

U.S. Department of Labor

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Issue Date: 28 October 2011

CASE NO.: 2011-CLA-4

IN THE MATTER OF

**ADMINISTRATOR, WAGE AND HOUR DIVISION,
UNITED STATES DEPARTMENT OF LABOR
Plaintiff**

v.

**CHICK-FIL-A OF CORDOVA MALL and
KATHY WORLEY, an Individual
Respondents**

DECISION AND ORDER

This action arises under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §201 *et seq.*, hereinafter the Act, and Regulations found at 29 C.F.R. Parts 579 and 580 for final administrative determination of violations of the child labor provisions of Section 12 of the Act, 29 U.S.C. §212, and assessment of the civil money penalty thereon.

This is a single issue case. The facts are not in real dispute, but what is in dispute is the appropriateness of the penalties assessed.

Kathy Worley (KW) is the owner of Chick-Fil-A located at the Cordova Mall in Pensacola, Florida, and has been since 2003. In April of 2009, Donald Dailey, a Wage and Hour Investigator, determined that three of KW's employees under the age of 18 loaded the mall compactor with trash while the key to the compactor was in the "on" position. The statements and identity of the three youths can be found at Government's Exhibits 2, 3 and 4. Each acknowledged on occasions they had "loaded" trash in the compactor.

In conducting his investigation, Mr. Dailey agreed KW had been cooperative, and he did not believe she intentionally violated the Act or put minors at risk, nor would she in the future. Mr. Dailey also acknowledged that there were exemptions to Hazardous Order Number 12 which allowed sixteen and seventeen year old minors (the ages of the three employees) to “load” the compactors provided, among other things, that the key-lock and the control system is maintained in the custody of employees who are eighteen years of age or older (29 C.F.R. §570.63(c)). In this instance, Mr. Dailey testified because the key to the control box was on a chain affixed to the control box as shown in Government Exhibit 7, that he found a violation had occurred and reported the same for assessment of a civil penalty.

As far as the penalty, \$1,320.00 per minor for a total of \$3,960.00, Mr. Dailey testified he did not establish that amount. Rather, he said, the facts gained from his investigation were placed into a computer which determined the amount. Mr. Dailey, however, testified that he thought the penalty fair considering the potential danger to minors had the compactor been put into operation. Mr. Dailey’s supervisor, Michael Young, expressed similar thoughts testifying that while he had little leeway in altering the computer’s determination, he too found the penalty to be fair in view of the circumstances. He also pointed out it was immaterial who owned the compactor, it was who was using it that determined the violation.

On September 9, 2009, following Mr. Dailey’s investigation and pursuant to Section 16(e) of the Act and Regulations found at 29 C.F.R. §§579.5 and 580.3, a civil money penalty in the amount of \$3,960.00 was assessed against Respondents for alleged violations of the Act and applicable Regulations found at 29 C.F.R. §§570.63 (Hazardous Order Number 12), by employing minors under the age of eighteen in occupations found by the Secretary to particularly hazardous for the employment of minors between sixteen and eighteen years of age.

KW, by letter dated September 20, 2009, timely wrote an exception to the determination, and on September 19, 2011, a formal hearing was conducted in this matter wherein KW represented herself. The witnesses included Mr. Dailey, Mr. Young and KW. The documentary evidence admitted was as follows: ALJ Exhibit 1, Government’s Exhibits 1-10 and KW’s Exhibits 1-3.

Basically, KW’s testimony was straightforward. She said she never intentionally violated the Act and was unaware where the key was even located pointing to her Exhibit B, page 9 to demonstrate the control box was on the side and away from the compactor and not in plain view to someone loading the compactor. She also pointed to page 4 of her Exhibit B that depicted a “caution” sign on the compactor which read “sixteen and seventeen year olds may only load this compactor.” A warning she said that was also displayed in her place of business. (KW Exhibit A, pp. 1 and 2).

The purpose of my investigation is to independently review the appropriateness of the assessed civil penalties. In this instance, I find the computer generated imposition of \$3,960.00 in civil penalties for the violation of Hazardous Order Number 12 should be mitigated and tailored by the circumstances of this particular case and that such high penalties are unnecessary as a deterrent to future violations.

29 C.F.R. §579.5(c) provides factors relating to the gravity of the violation, including any history of prior violations, evidence of willfulness or failure to take reasonable precautions to avoid violations, the number of minors illegally employed, the age of minors so employed and exposure of such minors to hazards and any resultant injury to such minors, the duration of such illegal employment and the hours of the day and whether such employment was during or outside school hours. Subsection (d) deals with mitigating factors of a violation and the determination of whether a civil penalty would be necessary to achieve the purposes of the Act. In other words, whether the violations were de minimis, whether there is no previous history of child labor violations, whether the employer's assurance of future compliance is credible, and whether exposure to obvious hazards was inadvertent rather than intentional.

It is clear from the evidence that on occasion three minor employees were allowed to load trash and/or boxes into the mall's compactor that had the operating key chained to the control box. What is also clear is that there's no history of a prior violation on KW's part nor was there willful conduct in this instance. Neither was a minor injured nor did their loading of the compactor appear to be a daily activity. Kathy Worley has given her assurance of future compliance, and I do not find the penalty of \$3,960.00 necessary to achieve the purpose of the Act.

ORDER

Based upon the foregoing, I find that civil penalties assessed against Respondent should be reduced to \$100.00 for each violation for a total of \$300.00.

So ORDERED this 28th day of October, 2011, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Administrative Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 580.13. The address for the Board is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64272 (2002). Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file the appeal with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 580.13.

If no appeal is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 580.12(e).