U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

ROBERT B. REICH, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

COMPLAINANT,

v.

BAYSTATE ALTERNATIVE STAFFING, INC., ABLE TEMPS REFERRALS, INC., ANN F. WOODS, HAROLD WOODS, WILLIAM "BILL" WOODS AND MARLENE WOODS, d/b/a ALTERNATIVE STAFFING,

RESPONDENTS.

CASE NO. 94-FLS-22

DATE: Dec. 19, 1996

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

The Wage Hour Administrator seeks to impose $150,000 in civil money penalties on the Respondents under Section 16(e) of the Fair Labor Standards Act of 1938, as amended (the FLSA or the Act), 29 U.S.C. § 216(e) (Supp. V 1993), for willful violations of the overtime provisions of the Act, 29 U.S.C. § 207. The Respondent corporations are engaged in the business of providing day workers to manufacturers, cleaning companies and other employers in Massachusetts, and the individual Respondents are officers or managers of the corporations.

The Administrative Law Judge (ALJ) held that the day workers were "employees" rather than independent contractors and were entitled to the protection of the overtime provisions of the FLSA. ALJ [Recommended] Decision and Order (R. D. & O.) at 17. He also held that the Respondents are "employers" of the day workers under the Act, that Respondents violated the FLSA by not paying overtime compensation to the day workers, and that the Respondents had knowledge of and acted with reckless disregard for whether they were obligated to pay overtime. R. D. & O. at 40. The ALJ concluded that the Respondents actions were willful violations of the Act and upheld the Administrator's proposed penalty as appropriate under the Act and regulations. 29 C.F.R. § 578.4 (1996).[1/]

[1/] The ALJ mistakenly relied on 29 C.F.R. § 579.5, a provision applicable to civil money penalties for child labor violations of the FLSA.

The individual Respondents have operated a number of day worker placement firms in New Hampshire and Massachusetts for over ten years. R. D. & O. at 6. The placement firms solicit business from employers through direct mail, advertisements in local newspapers and by word-of-mouth. T. (Transcript of hearing) 137. When an employer calls in a request for workers, Respondents offer the opportunity on a first come, first served basis to workers who have walked in to their offices that day. T. 141. Respondents register the workers, checking their picture IDs and Social Security cards, T. 139, and making sure the workers are sober and not under the influence of drugs. T. 142. Respondents sometimes provide transportation to the work sites, T. 137, and assure that the workers wear appropriate clothing and shoes. T. 142. Respondents give each worker a time slip to be filled out by their supervisor at the work site and handed in to Respondents. T 144-47. Respondents charge the client companies between $6.00 and $7.50 per hour for each hour worked by the day workers and usually pay the workers the minimum wage. J (Joint Exhibit) 1. The parties stipulated that some of the workers worked more than forty hours in some work weeks but that they were not paid overtime. *Id.*

The Administrator takes the position, which was adopted by the ALJ, that under the regulations, Respondents willfully violated the FLSA because a Wage-Hour investigator informed them in 1990 and again in 1992 that they were obligated to pay overtime for these workers. R. D. & O. at 9 and 38; 29 C.F.R. § 578.3(c)(2). Respondents do not dispute the fact that Wage-Hour notified them that it considered their failure to pay the day workers overtime a violation of the Act. However, Respondents disputed that conclusion; they assert that they are not the employer of the day workers and that, having relied in good faith on the advice of their counsel to that effect, they did not willfully violate the Act.

Section 16(e) of the FLSA subjects a person to a civil penalty "who repeatedly or willfully *violates*" the minimum wage or overtime requirements of the Act, 29 U.S.C. § 216(e) (emphasis added), and the regulations implementing that provision require that "[a]ll of the facts and circumstances surrounding the *violation* shall be taken into account in determining whether a violation was willful." 29 C.F.R. § 578.3(c) (emphasis added).[2/] We find that a determination that an employer's practices are, in fact, in violation of the Act is a prerequisite to finding that those violations were willfully committed for purposes of the civil penalty provisions of Section 16(e).

The Fair Labor Standards Act defines an "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d) (1988). The Act provides that "'[e]mployee' means any individual employed by an employer," 29 U.S.C. § 203(e)(1), and "'employ' includes to suffer or permit to work." 29 U.S.C. § 203(g). The Supreme Court has observed that the FLSA definition of "employ" is of "striking breadth . . . [which] stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 326 (1992).

[2/] *See also* House Rep. No 260, 101st Cong., 1st Sess. (1989), at 25, *reprinted in* 1989 U.S.C.C.A.N. 696, 713 (Section 16(e) grants the Secretary "the authority to assess fines for flagrant *violations* [of the Act]." (Emphasis added.)

The courts have developed multi-part tests under the FLSA for determining whether a worker is an employee or an independent contractor, and whether two or more businesses are joint employers of a worker. In *Martin v. Selker Bros., Inc.,* 949 F.2d 1286, 1293 (3d Cir. 1991) the court set forth the factors for determining whether a worker is an independent contractor : 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business. In *Aimable v. Long & Scott Farms*, 20 F.3d 434, 438 (11th Cir. 1994), *cert. denied, mot. granted*, 115 S. Ct. 351, the court listed the factors for joint employment : (A) the nature and degree of control of the workers; (B) the degree of supervision, direct or indirect, of the work; (C) the power to determine the pay rates or the methods of payment of the workers; (D) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; (E) preparation of payroll and the payment of wages. *See also* 29 C.F.R. § 791.2. Further, "[i]t is a well-established principle that the determination of the employment relationship does not depend on isolated factors but rather upon the 'circumstances of the whole activity.'" *Martin v. Selker Bros., Inc.,* 949 F.2d 1286, 1293 (quoting *Rutherford Food*, 331 U.S. at 730). In addition, technical considerations or simply counting the number of factors on each side does not control; rather the ultimate issue is whether as a matter of "economic reality" the particular worker is an employee of the business or organization in question. *Goldberg v. Whitaker House Cooperative*, *Inc.*, 366 U.S. 28, 33 (1961).

Before discussing the specific facts in this case, we think it is important to take note of the Congressional intent behind the Fair Labor Standards Act's overtime requirement. Overtime was intended as a means to "spread employment to avoid the extra wage and workers were assured additional pay to compensate them for the burden of a workweek beyond the hours fixed in the Act. . . . [T]he Presidential message which initiated the legislation . . . referred to a 'general maximum working week,' [and to] the evil of 'overwork' as well as 'underpay.'" *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 578 (1942).

We have little difficulty concluding that the day workers are not independent contractors: the manufacturers and other firms for which they perform labor have complete control over the manner in which the work is performed, the workers have no opportunity for profit or loss, they do not provide any material or equipment of their own or hire any helpers, and they are unskilled workers who exercise little or no initiative in completing their assigned tasks.[3/] The question for decision is

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[3/] Respondents have been litigating a similar issue in New Hampshire and Massachusetts. The state unemployment insurance agencies in those states took the position that Respondents' employment agencies were responsible for paying unemployment compensation contributions for the day workers, while Respondents argued they were not the employers of these workers. The Supreme Courts of both states have found that the day workers are not independent contractors. *See Work-A-Day of Fitchburg, Inc. v. Commissioner of Dep't of Empl. and Training*, 591 N.E. 2d 182, 183 (Mass. 1992), *reversing and remanding Work-A-Day of Fitchburg, Inc.*, No. X-1216-A-CT-RM, decision of Massachusetts Department of Employment and Training Board of Review, slip op. at

(continued...)

whether Respondents and their client companies are joint employers of the day workers, that is, whether Respondents acted directly or indirectly in the interest of an indisputable employer of the day workers, the client firms.

In *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), "chore workers" who provided domestic in-home services to the aged, blind and disabled were found to be the joint employees of the individual recipients for whom they performed services and the state agency administering the program. The court found the following facts significant in concluding that the state agency was a joint employer:

> the chore workers were paid by [the state agency][which] controlled the rate and method of payment and . . . maintained employment records. . . . [The state agency] also exercised considerable control over the structure and conditions of employment by making the final determination . . . of the number of hours each chore worker would work and exactly what tasks would be performed. . . . ' [The state agency] had periodic and significant involvement in supervising the chore worker's job performance.' [Quoting the district court's findings.] . . . . [The state agency's] power over the employment relationship by virtue of their control over the purse strings was substantial."

704 F.2d at 1470.

In *Brock v. Superior Care, Inc.,* 840 F.2d 1054 (2d Cir. 1988), Superior Care referred temporary health care personnel, primarily nurses, to individual patients, hospitals, nursing homes and other health care institutions. Superior Care maintained a roster of nurses and assigned them as work became available. 840 F.2d at 1057. The court found it significant, in concluding that the nurses were Superior Care's employees, that "the nurses constituted the most integral part of Superior Care's business, which is to provide health care personnel on request [and that Superior Care] unilaterally dictated the nurses' hourly wage, limited working hours to 40 per week . . . and supervised the nurses by monitoring their patient care notes and by visiting job sites." *Id.* at 1059. The court found that, even though the nurses were skilled workers, "they depended entirely on referrals to find job assignments, and Superior Care . . . controlled the terms and conditions of the employment relationship." *Id. See also Amarnare v. Merrill, Lynch, Pierce, Fenner and Smith, Inc.,* 611 F. Supp. 344, 349 (S.D.N.Y. 1984) (finding worker paid by temporary employment agency

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[3/](...continued)
3-4; *review pending, Department of Employment and Training v. Work-A-Day of Fitchburg, Inc.*, Docket No. 9416-CV-255 (Mass. Dist. Ct., Fitchburg) *; Work-a-Day of Nashua, Inc. (New Hampshire Dep't of Empl. Sec.)*, 564 A. 2d 445, 447 (N.H. 1989). In *Work-A-Day of Fitchburg* the court remanded the case to the state agency to determine "whether Work-A-Day or each of its respective clients is the employer for the purposes of [the state unemployment insurance law.]" 591 N.E. 2d at 183. In *Work-A-Day of Nashua,* the court held that Respondents did not meet their burden of showing that the day workers were engaged in an independent trade, occupation, profession or business so that Respondents would be entitled to exemption from unemployment compensation taxes. 564 A. 2d at 448.

performing services for and under direction of another is a "loaned servant" and employee of both entities under Title VII of Civil Rights Act of 1964).

In this case, Respondents regularly engaged in activities from which we can conclude that they acted in the interest of employers of the day workers: Respondents screened the workers for the client firms, by checking their picture IDs and Social Security cards. T. 139. Respondents established minimum qualifications for employment, determining if the workers were sober and not under the influence of drugs, T. 142, and checking to make sure the workers wore the type of clothing specified by the client as appropriate for the job, e.g., work shoes, no loose fitting clothing or tank tops. T.142. Respondents often transported the workers to the job sites. T. 143. Respondents gave the workers time slips which were filled out by the client company's supervisors. *Id.* The workers returned the filled out time slips to Respondents who checked to make sure they were completely filled out and paid them for their hours worked. T. 147. Respondents set the wage received by the day workers, usually the minimum wage. J-1. Respondents arranged for workers to return to the same client when the client so requested, T. 148, and also refused to refer a worker to a client when the client indicated dissatisfaction with the worker. T.149.

We find that, weighing all the relevant factors, Respondents met the definition of employers of the day workers under the FLSA. 29 U.S.C. § 203(d). As a matter of economic reality, the workers were dependent on Respondents' for their livelihood; without the services of Respondents, it is doubtful many of the day workers would find work on a regular basis.[4/] Like the state agency in *Bonnette* and the health care referral agency in *Superior Care,* Respondents regularly act in the interest of their clients as employers of the day workers by establishing qualifications and screening the workers according to those qualifications, keeping employment records and controlling the rate and method of payment. We also find it important that Respondents are in the best position to assure that the day workers do not work overtime so that the purposes of the Act to spread employment, to protect workers from excessive hours, and to assure them of additional pay for an extended workweek can be met.

We also agree with the ALJ that some of the individual Respondents meet the standards under the Act and applicable case law to be held responsible for compliance as employers of the day workers. *See Reich v. Circle C Invs*, 998 F.2d 324, 329 (5th Cir. 1993) (individual who does not have ownership interest and does not control day-to-day activities of business held employer of workers through exercise of control over work situation); *Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st Cir. 1983) (finding corporate officer with operational control of corporation's business is employer under FLSA).

Respondents apparently concede that William Woods was an employer of the day workers (*see* pp.9-10 of Respondents' Initial Brief), but challenge the ALJ's finding that Ann Woods, Harold Woods and Marlene Woods exercised the degree of control of the work situation required to be characterized as employers. The record shows that:

[4/] Marlene Woods testified that "a lot of the people who work for us work for us for a long time" because Respondents treat them well. P-2 at 16.

- Marlene Woods was the manager of All American Temps in Fitchburg responsible for overall supervision of the office. P-2 at 6. She hired and supervised the permanent employees, *id.* at 7, and was the contact person for client companies and for workers seeking temporary employment. *Id.* at 10. Marlene Woods set the rates charged to the client companies and purchased insurance for the workers. *Id.* at 77. She gave directions to the workers about on-the-job conduct, *id.*, and exercised the authority on her own initiative to refuse to refer workers to jobs for misconduct, such as drug use or accidentally setting a work area on fire. *Id.* at 18. We find that Marlene Woods exercised sufficient control over the work situation of the day workers to meet the definition of employer in the Act.

- Harold Woods was, President, Treasurer and a director of Alternative Staffing, Inc., R. D. & O. at 32, President of Work-A-Day of Nashua, Treasurer of Work-A-Day of Fitchburg and of Work-A-Day of Lowell. R. D. & O. at 33; T. 246. His duties included opening bank accounts, making sales, renewing contacts with prior clients, taking orders for workers, transporting and paying the day workers, and general office duties. T. 246-7. We find Harold Woods met the definition of employer under the Act.

-Ann Woods was the President of Baystate Alternative Staffing, the President of Able Temps Referrals, Inc., the President and Treasurer of Work-A-Day of Worcester, Inc., and the "clerk and director" of Alternative Staffing, Inc. R. D. & O. at 31-33. However, she did not know she was President of Alternative Staffing and of Work-A-Day of Worcester and had no idea what a president did. P-9 at 22-23. Ann Woods signed the 1990 Stipulation with the Wage-Hour Division and the Respondents' Response to the Administrator's Request for Admissions, but she had no involvement with the Department of Labor investigation and did not remember signing the stipulation. *Id.* at 32 She signed the day workers' pay checks, *id.* at 10, answered the phones, *id.*at 17-18, handled other paperwork, *id,* at 17, maintained records on the office computer, *id.* at 10, and provided a second signature on new bank accounts. *Id.* at 27. Ann Woods rarely had any dealings with the dispatchers, drivers, or client companies, *id.* at 17-18. We find that Ann Woods did not have sufficient control of the day workers' work situation to qualify as their employer.

We find that the Administrator has carried her burden of showing that Respondents willfully violated the overtime provisions of the Act under the standard of willfulness established by the Supreme Court in *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128,131 (1988) (whether the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute), and the implementing regulations. 29 C.F.R. § 578.3(c). Respondents were put on notice by a Wage-Hour investigator in 1990 and 1992 that their practices of not keeping records of the hours worked by the day workers and not paying them overtime violated the Act. Because we have found that Respondents acted in the interest of employers of the day workers and a responsible official of the Wage and Hour Division put them on notice that their practices violated the FLSA, that is sufficient under the regulations to find that Respondents willfully violated the Act. 29 C.F.R. § 578.3(c)(2). In addition, during the 1990 investigation, the Wage-Hour investigator gave Respondents a copy of a Department of Labor publication (WH Publication 1297, P-20), which

specifically states that employees of a temporary help company are joint employees of such a company and of the client companies to which they are assigned each day. P-20 at 8.[5/]

Although Respondents disagreed with the Wage-Hour investigator's interpretation, it was not sufficient to continue to rely on their counsel's opinions after Respondents were advised by Wage-Hour that they were responsible for paying overtime for the day workers. Respondents had an obligation to make further inquiries, 29 C.F.R. § 578.3(c)(3), for example, requesting an opinion on the matter from the Wage and Hour Administrator. *See* 29 C.F.R. §§ 778.3 and 790.13; *Superior Care*, 840 F.2d at 1062 (failure to obtain opinion letter after being put on notice of violations constitutes reckless disregard). Failure to do so in these circumstances constituted reckless disregard of the requirements of the Act.

We do not agree that cases under the liquidated damages provision of section 16(b) of the Act provide support for Respondents' position that reliance on an attorney's opinion negates a finding of reckless disregard. We find those cases clearly distinguishable. In *Hultgren v. County of Lancaster*, 913 F.2d 498, 509-10 (8th Cir. 1990), the court reversed an award of liquidated damages, finding that the employer reasonably relied on the Department of Labor's suspension of all Wage-Hour investigations involving the overtime question at issue when it concluded it was not required to pay overtime. Here, several different officials of Wage-Hour consistently informed Respondents, their attorney and their accountant that their practices violated the Act. The court's comment in *Kinney v. District of Columbia*, 994 F.2d 6, 12 (D.C. Cir. 1993), that "reliance on opinion letters from counsel can show a good faith effort to comply with the [FLSA]," citing *Hultgren*, was dictum and was not the principal holding of *Hultgren* on this point.

Finally, we agree with the ALJ that the proposed penalty of $150,000 is appropriate. The violations involved hundreds of employees, continued over a period of several years and caused underpayment of wages almost equal to the proposed penalty. P-6. Considering the size of Respondents' business, the penalty is not unreasonable. 29 C.F.R. § 578.4(a). Between September 30, 1991 and July 3, 1994, Respondents paid over 4,000 workers over $ 4 million in wages representing almost 975,000 hours worked. R. D. & O. at 36. Estimating Respondents income at $3 for each hour worked by the day workers, R. D. & O. at 5, Respondents grossed almost $3 million for that period.

[5/] Respondents also were aware that their theory, supported by a paper structure of contracts with the workers designating them as independent contractors, was a flimsy one. Two courts had found that the day workers were not independent contractors. *See* note 3 above.

Accordingly, Respondents' appeal of the decision of the administrative law judge is DENIED and Respondents shall pay a penalty of $150,000.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member