

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CHERYL ALLEN FORZIATI,
Plaintiff,

v.

CIVIL ACTION NO.
14-12325-MLW

GRAY BOX CONSULTANT d/b/a
WICKED FAST MARKETING,
ADAM JAMES NELSON and
PHILLIP EDWARD GRASSO
Defendants.

REPORT AND RECOMMENDATION RE:
PLAINTIFF CHERYL FORZIATI'S MOTION FOR SUMMARY JUDGMENT
(DOCKET ENTRY # 25); DEFENDANT PHILLIP GRASSO'S MOTION FOR
SUMMARY JUDGMENT (DOCKET ENTRY # 31)

June 30, 2016

BOWLER, U.S.M.J.

Pending before this court is a motion for summary judgment filed by plaintiff Cheryl Forziati ("plaintiff") (Docket Entry # 25) as well as a motion for summary judgment filed by defendant Phillip Grasso ("Grasso") (Docket Entry # 31). After conducting a hearing, this court took the motions (Docket Entry ## 25, 31) under advisement.

PROCEDURAL BACKGROUND

On May 30, 2014, plaintiff filed a complaint against defendants Gray Box Consultant d/b/a Wicked Fast Marketing ("Gray Box"), Adam Nelson ("Nelson") and Grasso (collectively

"defendants"). (Docket Entry # 1). The complaint alleges that defendants failed to pay \$11,172.76 in wages in violation of: (1) the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. ("FLSA"); and (2) the Massachusetts General Laws chapter 149, section 148 ("chapter 149" or "the Wage Act"). (Docket Entry # 1).

Gray Box and Nelson did not respond to the complaint. (Docket Entry # 18). On April 22, 2015, plaintiff filed a request for the clerk to enter a default against Gray Box and Nelson. (Docket Entry # 18).

STANDARD OF REVIEW

Where, as here, the parties have filed cross motions for summary judgment, the court must "determine whether either of the parties deserves judgment as a matter of law on facts that are not disputed." Barnes v. Fleet Nat'l Bank, N.A., 370 F.3d 164, 170 (1st Cir. 2004). Each summary judgment motion is reviewed separately and factual disputes are resolved in favor of the nonmoving party. See OneBeacon America Ins. Co. v. Commercial Union Assurance Co. of Canada, 684 F.3d 237, 241 (1st Cir. 2012) (viewing cross motions for summary judgment "'separately,' in the light most favorable to the non-moving party, and draw[ing] all reasonable inferences in that party's favor").

Summary judgment is designed "'to pierce the boilerplate of

the pleadings and assay the parties' proof in order to determine whether trial is actually required.'" Tobin v. Federal Express Corp., 775 F.3d 448, 450 (1st Cir. 2014) (quoting Wynne v. Tufts University School of Medicine, 976 F.2d 791, 794 (1st Cir. 1992)). It is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). It is inappropriate "if the record is sufficiently open-ended to permit a rational factfinder to resolve a material factual dispute in favor of either side." Pierce v. Cotuit Fire District, 741 F.3d 295, 301 (1st Cir. 2014).

"Genuine issues of fact are those that a factfinder could resolve in favor of the nonmovant, while material facts are those whose 'existence or nonexistence has the potential to change the outcome of the suit.'" Green Mountain Realty Corp. v. Leonard, 750 F.3d 30, 38 (1st Cir. 2014) (quoting Tropigas de Puerto Rico, Inc. v. Certain Underwriters at Lloyd's of London, 637 F.3d 53, 56 (1st Cir. 2011)). The evidence is viewed "in the light most favorable to the non-moving party" and "all reasonable inferences" are drawn in his favor. Ahmed v. Johnson, 752 F.3d 490, 495 (1st Cir. 2014). In reviewing a summary judgment motion, a court may examine "all of the record materials on file," Geshke v. Crocs, Inc., 740 F.3d 74, 77 (1st Cir. 2014), "including depositions, documents, electronically

stored information, affidavits or declarations . . . or other material." Fed.R.Civ.P. 56(c)(1); see Ahmed v. Johnson, 752 F.3d at 495. "Unsupported allegations and speculation," however, "do not demonstrate either entitlement to summary judgment or the existence of a genuine issue of material fact sufficient to defeat summary judgment." Rivera-Colon v. Mills, 635 F.3d 9, 12 (1st Cir. 2011); see Serra v. Quantum Servicing, Corp., 747 F.3d 37, 40 (1st Cir. 2014) ("allegations of a merely speculative or conclusory nature are rightly disregarded").

The parties each filed a LR. 56.1 statement of undisputed facts. Uncontroverted statements of fact in the LR. 56.1 statement comprise part of the summary judgment record.¹ See Cochran v. Quest Software, Inc., 328 F.3d 1, 12 (1st Cir. 2003) (the plaintiff's failure to contest date in LR. 56.1 statement of material facts caused date to be admitted on summary judgment); Stonkus v. City of Brockton School Department, 322 F.3d 97, 102 (1st Cir. 2003) (citing LR. 56.1 and deeming admitted undisputed material facts that the plaintiff failed to controvert). Adhering to this framework, the record sets out the following facts.

FACTUAL BACKGROUND

A. Plaintiff's Employment

¹ Statements of law in the statement of undisputed facts are not considered.

On November 10, 2012, Gray Box hired plaintiff as a part-time graphic designer with an annual salary of \$33,000. (Docket Entry # 26-1, p. 2). Payment was to be made in semi-monthly installments of \$1,325 with an additional payment of up to \$70 for transportation. (Docket Entry # 26-1, p. 2). Nelson signed the offer letter and specified that plaintiff would report to him as the principal and officer of Gray Box.² (Docket Entry # 26-1, p. 3).

On November 12, 2012, plaintiff began working for Gray Box. (Docket Entry # 26-1, p. 2). She worked in the Boston office two days a week with Nelson and another employee, Scott Kaye ("Kaye"), and from home the remainder of the week. (Docket Entry # 34-1, p. 15) (Docket Entry # 34-4, p. 6).

During the spring of 2013, Nelson began to act erratically due to a methamphetamine drug problem. (Docket Entry # 31-2, ¶ 21) (Docket Entry # 42-1, ¶ 21). He did not show up to the office or communicate with his employees for days at a time. (Docket Entry # 45 p. 38). As a result of Nelson's absence, the office environment became stressful as a number of clients called inquiring about the status of their work. (Docket Entry # 34-1, p. 34). Plaintiff and Kaye telephoned Grasso looking for Nelson because they needed direction at work. (Docket Entry

² Nelson and Grasso married in 2004 and divorced in 2014. (Docket Entry # 31-2, pp. 1, 5).

34-1, pp. 31-38). Grasso did not know Nelson's location because he too had been unable to communicate with Nelson. (Docket Entry # 32, p. 4).

Additionally, clients telephoned Grasso on two or three occasions looking for Nelson in August 2013. (Docket Entry # 32, ¶ 20). Grasso states by affidavit that he relayed the clients' messages to plaintiff and Kaye. (Docket Entry # 32, ¶ 20).

Plaintiff and Kaye did not receive payment for the pay periods of July 15, August 1 and August 15. (Docket Entry # 34-1, pp. 45-46). As a result, plaintiff and Kaye stopped showing up to Gray Box's office on or about August 15, 2013. (Docket Entry # 34-1, pp. 45-46).

On August 23, 2013, plaintiff emailed Nelson inquiring when she would receive payment. (Docket Entry # 34-3, p. 20). On August 28, 2013, plaintiff emailed Nelson and Grasso demanding payment of \$4,080 for the periods of July 15, August 1 and August 15, 2013. (Docket Entry # 34-3, p. 9). Although the email was sent to both Nelson and Grasso, plaintiff only addressed Nelson, stating, "[Nelson], I have not heard from you since our brief text on August 17 . . . I need to know when I will be paid the accrued amount from past paychecks for my employment with [Gray Box]." (Docket Entry # 34-3, p. 9). Nelson did not answer any of plaintiff's inquiries regarding

payment. (Docket Entry # 45, p. 36).

Plaintiff's last date of employment is disputed because she did not officially resign and Gray Box did not formally terminate her employment. (Docket Entry # 34-1, p. 28).

Plaintiff states by affidavit that she continued to perform services for Gray Box until November 2013.³ (Docket Entry # 28, p. 2). Plaintiff filed for unemployment benefits during the week of September 2, 2013. (Docket Entry # 38-1, p. 1).

Plaintiff also performed services for companies, which were not clients of Gray Box during the fall of 2013. (Docket Entry # 39, p. 3).

B. Gray Box

In 2008, Nelson founded Gray Box. (Docket Entry # 26-2, Ex. 6, p. 5). The articles of organization identify Grasso as the secretary and Nelson as the president, vice president, director and treasurer. (Docket Entry # 26-2, Ex. 6, p. 3). Nelson informed Grasso that he held a 20% ownership interest in Gray Box. (Docket Entry # 26-5, p. 18). However, Nelson filed K-1 tax documents which identified Grasso as a 25% owner. (Docket Entry # 32, p. 2). Plaintiff was aware of Grasso's 20% ownership and testified that, "[Nelson] always said if he got hit by a bus, [Grasso] would take full ownership of the

³ The complaint indicates that plaintiff continued to perform services until September 10, 2013. (Docket Entry #1).

company." (Docket Entry # 24-1, p. 25).

At some point in early 2013, Nelson informed Grasso that he was thinking about providing plaintiff with an ownership interest in the company by transferring Grasso's 20% ownership to plaintiff. (Docket Entry # 32, ¶ 12). Grasso did not object although there is no evidence that Nelson made the transfer of ownership to plaintiff. (Docket Entry # 32, ¶ 12).

Grasso has worked as a full time employee at Cole Hersee/Littelfuse, Inc. ("Cole Hersee"), an electronic manufacturing company, since 2004. (Docket Entry # 32, ¶ 1). He typically worked 50 hours a week and frequently traveled out of state for business trips. (Docket Entry # 32-2, p. 1). By affidavit, Grasso states that he did not have access to Gray Box's bank account or payroll. (Docket Entry # 32, ¶¶ 4, 10-11). He had no contact with the company's outside payroll company and was not involved in Gray Box issuing payroll. (Docket Entry # 32, ¶¶ 4, 11). Additionally, Grasso attests that he was not involved in the hiring or firing process. (Docket Entry # 32, ¶ 4). Kaye, however, attests that Nelson and Grasso "were involved in major decisions regarding" Gray Box. (Docket Entry # 40, ¶ 5).

Grasso also visited Gray Box's office on a number of occasions. (Docket Entry # 34-1, p. 34). He delivered office supplies and once brought a snack table to the office because

Grasso shared a vehicle with Nelson. (Docket Entry # 34-1, p, 34) (Docket Entry # 32, p. 2). On March 29, 2013, Grasso viewed Gray Box's new location after returning from a flight at midnight. (Docket Entry # 40, p. 2). Grasso and Nelson spent the following weekend installing a floor in the new office space. (Docket Entry # 40, p. 2).

Grasso's supplemental income and loss federal tax forms declare he had non-passive income from Gray Box of \$2,133 in 2010 and \$630 in 2011.⁴ (Docket Entry # 46, pp. 5, 10). Grasso's individual income tax return for 2013 identifies his non-passive loss as zero and does not include a monetary amount for non-passive income. (Docket Entry # 46, p. 19). In a reconciliation worksheet, attached to the 2013 individual income tax return, Grasso indicated his status at Gray Box as non-passive.⁵ (Docket Entry # 46, p. 20). Despite reporting non-passive income in 2010 and 2011, Grasso did not receive compensation, dividends or distributions for his role as corporate secretary. (Docket Entry # 32, ¶¶ 4, 6).

On October 2, 2013, Grasso Facebook messaged plaintiff and Kaye requesting copies of their W-2 tax forms for Gray Box's

⁴ According to the IRS, non-passive income is the result of a taxpayer's material participation in an activity that "he or she works on a regular, continuous and substantial basis in operations." (Docket Entry # 51).

⁵ Plaintiff alleges in a memorandum that Grasso declared non-passive income for 2013 but the tax return does not include a monetary amount. (Docket Entry # 42).

corporate tax return. (Docket Entry # 26-4, p. 2). Although Nelson typically prepared Gray Box's tax returns, Grasso planned to file them in order to avoid a penalty because Nelson was unreachable. (Docket Entry # 36, p. 4). In accordance with his accountant's advice, Grasso did not file Gray Box's tax returns. (Docket Entry # 36, p. 4).

C. Lillian Grasso's Loan

Lillian Grasso, Grasso's mother and Nelson's mother-in-law, made a series of loans to Gray Box between October 2012 and April 2013. (Docket Entry # 33, p. 1). Grasso avers that Nelson asked Grasso for permission before requesting a loan. (Docket Entry # 32, p. 3). Lillian Grasso testified that only Nelson approached her to request a loan for Gray Box, but sometimes Grasso would be present during the request. (Docket Entry # 33, p. 1). In an affidavit filed in state court, however, Grasso states that he approached Lillian Grasso for loans for the business and that the loans eventually totaled \$57,500. (Docket Entry # 26-2, ¶ 3). Viewing the record in plaintiff's favor, a reasonable finder of fact could find that Grasso arranged for his mother to loan Gray Box \$55,000 from October 2012 to April 2013. (Docket Entry # 26-5, p. 49) (Docket Entry # 33, ¶ 4).

As evidenced by checks and stated in Lillian Grasso's affidavit, she loaned the following amounts to Gray Box: (1)

\$10,000 on October 17, 2012; (2) \$10,000 on October 20, 2012; (3) \$5,000 on January 20, 2013; (4) \$20,000 on March 10, 2013; and (5) \$5,000 on April 20, 2013. (Docket Entry # 33, ¶ 4). In addition to the foregoing checks payable to Gray Box, on January 22, 2013, she made a \$5,000 loan via wire transfer from a Harbor One Bank money market fund. (Docket Entry # 33, ¶ 5). The Harbor One Bank account contained only Lillian Grasso's money but included Grasso as an account holder in the event his widowed mother became incapacitated. (Docket Entry # 33, ¶ 5). Lillian Grasso arranged the wire transfer of the \$5,000 loan to Grasso and Nelson's personal joint account with Harbor One Bank because she was in Canada on the date of the transfer. (Docket Entry # 33, ¶ 5). She also directed Grasso to issue a check and deposit it into Gray Box's account. (Docket Entry # 33, ¶ 5). On all other occasions, the loans were directly deposited into Gray Box's account. (Docket Entry # 33-1, pp. 1-5).

In late 2013, Lillian Grasso requested that Nelson sign a promissory note for the outstanding debt. (Docket Entry # 33, ¶ 6). Nelson sent an email to Lillian Grasso on January 14, 2014 confirming his intention to repay the loans. (Docket Entry # 33-3). However, Nelson did not repay Lillian Grasso. (Docket Entry # 26-5, p. 56).

D. Grasso and Nelson Divorce

Nelson and Grasso became estranged due to Nelson's drug

problem. (Docket Entry # 36, ¶ 1). On June 15, 2013, Nelson and Grasso separated and Nelson moved out of the marital home.

(Docket Entry # 32, ¶ 16).

On February 6, 2014, Nelson and Grasso entered into a separation agreement. (Docket Entry # 26-3, p. 14). The agreement indicated that Grasso would resign from his position as secretary at Gray Box and relinquish his shares of the company. (Docket Entry # 26-3, p. 24). Nelson agreed to pay all of Gray Box's debts and liabilities. (Docket Entry # 37, p. 4). Additionally, Nelson and Grasso agreed that Nelson's outstanding loan to Lillian Grasso would not be a part of the separation agreement. (Docket Entry # 26-5, p. 52).

On April 3, 2014, the Plymouth County Probate and Family Court issued a judgment of divorce nisi, which incorporated the separation agreement. (Docket Entry # 32, ¶ 27). The divorce decree was finalized on July 3, 2014. (Docket Entry # 32, ¶ 27).

On July 2, 2014, counsel for Grasso "filed a Complaint for Contempt against" Nelson alleging that he breached the separation agreement in which "he agreed to pay all debts and liabilities of the company." (Docket Entry # 37, ¶ 16). Nelson did not appear for the trial on August 20, 2014 and was living out of his car at the time. (Docket Entry # 37, ¶ 16).

Despite separating from Nelson, Grasso remained friendly

with plaintiff and Kaye and they communicated online regarding Nelson and Gray Box. (Docket Entry # 36, p. 1). On January 29, 2014, Grasso informed plaintiff and Kaye via Facebook message that the separation agreement required Grasso to pay Nelson for the marital assets. (Docket Entry # 34-3, p. 12). Grasso suggested plaintiff and Kaye seek to attach those monies to recover their unpaid wages. (Docket Entry # 26-5, p. 53).

On November 29, 2013, Grasso messaged plaintiff stating, "It's Scott's bday . . . I'm about to tell him what I've always wanted to give him [Emoticon] [s]ince it's no longer a case of workplace sexual harassment." (Docket Entry # 26-4, p. 8). In January 2014, Grasso messaged Kaye, "since I'm no longer responsible for Gray [Box] . . . you look HOTTER than ever!!!!" (Docket Entry # 26-3, p. 5).

On or about January 30, 2014, Grasso's divorce attorney informed Grasso that plaintiff was taking the position that he was liable for plaintiff's unpaid wages. (Docket Entry # 32, ¶ 9). In an email correspondence, plaintiff's counsel proposed a settlement demand but Grasso's counsel responded that Grasso would not accept the demand given his lack of involvement in the company. (Docket Entry # 37-1, p. 5).

On January 31, 2014, Grasso Facebook messaged plaintiff stating, "I understand (even as a silent member) I am l[e]gally responsible for wages (Which sucks)." (Docket Entry # 34-3, p.

17). Plaintiff responded, "Adam owes it . . . no [A]dam needs to pay." (Docket Entry # 34-3, p. 17). On November 14, 2013, Kaye also wrote via Skype message that, "It's in no way your fault, and I don't want any of this to fallback on you, you don't deserve it." (Docket Entry # 34-3, p. 22).

DISCUSSION

Plaintiff and Grasso cross-move for summary judgment for both causes of action advanced in the complaint. (Docket Entry ## 25, 31). With respect to the FLSA, plaintiff contends that Grasso is an employer within the meaning of the FLSA. (Docket Entry # 26, p. 20-21). Plaintiff asserts that Grasso substantially controlled Gray Box's operations and finances because he was the corporate secretary, secured a loan from his mother and included passive income on his IRS forms. (Docket Entry # 26, pp. 17-21). Grasso refutes that he was plaintiff's employer because he did not supervise plaintiff and he did not have access to Gray Box's payroll services or bank accounts. (Docket Entry # 31-1, p. 15). With respect to the Massachusetts Wage Law Act claim under chapter 149, plaintiff claims that Grasso substantially controlled Gray Box's corporate policy because he was the secretary and secured the loan. Grasso disagrees that his role as secretary involved participating in formulating Gray Box's financial policy. (Docket Entry # 31-1, p. 16).

I. FLSA

The FLSA requires an employer of an enterprise engaged in commerce to pay his or her employees minimum wage rates. 29 U.S.C. § 206. The FLSA defines "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). Accordingly, "a[ny] corporate officer with operational control of a corporation's enterprise is an employer." Donovan v. Agnew, 712 F.2d 1508, 1511 (1st Cir. 1983).

Courts apply an "economic reality" test to determine employer status under the FLSA. See Manning v. Bos. Med. Ctr. Corp., 725 F.3d 34, 47 (1st Cir. 2013). The test considers "the totality of the individual's level of involvement with the corporation's day-to-day operations, as well as their direct participation in creating or adopting the unlawful pay practices." Agnew, 712 F.2d at 1513-14. In other words, an employer is an individual who significantly controls the corporation's finances to the extent he or she causes the corporation to undercompensate its employees. See Manning, 725 F.3d at 47.

The economic reality test determines employer status based on the underlying facts rather than technical classifications. See Agnew, 712 F.2d at 1513. As such, there is no specific criteria necessary to support a finding of employer status. See

Manning, 725 F.3d at 47-48. However, courts have noted that a corporate officer with an ownership stake is highly probative of employer status because it suggests significant operational control. See id. On the other hand, a corporate officer or supervisory employee who generally oversees the workplace is not an employer because he or she does not possess the requisite control to cause the employee to be underpaid. See id. Thus, the economic reality test ensures that only those employers with substantial control, and not all individuals connected to the corporation, will be personally liable for unpaid damages. Agnew, 712 F.2d at 1512.

The court in Manning considered an FLSA claim dismissed by the lower court's allowance of the defendant's motion to dismiss. Manning, 725 F.3d at 39. The plaintiffs in Manning, three employee nurses, alleged that the former president and chief executive officer ("the president") and human resources director ("the director") failed to properly compensate them. Id. The plaintiffs asserted that they were not compensated for work performed after scheduled shifts and during meal breaks as a result of the hospital's automated time keeping system. Id. at 40.

In reviewing the lower court's allowance of the defendant's motion to dismiss, the court in Manning examined whether the president and the director were personally liable under the

FLSA. Id. at 48. Regarding the president's liability, the plaintiffs contended that she was involved in employment related decisions such as hiring employees and negotiating with unions. Id. They also claimed she oversaw the hospital's budget and coordinated a merger of several Boston hospitals. Id. The court determined that "while allegations reliant solely on [the president's] position . . . would not be sufficient to hold her individually liable, [but] the complaint contains allegations indicating that she 'controlled [the company's] purse-strings or made corporate policy about [its] compensation practices.'" Id. at 48-49. The court reasoned that the complaint demonstrated a plausible inference that the president was an employer within the meaning of the FLSA because she exercised control over the enterprise by hiring employees, maintaining the budget and allocating substantial resources to mergers. Id. at 49.

With respect to the director's liability, the plaintiffs contended that he was involved in payroll services and "functioned for the profit of the family." Id. at 50-51. The court held that the complaint failed to state a claim against the director because the allegations "are nothing more than unadorned assertions that are not supplemented by specific allegations." Id. at 50. The court found the allegations failed to evidence any unlawful behavior and were more "consistent with the notion that [the director] was performing

his job functions, rather than engaging in conduct that led to the alleged violations." Id.

Here, this court concludes that Grasso is not an employer within the meaning of the FLSA. Applying the economic reality test, Grasso did not participate in Gray Box's day-to-day operations. He worked full time as an employee at Cole Hersee. Grasso never gave plaintiff direction at work nor did plaintiff ask Grasso for direction when Nelson went missing. His only communication with Gray Box clients occurred on two to three occasions and consisted of clients inquiring about Nelson's location. During his visits to Gray Box, Grasso only brought office supplies and a snack table for the office. In light of the foregoing, the fact that Grasso's 2010 and 2011 supplemental income and loss federal tax forms declare non-passive income does not allow a reasonable fact finder to find that Grasso was involved in the company's day-to-day operations. Overall, the summary judgment record establishes that Grasso did not have a high degree of involvement in Gray Box's day-to-day operations.

In addition, Grasso was not involved with nor did he have contact with Gray Box's payroll services. When requesting payment, plaintiff only addressed emails to Nelson and stated, "Adam owes it . . . [A]dam needs to pay." (Docket Entry # 34-3, p. 17). Furthermore, Grasso did not participate in Gray Box's creation of unlawful pay practices. In fact, he attempted to

assist plaintiff in securing payment on a number of occasions. Thus, Grasso did not control Gray Box's payroll nor did he cause Gray Box to undercompensate plaintiff.

Although a corporate officer's ownership stake is highly probative of employer status, the court in Manning determined that these characteristics merely suggest operational control. See Manning, 725 F.3d at 47-48. Here, Grasso's limited role as secretary of Gray Box with a 25% ownership stake does not allow a reasonable fact finder to find significant operational control. Grasso did not perform any duties as secretary despite indicating nonpassive income on his tax returns. Grasso did not oversee plaintiff or manage the workplace. Additionally, Grasso's ownership stake did not evidence financial control. Grasso did not receive any distribution from Gray Box for his role as corporate secretary.

Plaintiff nevertheless contends that Grasso significantly controlled Gray Box's finances because he secured a loan for Gray Box from his mother. However, the fact that Grasso was present during Nelson's requests for loans does not evidence Grasso's financial interest in the company. At best, he arranged for his mother to loan Gray Box \$55,000 from October 2012 to April 2013. Grasso did not spend the money or advise Nelson on how to best use the money for Gray Box. The loan was from Lillian Grasso to Gray Box not from Grasso to Gray Box.

Grasso is therefore entitled to summary judgment as to the first cause of action for unpaid wages under the FLSA.

II. Massachusetts Wage Act

The Wage Act mandates that employees receive weekly payment of wages. Mass. Gen. Laws ch. 149, § 148. The Wage Act imposes individual liability for unpaid wages on "the president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be employers of the employees of the corporation." Id. Specifically, courts have interpreted manager as "someone who controls, directs, and participates to a substantial degree in formulating and determining policy of a corporation." Wiedmann v. The Bradford Grp., 831 N.E.2d 304, 314 (Mass. 2005).

The court in Weidmann reviewed the lower court's finding that the defendants were personally liable for the plaintiff's unpaid commissions under the Wage Act. Id. at 313. The plaintiff alleged the following defendants were personally liable: (1) the president, treasurer and clerk ("president"); (2) the office manager who "ran the company" ("office manager"); and (3) the general manager. Id. at 307. The defendants did not dispute that the president and office manager were managers under the Wage Act but the general manager's status was disputed. Id. at 313-14. The plaintiff contended that the general manager was a manager under the Wage Act because the

plaintiff reported to him and he was aware of the plaintiff's compensation package. Id. at 314.

In reviewing the lower court's finding in favor of the plaintiff, the court in Wiedmann considered whether the general manager was a manager within the meaning of the Wage Act. Id. at 313. The court held that there was insufficient evidence to conclude that the general manager directed and participated in formulating the corporation's policy. Id. at 314. The court reasoned that, "Merely holding a managerial position over some branch does not, by itself, mean that the manager has the 'management' of the 'corporation' as a whole." Id.

Here, no reasonable finder of fact could find that Grasso is a manager within the meaning of the Wage Act. Although Grasso was the corporate secretary, he did not substantially control, formulate or determine Gray Box's corporate policy. Grasso only spoke to Gray Box clients on two to three occasions. He did not manage or direct plaintiff in the workplace. Furthermore, Grasso did not receive any compensation or distributions for his secretarial position. Therefore, the summary judgment record evidences that Grasso's position as secretary was merely a title on paper rather than a manager within the Wage Act.

Nevertheless, plaintiff asserts that Grasso controlled Gray Box's corporate policy by securing a loan from his mother. As

stated, Grasso did not control or even suggest how the money was invested at Gray Box. The loan was from Lillian Grasso to Gray Box and not from Grasso to Gray Box.

Plaintiff also suggests that Grasso is a manager under the Wage Act because he is corporate secretary and possessed knowledge of plaintiff's under-compensation. However, the court in Wiedmann explicitly refuted this argument. The court held that a mere management position and knowledge of a compensation package is not sufficient to evidence substantial control over the corporation's policy. Wiedmann, 831 N.E.2d at 314.

Grasso is therefore entitled to summary judgment to the second cause of action for unpaid wages under the Wage Act.

CONCLUSION

In accordance with the foregoing discussion, this court **RECOMMENDS**⁶ that plaintiff's summary judgment motion (Docket Entry # 25) is **DENIED** and Grasso's summary judgment motion (Docket Entry # 31) is **ALLOWED**.

/s/ Marianne B. Bowler

MARIANNE B. BOWLER
United States Magistrate Judge

⁶ Any objections to this Report and Recommendation must be filed with the Clerk of Court within 14 days of receipt of the Report and Recommendation to which objection is made and the basis for such objection should be included. See Fed.R.Civ.P. 72(b). Any party may respond to another party's objections within 14 days after service of the objections. Failure to file objections within the specified time waives the right to appeal the order.