Dep't of Consumer Affairs v. Brewer, Attorneys & Counselors

OATH Index No. 514/19 (July 9, 2019)

Respondents violated the Earned Safe and Sick Time Act by failing to maintain sufficient sick leave policy, improperly requiring an employee to disclose medical information, and unlawfully retaliating against an employee by terminating his employment. Respondents ordered to pay $1,500 in fines to petitioner and $172,215.30 relief to ex-employee.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CONSUMER AFFAIRS
Petitioner
- against -
BREWER, ATTORNEYS & COUNSELORS AND WILLIAM A. BREWER, III
Respondents

MEMORANDUM DECISION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioner, the Department of Consumer Affairs, brought this proceeding, under New York City's Earned Safe and Sick Time Act ("ESSTA"). *See* Administrative Code § 20-924(a); Charter § 2203(e), (f), (h); 6 RCNY § 6-01(a) (Lexis 2019). The petition alleged that respondents Brewer, Attorneys & Counselors ("Brewer Firm") and William A. Brewer, III, fired investigator/attorney Romeo Peterson for exercising his rights under ESSTA; required Mr. Peterson to provide details of his medical condition; and failed to maintain a written sick leave policy that met ESSTA's requirements (ALJ Ex. 1). Denying any wrongdoing, respondents assert Mr. Peterson's termination of employment was for reasons unrelated to his use of sick time and that he received more sick leave than required by ESSTA (ALJ Ex. 2). Mr. Brewer also argued that there was no basis for his personal liability (Tr. 203).

At trial on May 2, 2019, petitioner offered documentary evidence as well as testimony from Mr. Peterson and Larisa Boanta, the Brewer Firm's former director of investigations.

Respondents relied on documentary evidence and testimony from Kimberly Pagan, the Brewer Firm's human resources director.

For the reasons below, the petition is granted in part. Respondents are ordered to pay $1,500 in in civil penalties to petitioner and $172,215.30 to Mr. Peterson.

ANALYSIS

Background

Employers in New York City with at least five employees must provide paid sick leave. Admin. Code §§ 20-912, 20-913(a). Employers may not require employees to discuss details of their medical condition in order to use paid sick leave and may only require medical documentation for an absence of more than three days. Admin. Code §§ 20-914(a)(2), 20-914(c), 20-921. Employers must also maintain written sick time policies that meet or exceed ESSTA's requirements and may not retaliate against employees who exercise or attempt to exercise their rights. 6 RCNY § 7-211(c); Admin. Code §§ 20-918, 20-919(a).

The following facts are undisputed. The Brewer Firm, a law firm with offices in Dallas and New York, employed five or more employees from April 2014 to date. Mr. Peterson worked 40 or more hours per week in the New York office from November 2016 to August 2017 (ALJ Ex. 3; Tr. 17). At the time, the "Sick/Personal Leave" section of the Brewer Firm's employee manual applied only to non-exempt employees, such as support staff. The manual did not mention sick leave for exempt professional employees, including Mr. Peterson. Instead, professional employees received 20 paid "vacation days" per year that were used for vacation, personal days, or sick leave (ALJ Ex. 3; Tr. 162-63).

On August 8, 2017, Mr. Peterson sent an email to Ms. Boanta, Ms. Pagan, the Brewer receptionist Elmis Erazo, and chief of staff Christella Xu, stating that he had a doctor's appointment the next day and would be in late (Pet. Ex. 6). The next morning, Mr. Peterson sent a follow-up email stating that his doctor's appoint ran long, as a result, he would not be coming into the office that day, and he would be taking the next two days as personal days (Pet. Ex. 7). Later that day, the Brewer Firm fired Mr. Peterson (ALJ Ex. 3 at ¶ 61). Mr. Peterson filed a complaint with petitioner (Tr. 61; Pet. Ex. 8).

Petitioner's Evidence

Before working at the Brewer Firm, Mr. Peterson worked for three years as a contract attorney at various large New York law firms (Tr. 18-19). He testified that he found out about a job at the Brewer Firm through Ms. Boanta, who had worked with him as a contract attorney (Tr. 20). After an interview with Mr. Brewer, the Brewer Firm hired Mr. Peterson in November 2016 as an investigator (Tr. 21). Mr. Peterson's duties included assisting attorneys with discovery issues on more than half a dozen pending cases (Tr. 21, 180). Mr. Brewer, Ms. Boanta, and associate attorneys reviewed Mr. Peterson's work (Tr. 23).

Mr. Peterson spent about 80% of his time working on a case involving the Transamerica Insurance Company, reviewing electronic documents, drafting research memoranda, retrieving data from government agencies, interviewing witnesses, and creating an evidence tree and timeline (Tr. 22-23, 25, 53, 55, 91). The timeline was a large, comprehensive, and searchable document that included all relevant facts and evidence for the case (Tr. 56). By the first week of August 2017, Mr. Peterson was the only investigator remaining on the Transamerica case and the timeline was 99.9% complete (Tr. 57, 59). According to Mr. Peterson, he had one or two billable hours of work remaining on the timeline, there was a lull in his workload, and he had no pending deadlines (Tr. 88-89).

Though there were no clear guidelines, employees requested vacations well in advance (Tr. 28). In 2017, Mr. Peterson took an eight-day vacation that began on February 27 (Tr. 27, 67; Pet. Ex. 2). Personal days of shorter duration required less notice (Tr. 28). According to Mr. Peterson, if he was sick and needed to take time off he had to use personal days (Tr. 29). He was unaware of any policy regarding procedures for requesting sick time (Tr. 29).

Mr. Peterson was late for work three or four times due to doctors' appointments (Tr. 32). On June 26, July 24, and August 1, 2017, he sent emails to Ms. Boanta and Ms. Erazo stating that he would be late the next day due to a doctor's appointment (Tr. 32-33, 68; Pet. Exs. 3, 4, 5). Mr. Peterson went to work after each of those appointments and there was no impact on his vacation accruals, billable hours, or performance (Tr. 43, 68). On August 2, 2017, Mr. Peterson exchanged emails with Ms. Xu and Ms. Pagan who asked him to notify them when he would be out or late (Pet. Ex. 5). Mr. Peterson agreed to notify them via email regarding upcoming appointments (Pet. Ex. 5).

On August 8, 2017, Mr. Peterson sent an email to Ms. Boanta, Ms. Xu, Ms. Erazo, and Ms. Pagan, with the subject line "Re: Dr. Appointment 8/9" (Pet. Ex. 6). He wrote, "I will be coming in late tomorrow" (*Id.*). The next morning, Mr. Peterson sent the following email, with "Personal days" written in the subject line, "My doctor appointment ran long today. As a result, I will not be coming into the office today. I will also be taking personal days for tomorrow and Friday. I will be back on Monday" (Pet. Ex. 7). Mr. Peterson testified that he believed that he could request only vacation or personal days (Tr. 46). Given the short notice, he considered his request to be for personal days (Tr. 46).

Less than 15 minutes after Mr. Peterson sent the email on August 9, Ms. Pagan called him and left him a voicemail. One minute later, she sent Mr. Peterson the following email:

> I just left you a voicemail. Please call me when you have a moment. Wanted to get on the phone with you for a moment to see if there is a medical emergency. There are options for medical leave if needed, so we can discuss. I will await your call. Thank you.

(Pet. Ex. 7).

Within the hour, Mr. Peterson spoke with Ms. Pagan on the phone (Tr. 48). Mr. Peterson recalled that Ms. Pagan asked him whether he was undergoing a medical emergency (Tr. 48). According to Mr. Peterson, he told Ms. Pagan that he did not have a medical emergency requiring immediate hospitalization, but he had received some negative medical news that would require further diagnosis, and he needed two personal days to follow up and pursue his options (Tr. 48, 83). Mr. Peterson specifically recalled stating that he had to follow up on medical news and look for specialists (Tr. 86). At trial, Mr. Peterson explained that "specialist" was "freshly added to my vocabulary that morning" (Tr. 86).

According to Mr. Peterson, Ms. Pagan kept asking whether he had a medical emergency (Tr. 49, 87). After the second or third time she asked, he "was rather peeved" and believed that she was not listening to him (Tr. 49). Mr. Peterson insisted that, after he explained his situation three times, "any reasonable" listener would understand that he needed to follow up with a specialist (Tr. 93-94). He recalled that Ms. Pagan asked him whether he had any work that needed to be taken care of and she told him that she would call him back (Tr. 50, 87).

Less than 30 minutes later, Ms. Pagan called Mr. Peterson and told him that Mr. Brewer and Ms. Xu no longer required his services (Tr. 50). Ms. Pagan told Mr. Peterson not to return

and that he would receive two weeks of pay (Tr. 50, 71). In his shock at being fired, Mr. Peterson did not know whether the two-week salary that he received reflected severance payment or his accrued leave balance (Tr. 51, 76-77).

Ms. Boanta, who directly supervised Mr. Peterson, testified about his work performance. She recalled that he was one of eight investigators (Tr. 104). Ms. Boanta described Mr. Peterson as a "great employee" and "great writer," who was always punctual and willing to help (Tr. 106-07). His work was "excellent" and he was "far superior" than others that she supervised (Tr. 105-07).

According to Ms. Boanta, she rarely took time off because she was afraid to be fired (Tr. 114, 140). She recalled taking four vacation days in 2016 and two in 2017 (Tr. 140). Ms. Boanta testified that other professionals were also afraid to take time off because of "the firm culture" (Tr. 114). She had some health issues of her own and left the Brewer Firm a few weeks after Mr. Peterson was fired (Tr. 138-39).

Ms. Boanta summarized the events that led to Mr. Peterson's firing. She recalled that he followed proper procedure by notifying the appropriate people on August 8 that he was going to be in late the next day due to a doctor's appointment (Tr. 123; Pet. Ex. 7). It was unusual for Mr. Peterson to take time off, especially on short notice (Tr. 124). Ms. Boanta was worried that he had a health related issue (Tr. 124-25).

On August 9, shortly after Mr. Peterson sent the email that his doctor's appointment "ran long," Ms. Boanta received a phone call from Ms. Xu, who stated that Mr. Peterson was going to be fired and that day would be his last day with the firm (Tr. 125). Stunned at that news, Ms. Boanta went to Ms. Xu's office and told her that Mr. Peterson was her best employee and she did not understand why he was being fired (Tr. 126). Ms. Xu replied that Mr. Brewer was not happy with Mr. Peterson, who told Ms. Pagan that he had no pressing assignments (Tr. 127). Ms. Boanta also spoke to Ms. Pagan, who said that she asked Mr. Peterson whether he had a medical emergency and he said "no" (Tr. 127). According to Ms. Boanta, she told Ms. Pagan that, even if Mr. Peterson did not have an emergency, that did not mean that there was no health issue, especially because he just came from a doctor's office (Tr. 127, 156).

Later that day, Ms. Boanta spoke to Mr. Brewer, who claimed that he was not happy with Mr. Peterson's work, his assignments were late, and he was "not a good fit for the firm" (Tr. 128, 155). Ms. Boanta testified that those claims were untrue (Tr. 128). She noted that Mr. Peterson

was the only remaining investigator on the Transamerica case and was responsible for the timeline, a crucial document involving thousands of other documents (Tr. 129). The Transamerica case was not going to trial until late September and Mr. Peterson had no pending deadlines on August 9 (Tr. 142, 156).

As Mr. Peterson's supervisor, Ms. Boanta would have known whether his work was untimely or that Mr. Brewer had not been happy with it (Tr. 133, 136). Mr. Brewer did not hesitate to tell other employees that their work was "terrible" or "awful" (Tr. 136). In contrast, Mr. Brewer "really liked" Mr. Peterson and told her to "hire more Romeos" (Tr. 105). Ms. Boanta noted that Mr. Brewer also said that Mr. Peterson had done a "great job" on the Transamerica timeline (Tr. 129, 131, 139).

Respondents' evidence

Ms. Pagan testified that she had 15 years' of human resources experience at other organizations (Tr. 159-60). When the Brewer Firm hired her in March 2017, she inherited a policy manual that had been written years earlier (Tr. 159-60, 196-97). The manual did not refer to sick leave for professional staff (Tr. 196-97). Instead, they received 20 paid days off per year, to be used for sick leave, personal days, or vacation (Tr. 162-63, 194-95). The firm kept no written performance evaluations or documents relating to discipline or termination of employment (Tr. 184-85).

According to Ms. Pagan, to take a sick day, a professional employee only needed to call in and a doctor's note was not "typically" required (Tr. 163-65). For example, one employee simply sent an email stating, "I'm sick" (Resp. Ex. C; Tr. 167). That employee, and others who had time in their "vacation bank," received paid sick leave (Tr. 164). Respondents' records showed that "slightly less than half of the professional employees" in the firm's New York office took at least one sick day from 2016 to 2017 (Tr. 186-93; Resp. Exs. H, I, J, K).

On August 9, 2017, after receiving Mr. Peterson's email stating that his doctor's appointment ran late and that he would be taking that day as well as the next two days off, Ms. Pagan spoke to Ms. Xu (Tr. 178). Ms. Xu expressed concern that Mr. Peterson was "just leisurely taking these two days off when there was work to be done" (Tr. 178). According to Ms. Pagan, she told Ms. Xu that she wanted to call Mr. Peterson and "dig deeper" to see if there was "a protected reason for these absences" (Tr. 178). Ms. Pagan claimed that if there was any

"inkling" that they were "anything medical related," it would have been okay and she would have told Mr. Peterson that they would see him when he returned to work on Monday (Tr. 178-79).

At trial, Ms. Pagan claimed that she could no longer recall her exact phone conversation with Mr. Peterson (Tr. 180). Mr. Peterson told her that he "needed to take care of a few things," there were no upcoming deadlines, and there was a "lull" in his work (Tr. 179-80). Ms. Pagan acknowledged asking whether he was "experiencing a medical emergency" (Tr. 179). She testified that her word choice "wasn't exactly correct" and she explained that she worked primarily in Texas, where "it was a little different" (Tr. 179). In any event, Ms. Pagan told Mr. Peterson that "medical leave options" were available (Tr. 180). They did not discuss the medical leave options because Mr. Peterson did not seem interested (Tr. 180). Ms. Pagan also claimed that Mr. Peterson did not say anything about the results of his doctor's visit, the need to speak to a specialist, receiving bad news, or scheduling surgery (Tr. 182-83).

Shortly after speaking to Mr. Peterson, Ms. Pagan sent an email to Ms. Xu stating that there was no medical emergency, Mr. Peterson needed time "to take care of things," and he had a lull with no deadlines (Resp. Ex. G). Ms. Pagan recalled that Ms. Xu was not happy, especially about Mr. Peterson's statement that there was a lull and no deadlines, and they began discussing termination of his employment (Tr. 182). According to Ms. Pagan, Ms. Xu said that there was a lot of work to do and that taking two days off did not seem timely (Tr. 182).

Later that day, Ms. Pagan spoke to Mr. Peterson again and told him that he was fired (Tr. 183). His last paycheck, issued two weeks later, included payment for seven days of unused vacation time (Tr. 184).

The Charges

Petitioner charged respondents with retaliating against Mr. Peterson for using sick time, requiring disclosure of details relating to Mr. Peterson's medical condition, and failing to maintain sufficient written sick time policies, in violation of ESSTA and petitioner's rules (ALJ Ex. 1). To prevail at this administrative proceeding, petitioner must establish the charges by a preponderance of the credible evidence. *See Taxi & Limousine Comm'n v. Sobczak*, OATH Index No. 1691/08 at 2 (Apr. 7, 2008), *modified on penalty*, Comm'r Dec. (May 9, 2008). In assessing credibility, relevant factors include demeanor, consistency of a witness's testimony,

supporting evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998).

For the most part, I credited the testimony of Mr. Peterson and Ms. Boanta. Although Mr. Peterson had a financial stake in the outcome and Ms. Boanta was his friend, that did not detract from their overall persuasiveness. They testified in a clear, consistent, and straightforward manner. Moreover, petitioner corroborated their testimony with documentary evidence. In contrast, Ms. Pagan offered vague, unsupported denials. Notably, respondents did not present any testimony from Mr. Brewer or others who were familiar with Mr. Peterson's work.

Retaliation

Employers are barred from engaging in retaliation or threatening "retaliation against an employee for exercising or attempting to exercise any right" under ESSTA. Admin. Code § 20-918. Retaliation occurs where "a protected activity was a motivating factor for an adverse action," even when "other factors" also motivated the adverse employment action. 6 RCNY § 7-108(e). A causal connection between an employee's exercise of rights and an employer's adverse action may be shown by direct evidence and may also be shown indirectly, where protected activity is closely followed by an adverse employment action. *See Krebaum v. Capitol One, N.A.*, 138 A.D.3d 528, 528-29 (1st Dep't 2016) (temporal proximity of complaint and termination of employment one month later indirectly showed causal connection).

Here, there was a close temporal proximity between Mr. Peterson's attempt to exercise his rights and an adverse employment action. On August 8, Mr. Peterson informed the Brewer Firm that he would be in late the next day because of a doctor's appointment. On August 9, Mr. Peterson notified the Brewer Firm that his doctor's appointment ran late and "as a result" he would not be in that day. Within a few hours, Mr. Peterson was fired.

Mr. Peterson's testimony regarding his phone conversation with Ms. Pagan further proved unlawful retaliation. In her emails and phone conversation, Ms. Pagan repeatedly referred to a "medical emergency." Mr. Peterson candidly acknowledged that he was not undergoing a medical emergency. Instead, he told Ms. Pagan that he received some negative

medical news that required further diagnosis and he needed two personal days to follow up and pursue his options. In particular, Mr. Peterson credibly recalled that he mentioned the need to look for specialists. He was not, as Ms. Xu suspected, "leisurely" taking two days off; he wanted to take two additional days for diagnosis of a medical condition.

Though Ms. Pagan claimed that she was listening for any "inkling" that Mr. Peterson needed time off for "protected" activity, the evidence does not support that claim. Instead, Ms. Pagan improperly focused on whether Mr. Peterson's unavailability was due to a "medical emergency," the term that she used in her email to Mr. Peterson before they spoke, during her phone conversation with him, and immediately afterwards in her email to Ms. Xu. Under ESSTA, the use of earned sick time is not limited to medical emergencies; employees may receive paid sick time for physical or mental illness, injury, a health condition, the need for medical diagnosis, or preventative medical care. Admin. Code § 20-914 (a). Thus, Mr. Peterson had a lawful right to use paid sick leave, which he had earned, to locate and confer with medical specialists. The Brewer Firm unlawfully penalized him for exercising that right.

Respondents suggested that Mr. Peterson was fired for non-medical reasons. For example, Ms. Boanta testified that Ms. Xu and Mr. Brewer told her that Mr. Brewer was "not happy" with Mr. Peterson. Mr. Brewer also told Ms. Boanta that Mr. Peterson's assignments were late and he was "not a good fit." Those claims were a pretext. Ms. Boanta, who supervised Mr. Peterson, offered unrebutted testimony that he was a reliable, excellent worker.

At trial, respondents also argued that Mr. Peterson used an inappropriate tone in an earlier email exchange regarding notification procedures and that he neglected the Transamerica matter (Tr. 204). Neither claim withstands scrutiny. In a pair of emails sent on August 2, 2017, Mr. Peterson questioned whether there had been a change in policy regarding who needed to be told about lateness or absence. Mr. Peterson's tone could have been friendlier, but the evidence confirmed that there had been a change in procedure and Mr. Peterson complied with the new procedure on August 8 and 9 (Tr. 117; Pet. Ex. 9). Likewise, there was no reliable evidence that Mr. Peterson had neglected the Transamerica matter. Instead, the unrebutted and credible testimony established that Mr. Peterson had received Mr. Brewer's praise for creating and managing a comprehensive timeline for a trial that was more than one month away. Respondents' lone witness, Ms. Pagan, conceded that she was unfamiliar with the firm's pending cases and Mr. Peterson's work (Tr. 177, 198).

Four days after Mr. Peterson was fired, Ms. Xu sent emails to Ms. Boanta requesting the Transamerica evidence tree that Mr. Peterson had been working on (Tr. 145; Resp. Exs. A, B). The emails did not prove that Mr. Peterson did anything wrong. Ms. Boanta credibly testified that the evidence tree was not a priority when Mr. Peterson was fired on August 9. Respondents offered no contrary testimony.

Even if Mr. Brewer was unhappy with Mr. Peterson, somebody disliked the tone of his emails, or he had not finished a document, that is not the controlling inquiry. In order to prove retaliation, petitioner only needed to show that Mr. Peterson's use or attempted use of his sick time was one of the motivating factors for his firing. 6 RCNY § 7-108(e). Because petitioner proved that Mr. Peterson's protected activity was a factor that led to an adverse employment action, this specification is sustained.

Unlawful request for medical documentation

An employer may not require disclosure of details relating to an employee's medical condition as a prerequisite to providing sick leave. Admin. Code § 20-921. The Brewer Firm violated that provision when its human resources director, Ms. Pagan, repeatedly asked Mr. Peterson whether he was experiencing a medical emergency.

Ms. Pagan testified that the firm "typically" did not require an explanation from employees and respondents offered evidence that another employee once received paid sick leave after sending an email stating, "I'm sick." That email, from another employee on another date, does not change the fact that Ms. Pagan repeatedly and impermissibly asked Mr. Peterson if he was undergoing a medical emergency. After he answered "no," Ms. Pagan passed that information along to Ms. Xu and Mr. Peterson was fired. This proved that the firm conditioned the granting of sick leave upon Mr. Peterson's disclosure of confidential medical information.

Failure to maintain sufficient written sick leave policies

Employers are required to maintain written sick leave policies that meet or exceed all of ESSTA's requirements. 6 RCNY § 7-211(c). Petitioner alleged that respondents' policies violated that requirement by requiring employees to use sick time in minimum increments of half-days and by reserving the ability to require employees to reveal the nature and extent of their illness or injury (ALJ Ex. 1 at ¶ 71). This charge is sustained, in part.

Petitioner relied on the Brewer Firm's policies and procedure manual (Pet. Ex. 1). The manual did not have a written sick leave policy for professional staff. For non-exempt support staff, there were two provisions in the manual that pertained to the charges. Section 4.3(f) stated that sick leave will be taken in half-day increments. Section 4.3(c) stated that when an employee was absent due to illness or injury, "the Firm reserves the right to take whatever steps are necessary to confirm the nature and extent of such illness or injury" (Pet Ex. 1).

The evidence failed to prove that the Brewer Firm's policy of a half-day minimum sick leave usage rule violated the law. Though employees may determine how much sick time they need to use, the statute provides that "employers may set a reasonable minimum increment for the use of safe/sick time not to exceed four hours per day." Admin. Code § 20-913(g). Petitioner failed to prove that the firm's policy of requiring non-exempt support staff to take sick leave in minimum daily increments of a half-day was materially different from the four-hour requirement authorized by statute. If support staff normally worked an eight-hour day, the firm's half-day minimum increment was equivalent to four hours.

However, the written sick leave policy violated ESSTA by purporting to give the employer the option of taking "whatever steps are necessary to confirm the nature and extent" of an employee's illness. Employers are prohibited from requiring employees to disclose medical details as a condition of using earned sick time and may only require medical documentation for an absence of more than three consecutive work days. Admin. Code §§ 20-921, 20-914(a)(2).

Mr. Brewer is jointly liable for the proven charges

The evidence also proved that Mr. Brewer is personally liable for the proven charges. ESSTA relies on the definition of "employer" set forth in section 190(3) of New York's Labor Law. Admin. Code § 20-912. That definition includes "any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business, or service." Labor Law § 190(3) (Lexis 2019). To determine whether an entity or person is an employer, courts apply an "economic reality test" and consider whether the alleged employer: (1) had the power to hire or fire employees; (2) supervised and controlled employee work schedules or employment conditions; (3) determined the method or rate of payment; and (4) maintained employment records, with no single factor being dispositive. *See Ramirez v. RiverBay Corp.*, 35 F. Supp. 3d 513, 520-21 (S.D.N.Y. 2014) (Director of Finance and head of the Payroll

Department, who participated in development and implementation of payroll practices, exercised authority over approval of overtime, and exercised operational control, deemed an "employer" under the Labor Law); *see also Irizarry v. Catsimatidis*, 722 F.3d 99, 115 (2d Cir. 2013).

Petitioner proved that Mr. Brewer, the founding partner, was a hands-on manager and the firm's ultimate authority. As Ms. Boanta credibly testified, "He made the hiring/firing decisions" (Tr. 108). In particular, the evidence showed that Mr. Brewer hired Mr. Peterson, assigned tasks to him, including the Transamerica matter, and oversaw his work (Tr. 18, 23-24, 52; ALJ Ex. 3). Petitioner also proved that Mr. Brewer played an active part in the decision to fire Mr. Peterson. Mr. Peterson credibly testified that, when Ms. Pagan informed him that August 9 was his last day at the firm, she told him that Mr. Brewer and Ms. Xu no longer required his services (Tr. 50). Ms. Boanta corroborated Mr. Peterson's account by speaking to Mr. Brewer that day. Though Ms. Boanta received a false explanation for the decision to fire Mr. Peterson, there was no doubt that Mr. Brewer made the decision. Notably, Mr. Brewer did not testify or offer any evidence to suggest that he lacked input in the decision to fire Mr. Peterson. Based on these circumstances, Mr. Brewer and the Brewer Firm are jointly liable. *See Dep't of Consumer Affairs v. PCC Cleaning Services, Inc.*, OATH Index No. 88/18, mem. dec. at 17 (June 26, 2018) (senior manager jointly liable for violating the paid sick time law).

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondents unlawfully retaliated against Mr. Peterson, as alleged in Count 1.

2. Petitioner proved that respondents improperly required disclosure of details relating to Mr. Peterson's medical condition, as alleged in Count 2.

3. Petitioner proved that respondents failed to maintain sufficient written sick leave policies by reserving the ability to require non-exempt employees to reveal the nature and extent of their illness, as alleged in Count 3.

4. Petitioner did not prove that respondents failed to maintain sufficient written sick leave policies by requiring employees to use sick time in minimum increments of one-half day, as alleged in Count 3.

5. Mr. Brewer and the Brewer Firm are jointly and severally liable for the proven charges.

ORDER

Fines payable to petitioner

For the proven charges, respondents are directed to pay the following fines to petitioner: $500 for retaliating against Mr. Peterson for exercising his rights (Count 1); $500 for unlawfully requiring Mr. Peterson to provide details of his medical condition (Count 2); and $500 for failure to maintain a sufficient written sick leave policy (Count 3). Admin. Code §§ 20-924(e); NYC Charter § 2203(h)(1).

Compensatory damages to Mr. Peterson

For the proven charge of retaliation, Mr. Peterson is entitled to compensatory damages of $2,500, lost wages and benefits, and other equitable relief for a wrongful termination. Admin. Code § 20-924(d)(iv). In a post-trial memo, petitioner calculated the value of lost wages, lost benefits, and interest on lost wages as nearly $200,000, from the date of Mr. Peterson's termination to date (Pet. Mem. at 1). Respondents countered that Mr. Peterson is not entitled to back pay because he failed to seek comparable employment after his termination (Resp. Mem. at 1). Respondents also noted that petitioner failed to offer any evidence at trial regarding Mr. Peterson's lost fringe benefits (Resp. Mem. at 5). Based on the evidence presented at trial, Mr. Peterson is entitled to $269,231 back pay, less $113,000 wages that he earned from other employment following his termination, plus interest.

Lost wages are calculated from the date of unlawful termination to the date of judgment, reduced by the complainant's earnings during that period. *See Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 144-45 (2d Cir. 1993); *Aurecchione v. NYS Division on Human Rights*, 98 N.Y.2d 21, 27 (2002). Petitioner has the burden of proving the amount of lost wages and that the complainant made an effort to mitigate the loss of income by seeking other employment. *See Comm'n on Human Rights ex rel. Rhodes v. Apollo Theatre Investor Group*, OATH Index No. 676/91 at 59-60 (June 14, 1991), *adopted in part, modified in part*, Comm'n Dec. & Order (Mar. 11, 1992), *modified*, Sup. Ct. N.Y. Co. Index No. 10056/92 (Apr. 20, 1993). The duty to minimize wage loss "is not onerous" and does not require the complainant to obtain a new job. *Hawkins v. 1115 Legal Service Care*, 163 F.3d 684, 695 (2d Cr. 1998).

When he was fired on August 9, 2017, Mr. Peterson was earning $140,000 per year, or $2,692.31 per week (ALJ Ex. 3 at ¶ 19; Tr. 18). It has been 100 weeks from August 9, 2017 to date. Thus, Mr. Peterson's expected earnings were $269,231.00 ($2,692.31 * 100).

Petitioner proved that Mr. Peterson made sufficient efforts to mitigate damages by seeking other employment. He promptly sought work and continued with those efforts through trial. One week after his firing, he searched online and reached out to various staffing agencies to find work as a contract attorney (Tr. 61-64, 80-82). From August to December 2017, Mr. Peterson forwarded his resume to a dozen agencies (Tr. 80). Because he had to see medical specialists, undergo surgery in November 2017, and pursue follow-up treatment, he had limited availability at the end of the year, but he worked for roughly 50 hours in December 2017 at $32 per hour, plus overtime (Tr. 61-62, 81-82). In 2018, he worked from March to June at $33 per hour, plus overtime, for 50 to 60 hours per week (Tr. 62-63). From June to October he earned $36 per hour, plus overtime, for 40 to 45 hours per week, and he worked from November to December 2018 at $31 per hour, plus overtime, for 50 to 60 hours per week (Tr. 63-64). In 2019, he worked as a contract attorney for "a week or so" in January at a rate of $32 per hour, plus overtime, for 50 to 60 hours per week and from January to March at a rate of $36 per hour, plus overtime, for 40 to 60 hours per week (Tr. 65).

Respondents argued that Mr. Peterson was an "investigator" for the Brewer Firm and he only sought work as a contract attorney after he was fired. Thus, respondents suggest that Mr. Peterson did not seek comparable work (Resp. Mem. at 4). That claim lacks merit. Mr. Peterson's role at the Brewer Firm was to provide litigation support. His job title was "investigator," but his primary responsibilities were similar to that of a contract attorney. Mr. Peterson credibly testified that he "performed quite a bit of document review" for the Brewer Firm and it "was exactly the same work" he performed as a contract attorney (Tr. 22).

Though Mr. Peterson's back pay award must be reduced by his post-termination earnings, the exact amount of those earnings is unclear. The parties stipulated that Mr. Peterson's net pay for his post-termination work in 2017 was $2,600 and his total earnings in 2018 were as much as $80,000 (ALJ Ex. 3 at ¶¶ 27-28). A more precise calculation is unavailable because petitioner did not present paystubs, tax documents, or similar documents at trial and Mr. Peterson only

offered estimates of hours worked and rates of pay.[1] Respondents estimated that Mr. Peterson's post-termination gross wages were approximately $3,000 in 2017, $80,000 in 2018, and $30,000 in 2019, for a total of $113,000 (Resp. Mem. at 5). Those estimates will be relied upon to reduce the back pay award to $156,231 ($269,231 minus $113,000) because they are consistent with the proof at trial and petitioner failed to provide more accurate data.

After trial, petitioner sought to supplement the record by submitting an affirmation from Mr. Peterson and other documents, including pay stubs (Pet. Mem. at 3, n. 3). Respondents objected that petitioner failed to produce those documents in discovery or offer them at trial (Resp. Mem. at 2). Petitioner's supplemental documents were not considered in the calculation of damages because respondents did not have a full and fair opportunity to subject them to adversarial testing. *See Police Dep't v. Stephenson*, OATH Index No. 2195/07, mem. dec. at 14 (June 14, 2007) (denying motion to reopen the record where evidence was available to petitioner at the time of the hearing, there was no reason offered to explain why it was not submitted at trial, and respondent would be unduly prejudiced from introduction after the close of evidence).

There was evidence that Mr. Peterson received fringe benefits, including medical coverage and 401K contributions while working at the Brewer Firm. However, petitioner failed to offer any reliable evidence at trial to calculate the value of those benefits. Thus, petitioner did not meet its burden of proving that Mr. Peterson is entitled to an award of lost benefits.

Mr. Peterson is also entitled to 9% interest on his lost wages, calculated from an intermediate date between the termination of employment to the date of this decision. *See Insinga v. Cooperative Centrale Raiffeisen Boerenleenbank B.A.*, 478 F. Supp. 2d 508, 512 (S.D.N.Y. 2007); *Aurecchione*, 98 N.Y.2d at 25-26 (pre-judgment interest is an essential element of complete compensation); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 135 (2d Cir. 1993) ("it is ordinarily an abuse of discretion *not* to include pre-judgment interest") (emphasis in original). An intermediate date between August 9, 2017 and today is July 25, 2018. Applying a 9% annual interest rate to the principal amount of $156,231 from July 25, 2018 to date (350 days or .959 of a year) results in total interest of $ 13,484.30 ($156,231 * .09 * .959).

[1] There was no stipulation regarding Mr. Peterson's 2019 wages. Assuming that he earned time-and-a-half for overtime and that the second assignment lasted 12 weeks, respondents correctly calculated that Mr. Peterson has earned between $19,040 and $30,240 this year (Resp. Mem. at 3, n. 2).

Accordingly, respondents are ordered to pay petitioner $1,500 in civil penalties and $172,215.30 ($2,500 + $156,231 + $13,484.30) to Mr. Peterson.

Kevin F. Casey
Administrative Law Judge

July 9, 2019

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