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## Court Holds CEO Personally Liable for FLSA Violations

In a case that should provide a cautionary tale to business owners and high-level managers, the United States Court of Appeals for the Second Circuit recently affirmed a ruling finding John Catsimatidis, the CEO and owner of New York-area grocery chain Gristede's, individually liable for wages under the Fair Labor Standards Act ("FLSA"). *Irizarry v. Catsimatidis*, 722 F.3d 99 (2d Cir. July 9, 2013). The panel determined that Catsimatidis's active participation in the operation of the company qualified him as an "employer" under the FLSA, triggering his personal liability for FLSA violations.

Employees of the grocery store chain brought a class action against the store and several of its executives, including its CEO, alleging, among other things, that they had been misclassified as exempt employees and were thus entitled to overtime compensation. After several years of litigation, the parties reached a settlement agreement, but the corporate defendants defaulted on their payment obligations under that agreement. The plaintiff employees then moved the Court to enter partial summary judgment in their favor as to Catsimatidis's personal liability, arguing that he met the statutory definition of "employer." The district court agreed, concluding that "[t]here is no area of Gristede's which is not subject to [Catsimatidis's] control, whether [or not] he chooses to exercise it," and that, given his operational control, Catsimatidis may be held to be an employer under the statute.

Reviewing the district court's decision on appeal, the Second Circuit applied a standard known as the "economic realities" test, which evaluates, on a case-by-case basis, whether, based on a totality of circumstances, the individual sought to be held personally liable as an "employer":

- Had the power to hire and fire employees;
- Supervised and controlled employee work schedules or conditions of employment;
- Determined the rate and method of payment; and
- Maintained employment records.

Applying the test to this case, the Second Circuit found Catsimatidis:

- Possessed extensive power to hire and fire, regardless of whether it was often applied;
- Exercised some operational control of the stores, but was rarely concerned with employee schedules or conditions;
- Exercised a large amount of financial control, often examining profit statements and setting up meetings with payroll companies; and
- Did not maintain the employment records, but worked in the same office where those records were kept.

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The panel held that although it was a close case and only the first and third prongs supported a finding that Catsimatidis was an employer, given the totality of the circumstances, he could be held liable. The Court noted that “Catsimatidis’s actions and responsibilities — particularly as demonstrated by his active exercise of overall control over the company, his ultimate responsibility for the plaintiffs’ wages, his supervision of managerial employees, and his actions in individual stores — demonstrate that he was an ‘employer’ for purposes of the FLSA.” Catsimatidis’s operational control of the business included a decision-making role that, even if it fell short of day-to-day supervisory involvement or actual complicity in FLSA violations, nonetheless directly affected the nature or conditions of the plaintiffs’ employment. The court rejected Catsimatidis’s argument that he was a “high-level employee who made symbolic or, at most, general corporate decisions that only affected the lives of the plaintiffs through an attenuated chain of but-for causation.” In other words, even though Catsimatidis did not hire or fire rank-and-file employees, did not fix their specific wages or schedules, and had only limited interaction with the

managers who did handle such matters, his decisions affected individual stores and the personnel therein in light of his overall financial control of the company. Indeed, no evidence was presented establishing that Catsimatidis was personally responsible for the determinations that led to the FLSA violations, or that he ever directly managed or otherwise interacted with the plaintiffs. Equally noteworthy, Connecticut state wage and hour laws also define “employer” to include individuals, and Connecticut courts have reached similar conclusions in the past.

This case highlights yet another reason for employers to step up efforts at proactively reviewing pay practices to ensure legal compliance. Additionally, employers should consider a review of their corporate structure to determine which individual executives assume the responsibilities and authority considered in the economic realities test, so that they may raise the awareness of such high-level executives regarding potential personal liability.

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