

93CV05540 - LPS - JRM

U.S. DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MAR 31 1997

United States District Court

EASTERN DISTRICT OF NEW YORK

ROBERT B. REICH, etc.

JUDGMENT IN A CIVIL CASE

v.

RSR SECURITY SERVICES, LTD., et alia

CASE NUMBER: CV-93-5540

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

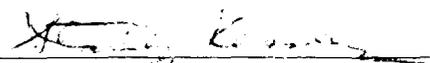
Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. and defendants RSR Security Services Ltd. and Michael A. Stern having consented to the entry of a default and to the amounts they owe plaintiff, IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the plaintiff and against defendants RSR Security Services Ltd., Michael A. Stern and Murray Portnoy. Plaintiff shall recover of defendants RSR Security Services Ltd. and Michael A. Stern the sum of \$119,447.32 in back wages and the sum of \$119,447.32 in liquidated damages. The plaintiff shall recover of defendant Murray Portnoy the sum of \$78,878.02 in back wages and the sum of \$78,878.32 in liquidated damages. Defendants are permanently enjoined from prospectively violating the Fair Labor Standards Act of 1938 and from withholding back wages due. Plaintiff is awarded the costs of this action.

March 31, 1997

Date

ROBERT C. HEINEMANN

Clerk


(By) Deputy Clerk

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

Robert B. Reich, *etc.*,

Plaintiff,

CV-93-5540 (CPS)

- against -

MEMORANDUM
AND ORDER

RSR Security Services Ltd. *et alia*,

Defendants.

-----X

SIFTON, Chief Judge.

Robert B. Reich, the Secretary of the United States Department of Labor, brings this action against defendants RSR Security Services, Ltd. ("RSR"); RSR's president, Michael A. Stern; RSR's vice president, Frank Watkins; and RSR's chairman of the board and fifty-percent shareholder, Murray Portnoy, for violations of the minimum wage, overtime and recordkeeping provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.* ("FLSA").

Trial of this action was held without a jury on September 24, 1996 through October 1, 1996. Prior to trial, on March 27, 1996, Watkins was dismissed as a defendant. On September 24, 1996, defendants RSR and Stern consented to the entry of a default and stipulated to the amounts they owe plaintiff.

The sole defendant contesting liability at trial, Portnoy argues that he is not an employer of RSR as defined under

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the FLSA and that he did not willfully violate the statute. Portnoy and plaintiff have stipulated to the amount of Portnoy's liability if the Court determines that he is an employer of RSR.

For the reasons set forth below, I find that Portnoy is an employer of RSR and that he willfully violated the FLSA. Portnoy is liable to plaintiff for \$157,756.04, consisting of \$78,878.02 in back wages and an equal amount in liquidated damages. A default judgment is also entered against defendants RSR and Stern jointly and severally for \$238,894.64, consisting of \$119,447.32 in back wages and an equal amount in liquidated damages.

Additionally, all three defendants are enjoined from committing future violations of the FLSA and from withholding unpaid back wages due employees, and plaintiff is awarded the costs of this action.

The following are findings of fact and conclusions of law on which these determinations are based, as required by Rule 52 of the Federal Rules of Civil Procedure.

BACKGROUND

In 1988, Michael Stern, his wife, Marilyn, and Murray Portnoy incorporated RSR Securities Services, Ltd., for the purpose of providing security guard, pre-employment screening, polygraph, patrol, and undercover services to corporate clients. Stern was a previous owner of two security guard companies and had knowledge of the security business. Portnoy, a named

principal of the labor relations firm of Portnoy, Messinger & Pearl, provided financial backing for RSR.

Marilyn Stern, Michael Stern, and Portnoy were the sole shareholders of RSR, each holding a fifty-percent interest in the corporation. The three agreed that Stern, whose previous security guard company had been the subject of an IRS investigation and who, as a result of that investigation, had an outstanding judgment against him, would not be an RSR shareholder.¹

Stern was elected president of RSR. Portnoy held various positions in the company including that of chairman of the board of directors. Prior to Watkins' employment as vice president of RSR in 1988, Portnoy and Stern were the sole officers of the company.

RSR operated out of a main office located in Long Island City, New York, and a branch office located within the Westbury, New York offices of Portnoy, Messinger & Pearl. Most of RSR's operations, including those involving the security guards, occurred in the Long Island City office.

Stern supervised the security guard operations at RSR. He hired and fired the guards, set the rates for guard services, assigned guards to job locations and monitored their performance

¹ The same security guard business and its predecessor had been investigated by the Department of Labor for minimum wage and overtime violations of the FLSA. Each investigation led to claims of violations which were resolved without litigation. It is unclear whether Portnoy was aware of these alleged FLSA violations prior to the formation of RSR and the institution of this action.

at those locations, prepared the company's payroll, and maintained most of RSR's files.

In October or November of 1988, Stern and Portnoy hired Frank Watkins as vice president of RSR to assist in the company's daily operations. Watkins' duties included overseeing the security guards and the undercover investigators, conducting pre-employment screening for clients, maintaining the company files and operating the computers. Approximately one year later, Watkins also became involved in sales and marketing for the company, assisted Stern in hiring and firing security guards, and prepared the payroll for RSR security guards.

Portnoy, who worked out of the Westbury office, was not directly involved in supervising of the guards. However, he had broad authority over RSR operations, including supervisory authority with respect to the employment, compensation, and working conditions of the guards. Specifically, Portnoy had authority to hire and recruit RSR employees, to sign payroll and other company checks, to set rates for security guard services, to control the manner in which RSR employees were compensated, and to resolve complaints of RSR employees with respect to employment conditions and benefits.

Portnoy also had some authority over Stern and Watkins and frequently gave them instructions on conducting RSR business. Portnoy testified that he could have unilaterally dissolved RSR if Stern didn't follow his instructions. In addition, Portnoy was the only principal with credit, and thus he financially

controlled the company. He signed RSR loans, leased cars for RSR employees on his personal credit, and approved company purchases.

Portnoy supervised RSR operations by receiving periodic reports from employees in the Long Island City office. Brian Serotta, a company accountant hired by Portnoy, reported to him on RSR finances and activities and, on at least one occasion, reported to him concerning improprieties in compensating RSR security guards. Portnoy also requested that Bonni McGuirk, an RSR salesperson, be "his eyes and ears" at RSR and report to him on problems there. Another former RSR salesperson, Karen Goodman, further testified that she forwarded client complaints about the guards to Portnoy.

Portnoy was also in regular contact with Watkins and Stern. Watkins testified that he periodically sent Portnoy faxes, work orders, memos, investigation reports, and invoices about RSR matters, including those involving the guard operations. Portnoy further testified that he called Mr. and Mrs. Stern about RSR business on a "reasonably frequent basis."

In addition to his indirect supervision of RSR activities, Portnoy was directly involved in several aspects of RSR's security guard operations. He signed payroll checks for RSR whenever Stern was unavailable,² gave Watkins instructions about conducting the guard operations, forwarded complaints about guards to Watkins, set client rates for security guard services,

² On at least three occasions, Portnoy signed security guard payroll checks.

assigned guards to cover specific clients, and directed Watkins to show RSR employment application forms to Pearl of Portnoy, Messinger & Pearl for revision. Portnoy also hired Stern and Watkins, who supervised the guards, and several salespeople who marketed security guard services.

Portnoy also monitored and controlled aspects of the guards' compensation. After discovering that RSR guards were illegally included on 1099 forms as independent contractors, Portnoy instructed Stern and Watkins to stop the practice.³ Thereafter, he checked with the other principals of the company to ensure that the practice had terminated. Furthermore, John Thompson testified that he complained to Portnoy about a problem regarding the salary of his son, who worked as an RSR security guard and that Portnoy resolved the problem.

In addition, Portnoy actively sought new business for RSR, including security guard services. He frequently referred Portnoy, Messinger & Pearl clients to RSR for security services and provided RSR personnel with the names of potential clients. After Portnoy referred prospective leads to RSR, he would give Watkins instructions about the security needs of those potential clients.

³ The Internal Revenue Service requires businesses to report on a 1099 information return form all payments of six hundred dollars or more that are made to "persons not treated as ... employees for services rendered in [a] trade or business." See *Jones v. Mega Fitness*, 94 Civ. 8393, 1996 WL 267941 at *1 (S.D.N.Y. May 21, 1996) (quoting Internal Revenue Service, Department of Treasury, Publication 334,189, Tax Guide for Small Businesses). Regularly employed personnel cannot be included on the forms. See *id.*

Lastly, Portnoy was generally viewed by others as having control over RSR operations. Sales literature represented to potential clients that Portnoy was a principal with authority and control over RSR operations, and that Portnoy, as the chairman of RSR, demanded nothing less than the highest legal, ethical, and quality services from the company. Portnoy further testified that he used his reputation with Portnoy, Messinger & Pearl clients in obtaining RSR clients and that he established a system whereby those clients who wanted undercover operatives would pay Portnoy, Messinger & Pearl, and those payments would be forwarded to RSR. Employees, including Watkins and several former security guards, also testified that they viewed Portnoy as a "boss" or the "President" of RSR.

Portnoy's Knowledge of FLSA

Describing the FLSA as "his passion," Portnoy testified at trial that he has extensive knowledge of the FLSA and its requirements. He first became familiar with the FLSA in 1939 and tracked the statute since that time. He further testified that he has read about the statute frequently and that he often advises Portnoy, Messinger & Pearl clients about how to comply with the FLSA's requirements. Additionally, an investigator for the Department of Labor testified that she dealt with Portnoy for the past ten to fifteen years because Portnoy was an expert on the FLSA and that one of the areas of Portnoy's expertise was to

determine when and whether employees were entitled to overtime compensation.

The FLSA Violations

RSR security guards were paid hourly wages starting at the minimum wage. Copies of RSR payroll records and the testimony of former security guards establish that RSR deducted a \$40 or \$45 sum from the guards' first or second payroll checks, which was used by RSR to pay for a fingerprint processing fee. The fingerprints were required by the state, and the deductions were recorded on payroll records as deductions for "state fees." Payroll records reflect that, in the weeks that these deductions were made, guards received less than the minimum wage.

In addition, copies of daily logs and timesheets kept by RSR guards indicate that guards frequently worked over forty hours per week, and many former guards testified that they worked an average of seventy or eighty hours per week. RSR security guards recorded on timesheets the times that they began and finished their shifts. They also recorded their hours in logbooks. Either Stern or Watkins totalled the weekly hours worked by each guard during a week and recorded the total number of hours on the top of the timesheets.⁴ However, Stern or Watkins recorded a different number on the payroll records, which

⁴ Frank Amatulli, a security guard, testified that he complained to Portnoy about not being paid overtime when he went to the Westbury office to pick up his paycheck. Watkins also testified that he complained to Portnoy about the guards "being cheated." Portnoy denies that Watkins or Amatulli ever spoke to him about the guards' compensation.

reflected one-third less overtime worked by each guard during the week. Thus, although RSR's payroll records indicated that RSR was compensating guards at one and one-half times their regular rate for overtime, the logbooks, timesheets, and testimony of former RSR employees established that RSR was in fact paying its employees the same rate for all hours worked, including overtime, and deliberately concealing its practices by falsifying the payroll records.⁵ These practices occurred from 1988 until RSR ceased operations in or around 1994.

In 1993, the Department of Labor began investigating defendants for FLSA violations. Plaintiff commenced this action on December 7, 1993, against defendants RSR, Stern and Watkins. Portnoy was subsequently named as a defendant on December 13, 1994. On March 27, 1996, upon plaintiff's application, Watkins was dismissed from the suit.⁶

The Secretary brings this action pursuant to §§ 16(c) and 17 of the FLSA, charging defendants with failing to pay RSR employees minimum wages in violation of § 6 of the FLSA, failing to pay employees overtime compensation in violation of § 7 of the FLSA, and deliberately falsifying the company's payroll records

⁵ When confronted by guards regarding this practice, Stern and Watkins gave several excuses for the company's practices, such as telling the guards that RSR was exempt from overtime requirements or that, because the company did not bill overtime, it didn't have to pay it. Eventually, Stern or Watkins told guard applicants prior to their employment at RSR that the company did not pay overtime.

⁶ On March 27, 1996, cross-claims asserted by Portnoy against Watkins, Stern, and RSR, and a third-party complaint against Mrs. Stern were dismissed. Motions to sanction Portnoy and his attorney, to disqualify Portnoy's attorney, to amend the complaint, and cross-motions for partial summary judgment were also denied.

in violation of the recordkeeping requirements of §§ 11(c) and 15(a)(5) of the FLSA. Plaintiff seeks to enjoin defendants from prospectively violating the FLSA and from withholding payment of back wages due past employees. The Secretary also requests liquidated damages or, in the alternative, prejudgment interest, and costs in bringing this action.

DISCUSSION

Jurisdiction over this action is conferred by 29 U.S.C. §§ 216 and 217, and by 28 U.S.C. §§ 1331 and 1345. The parties have conceded that RSR is an employer within the meaning of § 3(d) of the FLSA and an enterprise engaged in commerce within the meaning of §§ 3(s)(1) and 4 of the FLSA and is, thus, subject to the FLSA's provisions.

Whether Portnoy is an Employer under the FLSA

In order to be held liable under the FLSA, a defendant must be an employer, which § 3(d) of the statute defines to include

any person acting directly or indirectly in the interest of an employer in relation to any employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

29 U.S.C. § 203(d).

The Supreme Court has characterized the FLSA's definition of employer as "expansive." *Falk v. Brennan*, 414 U.S. 190, 195 (1973); *see Rubin v. Tourneau, Inc.*, 797 F. Supp. 247,

252 (S.D.N.Y. 1992) ("Courts have adopted an expansive interpretation of employer under FLSA."); *Tuber v. Continental Grain Co.*, 83 Civ. 4950, 1984 WL 1326 at *4 (S.D.N.Y. Dec. 11, 1984); *Koster v. Chase Manhattan Bank*, 554 F. Supp. 285, 290 (S.D.N.Y. 1983); *Dunlop v. South Glens Falls Lumber Co.*, 73 Civ. 515, 1976 WL 1514 at *2 (N.D.N.Y. Feb. 13, 1976). Furthermore, the remedial nature of the statute warrants a broad interpretation of its provisions so that it will have "the widest possible impact in the national economy." *Carter v. Dutchess Community College*, 735 F.2d 8, 12 (2d Cir. 1984); see also *Tourneau, Inc.*, 797 F. Supp. at 252.

Because the statute's definition of an employer is stated in such broad terms, it is necessary to look to the economic realities presented by the facts of each case to determine whether an individual is an employer under the statute. See *Dutchess Community College*, 735 F.2d at 12; *South Glens Falls Lumber Co.*, 1976 WL 1514 at *3. Courts considering the economic reality of an individual's status "focus on whether the alleged employer has some degree of control over the terms and conditions of employment ... including those aspects of employment covered by the statute." *Tourneau*, 797 F. Supp. at 252; see also *Falk v. Brennan*, 414 U.S. at 195 (real estate management company found to be an employer because its managerial responsibilities gave it "substantial control of the terms and conditions of the work of [the] employees").

Factors relevant to determining control under this "economic reality test" include

whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.

Dutchess Community College, 735 F.2d at 12 (quoting *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983)); *Tourneau*, 797 F. Supp. at 252. No one of those factors is dispositive; rather, it is based on a totality of the circumstances. *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) (citations omitted). Additionally, any relevant evidence may be considered and a mechanical application of the test is to be avoided. See *id.*

Portnoy argues that he was not an employer of RSR because he did not supervise the daily operations involving the security guards. He further contends that he was too busy managing his consulting business at Portnoy, Messinger & Pearl to be significantly involved at RSR and that Stern and Watkins, who directly managed the guard operations, were the only employers of RSR under the FLSA.

However, the definition of an employer under the statute includes those who effectively "dominate [the corporation's] administration or otherwise act, or [have] the power to act, on behalf of the corporation vis-à-vis its employees," *Donovan v. Sabine Irrigation Co.*, 695 F.2d 190, 194 (5th Cir. 1983). "An employer does not need to look over his

workers' shoulders every day in order to exercise control." *Superior Care, Inc.*, 840 F.2d at 1060.

The evidence indicates that Portnoy had broad authority and exercised significant control over RSR's operations, including its employment of the guards. Specifically, Portnoy's authority over Stern and Watkins, his control over RSR's finances, his ability to unilaterally close the company, and his ability to stop illegal pay practices from continuing, indicate that Portnoy had the authority to act as an employer of RSR. See *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487, 491 (2d Cir. 1960); *Dole v. Elliott Travel & Tours*, 942 F.2d 962, 966 (6th Cir. 1991); see also *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st Cir. 1983) (holding corporate officers with substantial ownership interest in corporation and directly involved in decisions affecting employee compensation liable).

Furthermore, contrary to Portnoy's suggestion that he was not involved in RSR affairs, the evidence indicates that Portnoy periodically exercised control over aspects of RSR's employment of the guards, including signing payroll checks when Stern was unavailable to do so, instructing that employment application forms be reviewed, participating in the assignment of guards to some work locations, setting the rates charged clients of the security guard services, stopping the inclusion of guards

on 1099 forms, and hiring those who supervised the guards.⁷ Portnoy's involvement in these aspects of the guards' employment demonstrates that he acted as an employer in relation to RSR guards, even if he was not specifically involved in the everyday minutia of supervising them. See *Wing v. East River Chinese Restaurant*, 884 F. Supp. 663, 666 (E.D.N.Y. 1995) (finding that shareholders who exercise operational control over a corporation's functions, including the compensation of employees, are considered employers under the FLSA).

Nor is Portnoy's failure to exercise exclusive daily control over RSR guard operations determinative of his status as an employer. See, e.g., *Klinghoffer Bros. Realty Corp.*, 285 F.2d at 491. Portnoy was widely regarded by both clients and employees as one of the principals with authority over the RSR security guard business. In addition, he exercised control over RSR operations in a manner typical of an employer. These factors are sufficient to support a finding that an individual is liable as an employer under the statute. See *Dunlop v. South Glens Falls Lumber Co.*, 73 Civ. 515, 1976 WL 1514 at *3 (N.D.N.Y. Feb. 13, 1976) (citing perception by company employees of individual's authority at company as one factor in determining liability); *Elliott Travel & Tours*, 942 F.2d at 966 (finding control and

⁷ Defendant argues that the evidence demonstrates that, on two out of those three occasions, he signed such payroll checks before the period giving rise to liability. He argues that this cannot be a basis for liability. However, the time at which he actually signed the checks is irrelevant in determining Portnoy's status as an employer, provided that he had authority throughout the relevant period to sign such checks.

authority sufficient to impose liability); *Donovan v Agnew*, 712 F.2d 1509 1510-14 (1st Cir. 1983) (individuals who control business and have direct effect upon employees are employers).

Lastly, plaintiff has introduced evidence showing that Portnoy was actively engaged in the management, supervision, and oversight of RSR affairs in general, aside from those involving the guards. Defendant argues that this evidence is irrelevant and that only that evidence supporting Portnoy's control over the guards should be considered. Although general management of corporate affairs might not, by itself, suffice to impose liability, the narrow approach suggested by defendant ignores the relevance of this evidence in determining Portnoy's ability to control RSR's employment of the guards. See *Superior Care, Inc.*, 840 F.2d at 1059 (rejecting claim that only evidence of employer's control over relevant employees may be considered). "Corporate officers with 'operational control' over an employing entity clearly fall within the definition" of an employer. See *Johnson v. A.P. Prods., Ltd.*, 934 F. Supp. 625, 628 (S.D.N.Y. 1996) (citing *Donovan v. Sovereign Security, Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984); *Elliott Travel & Tours, Inc.*, 942 F.2d at 965).

This evidence indicates that Portnoy's involvement in RSR was more than that of a shareholder. See *Wing v. East River Chinese Restaurant*, 884 F. Supp. at 667 (shareholders may be liable only if exercise some control over corporation). It also supports a finding that Portnoy had sufficient control over RSR

to dictate the manner in which Watkins and Stern conducted RSR operations and that Portnoy had, at a minimum, the ability to control the manner in which RSR paid the guards.

In sum, the evidence establishes that Portnoy had sufficient authority and control over RSR and its compensation and employment of RSR security guards to subject him to liability as an employer under the FLSA.

Defendants' Violations of the FLSA

Plaintiff alleges that defendants violated the minimum wage provisions of the FLSA by deducting a fingerprinting processing fee from the compensation of the RSR security guards; that they violated the overtime provision of the FLSA by paying their hourly employees straight time rather than time and one-half for overtime worked by the guards; and that defendants willfully concealed their illegal overtime policy by maintaining a falsified record of weekly hours worked, in violation of the recordkeeping requirements of the FLSA.

Section 6(a) of the FLSA provides that every employer shall pay to each of his employees wages not less than the specified minimum rate. 29 U.S.C. 206. An employer's deductions for expenditures from the compensation of a minimum wage employee that are primarily for the benefit of the employer violate the FLSA's minimum wage provision when that deduction results in the employee receiving less than the minimum wage. *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943, 946 (2d Cir. 1959); *Donovan v.*

Unique Racquetball & Health Clubs, Inc., 674 F. Supp. 77, 81 (E.D.N.Y. 1987).

Section 7(a) further prohibits the employment of any employee in excess of forty hours per week unless such employee receives compensation at a rate of not less than one and one-half times the employee's regular rate.⁸ 29 U.S.C. § 207(a). In addition, sections 11(c) and 15(a) require that an employer make and keep records of the amount of hours that employees work and the wages paid to those employees.⁹ 29 U.S.C. §§ 211(c), 215(a) (5).

Plaintiff presented sufficient evidence at trial to satisfy its burden of showing that defendants violated these FLSA provisions.¹⁰ See *Reich v. New Mt. Pleasant Bakery, Inc.*, 89 Civ. 581, 1993 WL 372270 at *4 (N.D.N.Y. Sept. 13, 1993). Furthermore, defendants RSR and Stern did not contest the

⁸ Section 7(a) (1) of the FLSA provides that "no employer shall employ any of his employees for a workweek longer than forty hours, unless such employee receives compensation ... in excess of the hours specified at a rate not less than one and one-half times the regular rate at which he is employed." A plaintiff has met its burden of proof that a defendant violated § 7 of the FLSA once it demonstrates that employees exceeded forty hours of work per week and that employees were paid the same rate of pay for all hours worked. See *Reich v. Waldbaum, Inc.*, 52 F.3d 35, 39-41 (2d Cir. 1995).

⁹ Section 11(c) of the FLSA requires that an employer "make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him..." 29 U.S.C. § 211(c). Section 15(a) (5) of the FLSA makes it unlawful to violate section 11(c).

¹⁰ The fingerprint processing fee is a cost of doing business. It is primarily for the benefit of the employer because it must be paid to New York State in order for New York State to process the employer's application to register the prospective employee as a security guard. Unless the fee is paid by the employer, the company cannot employ the person. Therefore, these deductions were in violation of section 6 of the FLSA. See *Home Lines Agency, Inc.*, 273 F.2d at 946.

Secretary's allegations at trial and consented to the entry of a default.¹¹ Portnoy likewise does not dispute plaintiff's allegations that RSR's practices violated the overtime and wage provisions of the statute and that the payroll records were deliberately falsified. Therefore, I find that defendants violated the minimum wage, overtime, and recordkeeping requirements of the FLSA.

Whether Defendant's Violations were Willful

Plaintiff and Portnoy dispute whether Portnoy willfully violated the FLSA requirements.¹² A violation of the FLSA is "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. at 130; *Reich v. Waldbaum, Inc.*, 52 F.3d at 39-41. The plaintiff bears the burden of proof that a defendant's conduct is willful. *Richland Shoe*, 486 U.S. at 162.

¹¹ A defaulting defendant admits every well-pleaded allegation of the complaint. *Wing v. East River Chinese Restaurant*, 884 F. Supp. 663, 669 (E.D.N.Y. 1995) (citing *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 63 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973); *Deshmukh v. Cook*, 630 F. Supp. 956, 959 (S.D.N.Y. 1986)).

¹² The willfulness of a defendant's violation of the FLSA is relevant to the amount for which a defendant will be liable under the statute. 29 U.S.C. § 255(a). The statute of limitations to enforce a cause of action for violation of the FLSA wage provisions is two years after the action accrues, unless the violation is willful, in which case a defendant is liable for the pay violations of the previous three years. 29 U.S.C. § 255(a); see also *Reich v. New Mt. Pleasant Bakery, Inc.*, 89 Civ. 581, 1993 WL 372270 at *4 (N.D.N.Y. Sept. 13, 1993). The parties have stipulated to the amount of damages for which Portnoy will be liable if he is found to have willfully violated the statute and the amount for which he will be liable if he did not willfully violate the statute.

Portnoy first argues that he could not have willfully violated the FLSA because he was unaware that the violations were occurring. Although knowledge of a violative practice or the existence of a violation generally suffices to establish willfulness, *see, e.g., Reich v. Waldbaum, Inc.*, 52 F.2d 35, 39 (2d Cir. 1995), such a high standard is not required. It is well established that an employer does not have to know that it is violating the FLSA in order to willfully violate the statute, provided that it recklessly disregards the possibility that its practices are in violation of the statute. *See Richland Shoe Company*, 486 U.S. at 132; *Waldbaum, Inc.*, 52 F.3d at 40. Thus, a willful violation may exist where a defendant exhibits indifference to the FLSA's requirements in a "purposeful, deliberate or calculated fashion." *Benjamin v. United Merchants and Mfrs., Inc.*, 873 F.2d 41, 44 (2d Cir. 1989); *see also Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1296 (3d Cir. 1991) (holding that employer's evident indifference toward the requirements imposed by the FLSA is fully consistent with a district court's determination that the employer had willfully violated the act).

Although Portnoy may not have had specific knowledge of the violative practices, the evidence at trial demonstrates that Portnoy recklessly disregarded the possibility that RSR was

violating the FLSA.¹³ When Portnoy agreed to form RSR with Stern, he was aware that Stern's prior security companies had been engaged in illegally activities. In addition, he later learned that RSR was illegally including the security guards on 1099 forms. Despite these indiscretions, Portnoy made no independent attempts to ascertain RSR's compliance. An employer may act recklessly when he fails to pay his employees overtime "without taking any steps whatever to determine the lawfulness of its conduct." *Brock v. Wilamowsky*, 833 F.2d at 18.

Portnoy argues that he had no independent knowledge of whether security guards were paid minimum wage and thus subject to the FLSA. He also argues that he repeatedly checked with Mr. and Mrs. Stern and Watkins to ensure that RSR was complying with the laws. However, Portnoy's sole reliance on the promises of the Sterns and Watkins was reckless when he knew that Stern's prior security companies had conducted illegal activities and that RSR's own pay practices had violated laws.

Moreover, Portnoy had other means of determining the rate at which the guards were paid. The evidence indicates that Portnoy signed payroll checks and that on at least one of the

¹³ Conflicting testimony was received as to Portnoy's actual knowledge of the violations. Watkins testified that he told Portnoy that the guards were being cheated. Mr. Amatulli, a security guard, also testified that he told Portnoy that he was not being paid time and one-half for his overtime. Portnoy denies that these conversations occurred, and argues that the testimony of Watkins should be discredited because he is allegedly testifying against Portnoy to avoid individual liability. Portnoy also argues that Amatulli's testimony must be discredited because he stands to gain \$7,500 if the plaintiff is successful in this suit. Although I find the testimony of Watkins and Amatulli credible in general, it is unnecessary to decide whether these conversations actually occurred.

payroll checks there was a stub indicating that the guard was being paid minimum wage. In addition, Portnoy could have inquired into the guards' pay rates, as he was in regular contact with RSR employees, including the RSR accountant, or Watkins and Stern, who regularly handled the RSR payroll.

Given Portnoy's extensive knowledge of the FLSA and its requirements, it would have been relatively easy for him to determine whether his company was complying with the FLSA's provisions. Under these circumstances, Portnoy's decision to rely solely on the promises of Watkins and Stern was reckless. An employer cannot avoid liability for a company's FLSA violations by deliberately remaining ignorant of the manner in which his employees are paid. *See Wilamowsky*, 833 F.2d at 18. I find, therefore, that Portnoy recklessly disregarded the risk that RSR was not in compliance with the FLSA, and thus willfully violated the statute.

Liquidated Damages

Section 16(c) of the FLSA provides that an employer who violates the Act's minimum wage provisions "shall be liable to the ... employees affected in the amount of their unpaid minimum wages ... and in an equal amount as liquidated damages. 29 U.S.C. § 216(c). The purpose of liquidated damages is to compensate employees by making them whole for the delay in receiving wages improperly denied through violations of the FLSA.

Overnight Motor Co. v. Missel, 316 U.S. at 582-84; see *Waldbaum, Inc.*, 833 F. Supp. at 1051.

Section 260 of the FLSA permits employers to assert a good-faith defense to the FLSA's liquidated damages provision.¹⁴ In order to prevail on this defense, the employer has the burden of showing (1) subjective good faith and (2) objectively reasonable grounds for believing that he was acting in compliance with the provisions of the FLSA. *Wilamowsky*, 833 F.2d at 19. "The burden is a difficult one to meet, however, and '[d]ouble damages are the norm, single damages the exception...." *Id.* (quoting *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986)).

Stern and RSR have not provided any response to plaintiff's assertion that they are liable for liquidated damages. Although Portnoy does not address this point specifically, he argues elsewhere that his failure to comply was unintentional and that he acted in good faith, relying on Stern's assertions of compliance.

However, Portnoy has provided no evidence that he had objectively reasonable grounds for believing that he was acting in compliance with the FLSA. As stated above, despite Portnoy's

¹⁴ Section 260 provides in pertinent part:

[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to [the] action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages.

extensive knowledge of the statute's requirements, he made no effort to determine whether RSR was subject to the statute and whether it was in compliance. In addition, he was well aware that other RSR practices had violated the FLSA. Given Portnoy's failure to make any independent investigation of RSR's compliance with the FLSA, he has not demonstrated objectively reasonable grounds for believing that RSR was in compliance with the FLSA. Portnoy is thus liable for liquidated damages in an amount equal to the back wages that he owes plaintiff. See 29 U.S.C. § 216(b). Likewise, Stern and RSR are liable for liquidated damages in an amount equal to the back wages that they owe plaintiff.¹⁵

Injunctive Relief

Plaintiff also requests that defendants be enjoined from prospectively violating the provisions of the FLSA and from withholding back wages due former RSR employees. Section 17 of the FLSA authorizes a court to issue both prospective and restitutionary injunctions against employers who have violated the statute's provisions. 29 U.S.C. § 217. Where a corporate officer is found to be an employer under the FLSA, he may be enjoined along with a corporation. See *Sabine Irrigation Co., Inc.*, 695 F.2d at 196.

¹⁵ Because plaintiff is awarded liquidated damages, prejudgment interest is not awarded. See *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 714-16 (1945) (prejudgment interest not appropriate where liquidated damages awarded); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1064 (2d Cir. 1987) (per curiam) (same).

The decision whether to grant injunctive relief is within the sound discretion of the district court. *Wilamowsky*, 833 F.2d at 19; *Unique Racquetball & Health Clubs, Inc.*, 674 F. Supp. at 81. In determining whether an injunction should issue, the first consideration is the need for effective enforcement of the FLSA as "the Department of Labor cannot reasonably be charged with the responsibility of checking back on past violators." *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 516 (5th Cir. 1969) (quoting *Goldberg v. Cockrell*, 303 F.2d 811, 814 (5th Cir. 1962)); see also *Marshall v. Sam Dell's Dodge Corp.*, 451 F. Supp. 294 (N.D.N.Y. 1978). Additionally, courts should consider that injunctive relief "subjects the defendant to no penalty, to no hardship. It requires the defendants to do what the Act requires anyway — comply with the law." *Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962).

Portnoy argues that an injunction is inappropriate because RSR has ceased operations. However, the record does not clearly indicate that RSR has dissolved or that it could not reopen in the future. Moreover, the legal status of RSR does not affect the individual defendants from acting as employers.

Moreover, defendants have not made any representation that they will refrain from violating the FLSA's provisions in the future. Given the record of RSR's improper pay practices, Stern's record of noncompliance and the minimal hardship of such an injunction, injunctive relief is appropriate. Defendants Stern and Portnoy and defendant RSR, to the extent that it is

operating or conducting business, are enjoined from prospectively violating the FLSA and from withholding back wages due employees.¹⁶

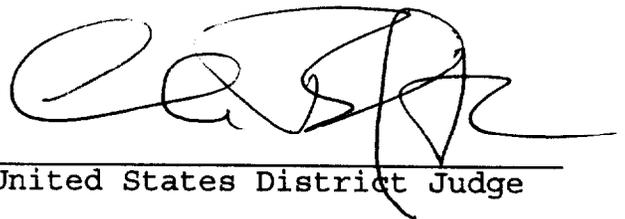
CONCLUSION

In sum, I find that Portnoy, Stern and RSR are employers within the FLSA and that they willfully violated the FLSA's minimum wage, overtime, and recordkeeping requirements. Defendants RSR and Stern are ordered to pay plaintiff \$119,447.32 in back wages, and \$119,447.32 in liquidated damages. Portnoy is ordered to pay plaintiff \$78,878.02 in back wages, and \$78,878.02 in liquidated damages. Defendants are permanently enjoined from prospectively violating the FLSA's provisions and from withholding back wages due. Plaintiff is also awarded costs in bringing this action.

The Clerk is directed to enter judgment in accordance with this opinion and to mail a copy of the within and a copy of the judgment to all parties.

SO ORDERED.

Dated : Brooklyn, New York
March 31, 1997



United States District Judge

¹⁶ Costs are appropriately awarded to plaintiff. See Fed. R. Civ. P. 54(d) (1) (costs "shall be allowed as of course to the prevailing party"; *Lerman v. Flynt Distributing Co.*, 789 F.2d 164, 166 (2d Cir. 1986).