



New York State Department of Labor
David A. Paterson, Governor
Colleen C. Gardner, Commissioner

April 22, 2010



Re: Request for Opinion
~~Labor Law § 215~~
RO-09-0147

Dear [REDACTED]:

This letter is written in response to your letter of October 26, 2009, in which you request an opinion as to whether an individual may pursue a retaliation claim against an employer. Your letter states that a twenty-five percent shareholder and executive of a company, who was responsible for the company's payroll and human resources functions, was discharged after he informed the majority shareholder and executive that the company was in violation of the Labor Law with regard to the payment of overtime and recordkeeping. Your letter asserts that the individual was not an "employee" for the purposes of Section 215 of the Labor Law and that he did not make a "complaint" within the meaning of the language used in that Section. In connection with that assertion, your letter asks a number of questions, which are addressed individually below.

As relevant to your inquiry, Labor Law § 215(1)(a) provides, in part, as follows:

§ 215. Penalties and civil action; employer who penalizes employees because of complaints of employer violations.

1. (a) No employer or his or her agent, or the officer or agent of any corporation, partnership, or limited liability company shall discharge, penalize, or in any other manner discriminate or retaliate against any employee (i) because such employee has made a complaint to his or her employer...that the employer has violated any provision of this chapter...

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1. In your letter you ask: (a) whether *X* is an "employee" entitled to protection under § 215 of the Labor Law, and more specifically, (b) if the definition of "employee" in Article 1 [of the Labor Law] is interpreted to be broader than "mechanic, workingman or laborer" who performs manual work, how does the Department interpret the meaning of this definition?

Although § 2(5) of the Labor Law states that when the term "employee" is used in the Labor Law the term "means a mechanic, workingman or laborer working for another for hire," it is well settled under the [New York] case law that the "determination of whether an employer-employee relationship exists rests upon evidence that the employer exercises either control over the results produced or over the means used to achieve the results." (*Bhanti v. Brookhaven Memorial Hospital Medical Center, Inc.*, 260 A.D.2d 334, 335 (2nd Dept. 1999).) The central inquiry in making that determination is "whether the alleged employer possessed the power to control the workers in question, ... with an eye to the 'economic reality' presented by the facts of each case." (*Doo Nam Yang v. ACBL Corp.*, 427 F. Supp. 2d 327, 342 (S.D.N.Y. 2005) quoting *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961).) Factors to consider when examining the "economic reality" of a particular situation 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," though no single factor is dispositive. (*Id.*, quoting *Carter v. Dutchess Comm. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984)).

In your letter you state: *X* owns twenty-five percent of the company's shares, *Y* holds the other seventy-five percent, *X* is responsible for the company's payroll and human resources functions, *X* discovered that the company is not in compliance with the Labor Law, *X* brought the violation to the attention of *Y*, and subsequently *X* was discharged. Based on the "economic reality" factors test, it is evident that *X* would be considered an employee of *Y* because *Y* had the power to hire and fire *X*, and *Y* controlled the maintenance of employment records. This latter point is evidenced by the fact that *X* discovered Labor Law violations with respect to the maintenance of employment records but evidently was powerless to fix such violations himself. Instead he brought them to the attention of *Y*. That shows *X* did not truly have the authority to maintain employment records because *Y* maintained control over how *X* maintained the records. Accordingly, it is the opinion of this Department that *X* was an employee of *Y* for the purposes of Labor Law § 215.

2. In your letter you next ask: (a) *did X make a complaint upon which he can base a claim for retaliation under Labor Law § 215*, and more generally, (b) *does the Department of Labor adopt the view, which has been adopted by the courts with reference to the FLSA retaliation provision, that if an employee raises a Labor Law violation to an employer while acting within the scope of his or her job duties, that employee has not engaged in protected activity sufficient to state a claim of retaliation?*

The Industrial Board of Appeals, which reviews the rules, regulations and orders of the Commissioner of Labor for validity and reasonableness, has explained the factors used in determining whether an employer retaliated against an employee as follows:

"In general, a prima facie case for retaliatory discharge is established upon a demonstration of three factors: (1) the employee engaged in a protected activity; (2) the employee suffered adverse employment action; and (3) there is a causal connection between the protected activity and the adverse action. 82 Am.Jur.2d Wrongful Discharge § 121. If these factors are proven, the burden shifts to the employer to prove a non-retaliatory reason for the discharge. The burden then shifts back to the employee to show that the employer's reason is a pretext and that the employee would not have been fired but for the protected activity." (*see, In re Colella*, PES-05-004 (Industrial Board of Appeals, August 22, 2007), citing 82 Am.Jur.2d Wrongful Discharge § 121.)

With regard to the first factor, one of the protected activities enumerated in Section 215 of the Labor Law is the employee's right to make "a complaint to his or her employer...that the employer has violated any provision of this chapter." "This chapter" means Chapter 31 of the Consolidated Laws of New York, also known as the Labor Law. (Labor Law §1.) Thus, if an employee can prove they made a complaint to their employer that the employer violated the Labor Law then they have demonstrated the first factor. In your letter you state, "X discovered a Labor Law violation and advised the company's other executive and majority shareholder thereof." Under those circumstances X can demonstrate the first factor because X "discovered a Labor Law violation," and X warned his employer of the violation.

As to the second factor, an employee must show he or she suffered adverse employment action by proving he or she was discharged, penalized, discriminated or retaliated against by his or her employer. In your letter you state that X was discharged after discovering the Labor Law violation, and you provide no other reason for the termination; therefore, it appears that the second factor was met.

Lastly, an employee must show that he or she suffered adverse employment action because he or she engaged in a protected activity. Your letter does not state whether X was discharged for any reason other than those concerning the Labor Law violation; nevertheless, if X was discharged because he warned his employer of the Labor Law violation then the third factor would be deemed to be met.

In sum, based on the information described in your letter, it appears that employer Y may have violated Section 215 of the Labor Law by discharging employee X in retaliation for making a complaint to the employer.

It is also worth noting that the actions by employee X described in your letter may fall under the protection of Section 740 of the Labor Law which, in relevant part, protects employees who object to, or refuse to participate in "any such activity, policy or practice in violation of law, rule, or regulation." Please be advised that the conclusion that X fits within the meaning of the term "employee" for purposes of Section 215 is equally applicable to Section 740. Accordingly, it appears that X may properly institute a civil action against Y for retaliatory personnel action under Section 740 of the Labor Law.

This opinion has been provided on the basis of the facts set forth in your letter. A different opinion might result if the circumstances outlined in your letter change, if the facts provided were not accurate, or if any other relevant fact was not provided. If you have any further questions, please do not hesitate to contact me.

Very truly yours,

Maria L. Colavito, Counsel

By:

A handwritten signature in black ink, appearing to read "Jeffrey G. Shapiro", written over a horizontal line.

Jeffrey G. Shapiro
Associate Attorney

JGS:mp:ck
