

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
STEVE H. SABBA AND TAXPRO FINANCIAL	:
NETWORK INC.,	:
	:
Petitioners,	:
	:
To Review Under Section 101 of the Labor Law:	:
An Order to Comply with Article 6 of the Labor	:
Law, dated April 29, 2008,,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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DOCKET NO. PR 08-079

RESOLUTION OF DECISION

APPEARANCES

Steve H. Sabba, *pro se* for Petitioners.

Maria L. Colavito, Counsel, NYS Department of Labor, Benjamin A. Shaw of Counsel, for Respondent.

WITNESSES

Steve H. Sabba, Clareann Lomber, Teresa Gumley, and Pasquel Acocella for Petitioners; Tamika McLemore and Favio Escudero, Labor Standards Investigator, for Respondent

WHEREAS:

Petitioner Steve H. Sabba and Taxpro Financial Network Inc (together, Petitioners), seek to vacate an Order to Comply with Article 6 of the Labor Law that the Respondent Commissioner of Labor (Commissioner) issued against Petitioners on April 29, 2008.

The Order directs Petitioners to pay to the Commissioner unpaid wages owed employee Tamika L. McLemore (Claimant) in the amount of \$1,908.50, with interest continuing thereon at the rate of 16% to the date of the Order in the amount of \$325.43, and a civil penalty in the amount of \$954.00, for a total amount due of \$3,187.93.

The Petition challenges the Order as unreasonable, alleging that the Claimant was not employed by Petitioners during the period covered by the Order. Petitioners assert that the Claimant “never worked here in 2007” and “lied to the New York State Dept. of Labor in an attempt to extort funds from our firm.” Respondent Commissioner filed an Answer to the Petition, denying its material allegations and asserting that the Petition fails to establish that Claimant was not employed during the period covered by the Order.

Upon notice to the parties, a hearing was held on June 16, 2009 before J. Christopher Meagher, Esq., Member of the Board and the Board’s designated hearing officer in this case. Each party was afforded full opportunity at the hearing to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

SUMMARY OF EVIDENCE

The Petition for review in the above-named case was filed with the Industrial Board of Appeals (Board) on June 10, 2008. Petitioner Steve H. Sabba (Sabba) is an owner and manager of Petitioner Taxpro Financial Network Inc. (Taxpro), a New York City business that provided accounting and tax services to taxpayers.

Claimant Tamika L. McLemore (McLemore) testified that on April 15, 2007 she filed a claim against Taxpro with the Department of Labor (DOL) for \$1,908.50 in unpaid wages accrued during the period February 24, 2007 to April 7, 2007. The claim stated that Taxpro had employed her as an administrative assistant at the rate of \$11 per hour and that she was not paid for 13 days of work, including overtime work, that she performed during the payroll weeks ending February 24, March 3, March 10, and April 7, 2007. The claim stated that McLemore’s last day of employment was April 5, 2007 and that she was discharged after inquiring about her pay. McLemore listed Sabba as the owner and responsible person of the firm, the person who had hired her, and the person from whom she had demanded payment. McLemore also submitted e-mail correspondence between herself and Sabba and a letter dated July 25, 2007 to DOL in support of her claim. The claim, e-mail correspondence, and letter are contained in DOL’s investigative file which was admitted into evidence. McLemore testified that the information contained in these documents is true and accurate.

It is undisputed that McLemore was initially employed by Taxpro in 2006 following an arrangement between Sabba and H & R Block where Block had provided support staff, including McLemore, to Taxpro during the tax season. After the expiration of the arrangement, Sabba employed McLemore and paid her directly for 90 hours work at the rate of \$9.00 per hour from May 1, 2006 to June 30, 2006.

McLemore testified that she exchanged e-mail correspondence with Sabba in February, 2007 requesting her 2006 W-2 form and inquiring whether Sabba could prepare her 2006 tax return. The e-mail messages in the record corroborate this discussion. McLemore testified that at a meeting held with Sabba to prepare the return, Sabba asked her if she would be willing to work for him again in 2007 and offered her the rate of \$11.00 per hour. McLemore accepted the offer, with the understanding that her work schedules

accommodate her graduate school classes. McLemore testified that she thereafter performed administrative assistant duties at Petitioners' office from February 24, 2007 through the first week of April, 2007. These duties included assisting clients; assigning clients to tax preparers; completing client transactions; filing tax forms; relieving the receptionist; and soliciting client donations for bottled water for a charity run by Sabba.

In her testimony and letter to DOL, McLemore stated that her employment came to an end after she made a complaint to Sabba on April 4, 2007 about not having been paid. McLemore stated that a few weeks after starting her employment at Taxpro she had to leave work to travel to South Carolina to attend to business related to the deaths of family members. While away, she received a phone call from Sabba's receptionist, Teresa Gumley, who told McLemore that Sabba wished her well and that she could come back to work whenever she was ready. McLemore said she called the office on her return home and then returned to work on April 4, 2007.

According to McLemore, Sabba had agreed from the onset of her employment to direct deposit her pay but as of her return to work no deposits had yet been made. It is undisputed that Taxpro's pay periods during this time frame expired on or before February 28, March 15, and April 4, 2007. McLemore testified that since the next pay period had gone by and she still hadn't received her pay, she spoke with Sabba and told him that "it was urgent that I get this taken care of." Sabba stated "you will get paid when I say you will be paid." McLemore said she replied, "you shouldn't treat your employees that way, and especially in front of your clients."

McLemore testified that she then had the following e-mail exchange with Sabba:

On Wednesday April 5, 2007 at 1:22 AM Sabba sent McLemore an e-mail:

"Don't ever humiliate me like that in a room full of clients ... Please take off tomorrow and Friday. We will be overstaffed. Come in Saturday ... Meanwhile email your hours. I don't have them."
[Ellipses in original.]

On April 5, 2007 McLemore sent Sabba an e-mail listing her total hours during the period February 24, 2007 to March 8, 2007. On April 9, 2007 McLemore sent Sabba a second e-mail listing those same hours and also "including the 2 additional days I had worked after returning" on April 4 and 5, 2007. The latter message listed 146.25 total hours during this entire period at the pay rate of \$11.00 per hour for which McLemore claimed she was not paid. The message also reminded Sabba that payment should be "less [an] advance". It is undisputed that Sabba issued McLemore a personal check dated March 10, 2007 in the amount of \$600 and had written the word "Advance" in the memo section of the check. McLemore testified that the payment was meant to "square off" monies owed for the prior year's work and as an advance for her employment in 2007.

On Monday April 9, 2007 Sabba sent McLemore an e-mail:

“I have no problem paying wages that are due. I don’t recall last week, I know you showed up unexpectedly and sat in the room next door chatting with someone so I’m not sure if you feel you should be paid for that ... and I did email you the night of the 4th saying not to come in until the 7th but you came anyway and sat in the room next door chatting some more so we’ll see ... and did someone else give you a raise to \$11 per hour? Last I checked we were at \$7.50 or \$8.” [Ellipses in original.]

On April 9, 2007 McLemore sent Sabba an e-mail:

“That is not true. When you and I sat while you were doing my taxes you and I agreed on the wages after you asked me about coming in on Saturdays initially. Then you asked my schedule and inquired to know if I could come in full time because one of your elves (as you call them) were uncooperative. You then asked if it were enough. Secondly I did not sit in the room next door and chat. If you felt you did not need me that day you should have sent me home. I don’t expect you to do the right thing because that is you. You have my contact number which you used at your disposal in the office. So why you chose to email me anticipating I would read it at 2am (when I arrived home from your office) rather than giving me a call is mind boggling. It’s hilarious how you take the time to email me disputing wages, payment and hours. But you avoided me when pleading to you the importance obtaining money owed to take care of my responsibility. You said that the client courtesy was first and foremost, but now you want to insult my intelligence. Emailing me is not proper procedure to decreasing my hours because you are angry and don’t want to pay me and you know this. Nor is not releasing me for the day once you acknowledged that you are decreased my hours. You did not pay me \$8 last year so why would you go decrease the pay ... Good luck with your water campaign for African wells. [Ellipse added.]

On April 9, 2007 Sabba sent McLemore an e-mail stating, “Thank you for your “well” wishes.” On April 16, 2007 McLemore sent Sabba an e-mail making a demand for her pay. There was no further correspondence between the parties.

Labor Standards Investigator (LSI) Favio Escudero (Escudero) testified concerning the DOL’s investigation of the wage claim that resulted in the Order under review. The investigative file reveals that on April 26 and May17, 2008, DOL issued Taxpro notices (i.e. “collection letters”) that a wage claim had been filed against it by the Claimant, the details of the claim, and that if it agreed with the claim it should remit payment to the Commissioner within ten days. DOL further advised that if Petitioner disagreed with the claim, it should respond in writing stating the basis of its dispute, and substantiate its reasons

with payroll records, contracts, and documentation demonstrating payment of the wages claimed by the Claimant.

On May 29, 2007 Sabba disputed the claim by asserting that his firm had “not employed” McLemore during the period of the wage claim and therefore did not owe the wages claimed. Sabba stated that McLemore had requested employment “[t]his season” but there was none available. He added that “I am not sure why she feels she is owed wages. I was told by the staff that for a few days she lingered in the office but did not actually do anything other than wait to speak with me but I was far too busy and she left on each of those occasions.” On July 17, 2007 Sabba forwarded DOL a copy of the personal check described above, with a letter explaining that the payment was a loan which he had not sought to collect. Sabba did not submit any payroll records to DOL.

On October 17, 2007 DOL’s investigators recommended that a “Recapitulation” be issued to Petitioners because the evidence submitted by the Claimant established that an employment relationship existed between the parties. This evidence included McLemore’s claim for unpaid wages, the e-mail correspondence, and McLemore’s letter of July 25, 2007 responding to Sabba’s contentions. Accordingly, DOL issued Petitioners a letter on November 17, 2007, recapitulating the details of the claim and requesting that Petitioners remit payment of the unpaid wages by November 7, 2007. DOL further advised that unless Petitioners responded they could be subject to criminal prosecution and further civil action, including assessment of interest and penalties. The letter enclosed a “Recapitulation Sheet” listing the amount of wages due and the period covered by the underpayment. Petitioners did not remit payment

Based on DOL’s investigation, its determination that an employment relationship existed between Petitioners and the Claimant, and Petitioners’ failure to submit payroll records establishing that it had paid the wages claimed, the Commissioner issued Petitioners the Order under review on April 29, 2008.

Sabba testified that in early 2007, McLemore approached him requesting to be employed but he turned her down because the firm was fully staffed at the time. Sabba submitted a one page “Employee Earnings Summary” for January through December, 2007 prepared by Taxpro’s payroll service that lists the names and annual earnings of Taxpro’s 2007 employees. Sabba identified five employees on the list as his office assistants and argued this showed he had plenty of staff at the time and didn’t need anymore.

Sabba testified that Taxpro never employed McLemore during the period of the wage claim and denied that he ever offered her employment at the rate of \$11 per hour. He stated that McLemore came to the office once or twice during this time frame and spent time with staff and clients, but never actually worked. On one occasion, McLemore told him that she had to go to South Carolina to deal with family illness. Sabba stated that he felt sorry for McLemore so he lent her \$600. Sabba denied ever having a representative call McLemore to invite her to return to work and stated that he did not have her phone number.

Sabba testified that his office assistants have never been paid \$11 per hour and at the time of the hearing were paid \$10 per hour. Sabba argued he would therefore never have offered McLemore employment at the rate of \$11 per hour. Pointing to McLemore's list of hours worked in February and March, 2007, Sabba stated that the firm paid its employees semi-monthly. Sabba argued that if McLemore worked the hours she claimed in February and March, 2007 then she would have been paid on the February 28 and March 15, 2007 payrolls. Sabba stated that she was not.

In rebuttal to McLemore's testimony, Sabba stated that McLemore's description of office practices, employees, events, and surroundings during the time period of the claim was incomplete or inaccurate. Sabba offered his own description of these matters and argued that McLemore would have known of them if she had worked in the office at the time.

On cross examination, Sabba was asked whether he brought payroll records stating the names, daily and weekly hours worked, rate of pay, and deductions for each of his employees. Sabba stated that these records were available, but he did not bring them to the hearing. Sabba qualified this testimony by stating that he did not maintain records of the daily or weekly hours of the salaried employees, such as Clairann Lomber, but did for the hourly employees, such as Teresa Gumley. Aside from the annual earnings summary described above, Sabba did not produce payroll records for any of Taxpro's employees during the time period of the claim.

Also on cross examination, Sabba was asked to review the e-mail correspondence between himself and McLemore and identify the text of any message that was inaccurate. Sabba testified that the text of all messages was accurate except one portion of his message to McLemore on April 5, 2007. Sabba testified that,

“I did not put, ‘please take off tomorrow and Friday. We will be overstaffed. Come in Saturday.’ I wrote something to the effect of, ‘you don’t need to come in.’ I never said, ‘come in Saturday.’”

Sabba did not dispute the accuracy of the text of any of the remaining e-mails, including his statement to McLemore on April 9, 2007 “... and I did email you the night of the 4th saying not to come in until the 7th ...”

Again on cross examination Sabba was asked whether on February 23, 2009 he had pled guilty to one count of a class E felony of filing a false tax return, and two misdemeanors. Sabba admitted that he had pled guilty to these offenses, allocated to them in court, and that as a condition of his sentence he is currently prohibited from filing e-tax returns.

Clareann Lomber (Lomber) testified that she has been employed as the daytime receptionist by Taxpro since December, 2003 and is currently employed by its successor entity. Her hours during tax season are generally 7:30 AM to 8:15 PM and in non-tax season from 8:30 AM to 5:30 PM. Lomber operates the reception desk in the outer office during these hours. Her duties include answering phones, making appointments, being a liaison

between Sabba and clients or vendors, and buzzing employees and clients through a door to the inner office where staff works. Sabba presented Lomber with McLemore's list of hours during the period February 24, 2007 to March 8, 2007 and asked Lomber whether she was physically present at the reception desk during those hours, or most of them. Lomber replied that she was, unless it was a Saturday. Sabba asked Lomber whether she "believed" that McLemore had worked those days. Lomber replied "No." Lomber said she recalled seeing McLemore on two or three occasions during the 2007 tax season. According to Lomber, McLemore was looking for work, "but there was no work available, so she would come in and hang out with me in the lobby, speak with clients, try to solicit donations for her son's football team."

On cross examination, Lomber stated that she has no other employment outside of her work for Sabba. She acknowledged that prior to her testimony she signed an affidavit that Sabba typed up and asked her to sign concerning the dispute. Lomber also testified that as a salaried employee she is not required to keep time records and keeps no time records of her own. She did not bring any payroll records to the hearing to show the hours she worked from February 24 to March 8, 2007.

Teresa Gumley (Gumley) testified that she was employed as the evening receptionist by Taxpro in 2007. She replaced Lomber at approximately 5:00 PM and worked until 10:00 or 11:00 PM on weeknights Monday to Friday. Her duties included greeting clients, buzzing people in, and answering the phone. Sabba presented Gumley with McLemore's list of hours during the period February 24 to March 8, 2007 and asked her whether she was present during a lot of those periods. Gumley replied that she was, if it was in the evenings. Gumley testified that she recalled seeing McLemore "once" during those times.

On cross examination, Gumley testified that she did not have an independent recollection of each day during the above period but generally remembered what her schedule was. She did not remember a trip McLemore took to South Carolina. Gumley said she kept a personal record of her work hours in 2007 on a calendar at home but did not bring this record to the hearing.

Pasquel Acocella (Acocella) testified that he was employed as a tax preparer by Taxpro during the 2006 tax season. He received a phone call from McLemore four or five months before the hearing asking whether he could verify her employment with Taxpro after her assignment to the firm by H & R Block. Acocella said he declined the request because he had not been employed there in 2007 and could not verify her employment at the time. Acocella also testified that he was employed by another firm down the hall in 2007 and visited Taxpro's office once a day from February to April, 2007. He stated that he saw McLemore there on three occasions during that time frame.

In rebuttal to Acocella's testimony, McLemore denied having called him to verify her employment. McLemore testified that Acocella had called her to inquire what was happening in her case and to urge her to work things out with Sabba.

GOVERNING LAW

A. Standard of Review and Burden of Proof

The Labor Law provides that “any person ...may petition the board for a review of the validity or reasonableness of any ... order made by the [C]ommissioner under the provisions of this chapter” (Labor Law 101 §[1]). It also provides that an order of the Commissioner shall be presumed “valid” (Labor Law §103 [1]).

A petition filed with the Board that challenges the validity or reasonableness of an Order issued by the Commissioner must state “in what respects [the order on review] is claimed to be invalid or unreasonable” (Labor Law § 101[2]). It is a petitioner’s burden at hearing to prove the allegations that are the basis for the claim that the order under review is invalid or unreasonable (Board’s Rules of Procedure and Practice § 65.30 at 12 NYCRR § 65.30 [“The burden of proof of every allegation in a proceeding shall be upon the person asserting it”]; *Angello v Natl. Fin. Corp.*, 1 AD 3d 850, 854 [3d Dept 2003]).

It is therefore Petitioners’ burden to prove by a preponderance of the evidence the allegations in the Petition that the Order improperly determined that McLemore was employed by Petitioners during the period of the wage claim.

B. Definition of Employment Under the Labor Law

“Employed” is broadly defined in Article 1 of the New York Labor Law as including “permitted or suffered to work” (Labor Law § 2 [7]). The New York statute mirrors the federal Fair Labor Standards Act (FLSA) which also defines “employ” to include “suffer or permit to work.” (29 U.S.C. § 203 [g]).

C. Recordkeeping Requirements

Labor Law §§ 195(4) and 661 require employers to maintain payroll records. Section 661 requires employers to make such records available to the Commissioner:

“Every employer shall keep true and accurate records of hours worked by each employee covered by an hourly minimum wage rate, the wages paid to all employees, and such other information as the commissioner deems material and necessary, and shall, on demand, furnish to the commissioner or [her] duly authorized representative a sworn statement of the same. Every employer shall keep such records open to inspection by the commissioner or [her] duly authorized representative at any reasonable time”

The Commissioner’s regulations at 12 NYCRR § 142-2.6 also provide in relevant part:

“(a) Every employer shall establish, maintain and preserve for not

less than six years weekly payroll records which shall show for each employee:

- (1) name and address;
- (2) social security number;
- (3) wage rate;
- (4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;
- (5) when a piece-rate method of payment is used, the number of units produced daily and weekly;
- (6) the amount of gross wages;
- (7) deductions from gross wages;
- (8) allowances, if any, claimed as part of the minimum wage.

D. DOL's Calculation of Wages in the Absence of Adequate Employer Records.

An employer's failure to keep adequate records does not bar employees from filing wage complaints. Where employee complaints demonstrate a violation of the Labor Law, DOL must credit the complaint's assertions and relevant employee statements and calculate wages due based on the information the employee has provided. The employer then bears the burden of proving that the disputed wages were paid. *See* Labor Law § 196-a.; *Angello v. Natl. Fin. Corp.*, 1 AD3d 850 [3d Dept 2003]. As the Appellate Division stated in *Matter of Mid-Hudson Pam Corp. v Hartnett*, 156 AD2d 818, 821 [3d Dept 1989], "[w]hen an employer fails to keep accurate records as required by statute, the Commissioner is permitted to calculate back wages due to employees by using the best available evidence and to shift the burden of negating the reasonableness of the Commissioner's calculations to the employer."

In *Anderson v Mt. Clements Pottery Co.*, 328 U.S. 680, 687-688 [1949], superseded on other grounds by statute, the U.S. Supreme Court long ago discussed the fairness of relying on employee statements where the employer failed to keep adequate records:

"[W]here the employer's records are inaccurate or inadequate....[t]he solution...is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act."

Citing to *Anderson v Mt. Clemens*, the Appellate Division in *Mid-Hudson Pam Corp. v Hartnett*, *supra*, agreed:

“The public policy of providing protection to workers is embodied in the statute which is remedial and militates against creating an impossible hurdle for the employee.... Were we to hold otherwise, we would in effect award petitioners a premium for their failure to keep proper records and comply with the statute. That result should not pertain here.”

FINDINGS

Petitioners “Employed” the Claimant During the Period of the Wage Claim

The sole question raised by this appeal is whether the Claimant was “employed” by Petitioners during the period of the claim. Sabba’s Petition to the Board alleged that Claimant “never worked here in 2007” and had fabricated the claim “in an attempt to extort funds from our firm.”

If the answer to the question of whether the Claimant was “employed” is affirmative, we must necessarily affirm the Commissioner’s determination below. Petitioners here do not contest the Commissioner’s determination of wages owed to an employee for the specific hours listed in the claim period -- i.e. the precise amount and extent of work performed -- but argue that Claimant was never employed during the claim period at all.

We find that the record evidence amply demonstrates that Petitioners “employed” the Claimant during the period of the wage claim and therefore affirm the Order below. The Labor Law broadly defines “employed” as including “permitted or suffered to work” (Labor Law § 2 [7]). We find the Claimant’s testimony that she was hired by Sabba and performed “work” as an administrative assistant at Petitioners’ office during the period of the claim credible and corroborated by Sabba’s own written admissions. *Doo Nam Yang v ACBL Corp.*, 427 F Supp 2d 327, 331-37 (SDNY 2005) [employee testimony concerning wages and hours credited where corroborated by other evidence, including employer testimony].

Claimant credibly testified that she was hired by Sabba in February, 2007 at the rate of \$11.00 per hour. She performed work as an administrative assistant at his office from February 24 to March 8, 2007. Following a break in her employment she returned to work on April 4, 2007 and worked for two more days. She was terminated after complaining to Sabba in the office on April 4th about not being paid.

The record evidence establishes that early on the morning of Wednesday April 5, 2007, Sabba sent McLemore an e-mail message admonishing her for an incident in the office. The message directed McLemore to “take off” the next two days because the office would be “overstaffed” and to “[c]ome in Saturday”, which would have been April 7, 2007. While Sabba denied that he wrote this latter statement, we do not credit this denial since four days later on April 9, 2007 Sabba reiterated in another message to McLemore, “...and I did email you the night of the 4th saying not to come in until the 7th...”. Sabba’s message to

McLemore on April 5, 2007 concluded with a directive, “Meanwhile email your hours. I don’t have them.”

The record further establishes that later that day McLemore sent Sabba a list of her hours for the period February 24, 2007 to March 8, 2007. On Monday April 9, 2007, McLemore sent Sabba a second list of those same hours including the two additional days “*that I worked*” after returning on April 4 and 5, 2007 (emphasis added). The list included the rate of pay at \$11.00 per hour. This message prompted a reply from Sabba where he selectively disputed McLemore’s entitlement to be paid for “last week”, asserting that she showed up unexpectedly and “sat in the room next door chatting with someone”, and reiterating that he had emailed her “not to come in” until Saturday the 7th. Sabba acknowledged that a pay rate had been agreed to by the parties for McLemore’s work, but asserted that it was lower, “... and did someone else give you a raise to \$11 per hour? Last I checked we were at \$7.50 or \$8.” In a reply e-mail, McLemore responded to these contentions. McLemore told Sabba that they had agreed to “the wages” at the time of her hire; she “did not sit in the room next door and chat”; and it was unreasonable for Sabba to have e-mailed her at 2 AM to tell her not to report the next day when he could have called her. McLemore added that she believed she was entitled to pay for her last day because, “If you felt you did not need me that day you should have sent me home.”

Sabba’s prior statements compel the reasonable inference we draw that an employment relationship existed between the parties and that McLemore had been employed during the claim period. Following a dispute in the office at the end of the period, Sabba directed McLemore when to “take off” and when to “come in” because of “staffing” concerns. He directed McLemore to submit a list of her “hours” because he did not have a record of them. When McLemore submitted the list of hours she had “worked”, Sabba selectively disputed only the last two days. When McLemore demanded payment for her work, Sabba acknowledged that the parties had agreed to a rate of pay for it, albeit at a lesser rate than McLemore had asserted. Sabba’s statements and directives concerning McLemore’s work schedule, hours of work performed, and rate and method of payment are clear evidence that she had been employed in the claim period (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 139 [2d Cir 1999] (power to hire and fire, supervise and control employee work schedules, and determine rate and method of payment evidence employer-employee relationship).

We find that Sabba’s e-mail admissions corroborate McLemore’s testimony that she was hired, worked, and was terminated after a complaint over not being paid for such work. We do not credit Sabba’s testimony that he did not offer McLemore employment, did not employ her, or that McLemore merely visited the office a few times but did not work. Sabba’s directives to McLemore over her wages and hours are clearly those made by an employer to his employee, not those made by an office manager to a guest.

In light of the above, we find the testimony of Lomber and Gumley insufficient to negate a finding that McLemore was employed during the period of the claim. On cross examination, Lomber acknowledged that she has no other employment outside of her work for Saaba and had signed an affidavit that Saaba typed up and asked her to sign concerning

the dispute. Lomber testified that as a salaried employee she is not required to keep time records and keeps no time records of her own. She did not bring any time records to the hearing showing the hours she had worked from February 24 to March 8, 2007. Gumley testified that she did not have an independent recollection of each day during the above period but generally remembered what her schedule was. She did not remember a trip McLemore took to South Carolina. While Gumley claimed to keep a time record of her work hours in 2007 on a personal calendar at home, she did not produce those records at the hearing. Sabba failed to produce time records for either of these witnesses showing that they were present during the hours listed by McLemore on her claim.

Sabba argues that the testimony of these witnesses establishes that McLemore never worked and was never employed during the period of the claim. We find their testimony simply too general, conclusory, and unreliable to support such an inference and do not credit it. Their testimony is contradicted by McLemore's credible testimony that she worked the hours listed in her claim and Sabba's admissions that she had been employed during this time frame. As the employer, Sabba's admissions are the most probative evidence of the employment relationship between Petitioners and the Claimant. We reject evidence proffered by the employer that is in conflict with this proof. *Matter of Michael Fisher (d/b/a Mefco Builders)*, PR 06-099 at pp.3-4 (April 25, 2008) (testimony of job foreman concerning hours at work site inconsistent with employer's proffered payroll records undermines petitioner's proof); *Matter of Mohammed Aldeen*, PR 07-093 at pp. 14-15 (May 20, 2009) (employee testimony concerning hours inconsistent with work schedules proffered by employer is suspect).

We also reject Sabba's contention that McLemore's testimony should not be credited because she inaccurately described various practices, employees, events, and surroundings that she would have known about if she had worked the hours claimed. Sabba gave his own description of these matters. We find that McLemore's testimony was credible, however, and corroborated by Sabba's own admissions. We do not find Sabba's testimony credible, since it was contradicted by these admissions and impeached by his guilty plea to the E Felony of filing a false tax return, a criminal conviction undermining his honesty and veracity as a witness (Prince, Richardson on Evidence § 6-409 [testimony of witness may be impeached by proof of conviction of a crime]).

Sabba argues that he would not have hired McLemore because he was fully staffed with assistants for the 2007 season. He states that he would not have agreed to a rate of \$11 per hour because the assistants were paid less at the time. He further argues that if McLemore had worked the hours claimed then she would have been paid on the February 28 and March, 2007 payroll periods. Sabba failed to produce payroll records of the hours and rates of pay of the other employees employed during the claim period, however, to show his pattern of recordkeeping. His arguments of what he would have done are self serving and insufficient to draw an inference negating the claim.

Finally, the parties disputed the purpose of a personal check from Sabba to McLemore dated March 10, 2007 in the amount of \$600.00. Since we find the other record

evidence dispositive of the employment relationship, we find it unnecessary to resolve this dispute.

By virtue of the above, we affirm the Commissioner's determination finding that an employment relationship existed between the parties during the period of the claim. The Order determining that the Claimant is owed back wages is therefore affirmed in all respects.

Interest

Labor Law § 219(1) provides that when the Commissioner determines that wages are due, then the order directing payment shall include "interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of payment". Banking Law § 14-A sets the "maximum rate of interest" at "sixteen percent per centum per annum."

Petitioners did not challenge the assessment of interest made by the Order. The Board finds that the considerations and computations required to be made by the Commissioner in connection with the interest set forth in the Wage Order are valid and reasonable in all respects.

Imposition of Civil Penalties

If the Commissioner determines that an employer has violated Article 19 of the Labor Law, she is required to issue a compliance order to the employer that includes a demand that the employer pay the total amount found to be due and owing. *See* Labor Law § 218 (1).

"In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of these provisions, rules, or regulations, or to an employer whose violation has been found to be willful or egregious, shall direct payment to the Commissioner of an additional sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages ... found by the Commissioner to be due, plus the appropriate civil penalty ... In assessing the amount of the penalty, the Commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages ... the failure to comply with recordkeeping or other non-wage requirements."

Petitioners did not submit evidence challenging the Commissioner's assessment of a civil penalty in the Order beyond their assertion that Claimant was not employed during the

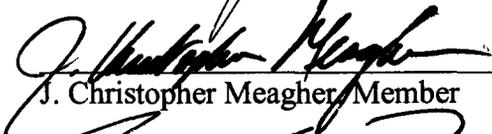
period covered by the Order. The Board finds that the determination made by the Commissioner in assessing Petitioners a 50% civil penalty in the Order is therefore valid and reasonable in all respects.

NOW THEREFORE, IT IS HEREBY RESOLVED THAT:

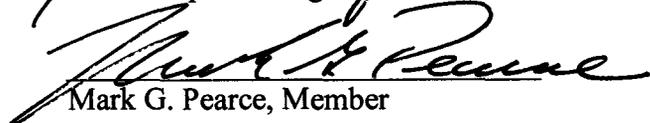
1. The Order to Comply with Articles 6 of the Labor Law, dated April 29, 2008, is affirmed in all respects, and;
2. The Petition is denied.



Anne P. Stevason, Chairman



J. Christopher Meagher, Member



Mark G. Pearce, Member



Jean Grumet, Member



LaMarr J. Jackson, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
March 24, 2010.