parties agree that the best interest of justice under the MSPA and the H-2A program are served at this time by compromising all assessed civil monetary penalties (\$205,250.00) to a total amount of \$100,000.00. The Respondents agree to deliver the compromised civil monetary penalty of \$100,000.00 to the U.S. Department of Labor, consisting of \$98,350.00 for violations assessed under the H-2A program and \$1,650.00 for the alleged violations assessed under MSPA. The check will be made payable to the U.S. Department of Labor, Wage and Hour Division, and shall be mailed to the U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, Tennessee 37219.
4. Respondents Jimmy Fish and Christine Fish Gilliam entered into a settlement outside of and prior to this Consent Order and resolved all alleged issues relating to fourteen workers listed on Exhibit A of the jointly filed Consent Findings, including payments in the amount of \$32,936.00 in back wages and \$99,064.00 designated as compensatory and statutory damages. Those fourteen workers are not included in this Consent Order.
5. In order to resolve the alleged monetary amount which may be owed to the workers identified in Exhibit B, Respondents agree to pay back wages in the amount of \$33,630.55 which reflects the amounts allegedly owed the workers as set forth in Exhibit B. The Respondent shall issue checks for each former worker's alleged back wages in the amounts noted on Exhibit B of the jointly filed Consent Findings. The checks will be made payable jointly to "(Employee's Name) or U.S. Department of Labor, Wage and Hour Division." These checks shall be mailed 30 days after the date of this Consent Order is entered to: U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, Tennessee 37219.
6. Respondents agree to provide the Department of Labor with all available contact information for the former employees in Exhibit B, including but not limited, to last known addresses, phone numbers, social security numbers, federal employee identification numbers, and any other means to contact the workers identified in Exhibit B. This contact information will be mailed 30 days after the date this Consent Order is entered to: U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, Tennessee 37219. The Department of Labor will attempt to locate and distribute the checks to the former employees. Any monies not distributed within three years from the date of this Agreement, because of inability to locate the proper person or because of the refusal of any person to accept such funds, shall be deposited to the Treasury of the United States as miscellaneous receipts.
7. Any default of this agreement shall be subject to the assessment of interest and penalty interest at rates determined by the U.S. Treasury as required by the Debt Collection

Improvement Act of 1996 (Public Law 104-134) published by the Secretary of the Treasury in the Federal Register and other delinquent charges and administrative costs shall also be assessed. In the event of default, the Department of Labor intends to pursue additional collection action that may include, but is not limited to, administrative offset, referral of the amount to credit reporting agencies, private collection agencies, and/or Department of Justice.

8. Each party shall bear its own costs and expenses, including attorney's fees, arising in connection with any stage of the above-referenced proceeding including, but not limited to, fees, costs, and expenses which may be available under the Equal Access to Justice Act, as amended.
9. Subject to the performance by Respondents of all duties and obligations contained in this Consent Order, all alleged deficiencies and violations which were or could have been raised or identified by the U.S. Department of Labor shall be deemed fully and finally resolved by this Consent Order.
10. This Consent Order is binding upon the Parties as to all issues, actions, causes of action, and claims within the scope of the investigation period of April 13, 2009 through November 6, 2010, which have been or could have been advanced by the U.S. Department of Labor in this proceeding.

This Consent Order constitutes settlement of disputed claims and does not constitute an admission by Respondents of any violation of MSPA, or the H2-A program, their respective implementing regulations, or any violation of any other law, order, or regulation.

This Consent Order shall have the same force and effect as an Order made after a full hearing. The parties waive any further procedural steps before the Administrative Law Judge, and waive the right to challenge or contest the validity of this Consent Order.

This Consent Order serves as a final adjudication of all claims asserted by the U.S. Department of Labor in this action.

ORDER

After review of the filed Consent Findings, this Administrative Law Judge finds that they are in compliance with 29 C.F.R. § 500.232 and 29 C.F.R. § 501.40, are in the best interests of all the Parties, and adequately resolve all pending issues for this matter. Accordingly, **IT IS ORDERED** that the Consent Findings are **ADOPTED AND APPROVED**.

DANA ROSEN
Administrative Law Judge

DR/ECD/jcb
Newport News, Virginia