

11-4035-cv
Irizarry v. Catsimatidis

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT
3

4 August Term, 2012

5 (Argued: December 13, 2012 Decided: July 9, 2013)

6 Docket No. 11-4035-cv
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10 BOBBY IRIZARRY, RUBEN MORA, JOSELITO AROCHO, JOSEPH CREMA,
11 ALFRED CROKER, FRANK DELEON, MARIO DIPRETA, WILLIAM HELWIG,
12 ROBERT MISURACA, ROBERT PASTORINO, VICTOR PHELPS, DANIEL
13 SALEGNA, GILBERTO SANTIAGO,
14

15
16
17 *Plaintiffs-Appellees,*
18

19 CARLOS TORRES, on behalf of himself and all others similarly
20 situated, LEWIS CHEWNING,
21

22 *Plaintiffs-Counter-Defendants-Appellees,*
23

24 RAYMOND ALLEN, LLANOS BLAS, NABIL ELFIKY, MOHAMMED DABASH,
25 CARLOS MARTINEZ, LUIS MORALES, STEVE GROSSMAN, FRANKLYN
26 COLLADO, DAVID ADLER, DINO A. ZAINO, PATRICK LABELLA, ROBERT
27 MASTRONICOLA, ANTHONY BROOKS, VICTOR BENNETT, CANDIDO MOREL,
28 JOSE MARTINEZ, WAYNE HENDRICKS, HAROLD HORN, TROY MILLER,
29 OUSMANE DIATTA, ELLIOT STONE, TINA RODRIGUEZ, GABRIEL
30 KARAMANIAN, BRIAN HOMOLA, ANNA GARRETT, NELSON BETANCOURT,
31 JOSE DELACRUZ, YURI LAMARCHE, MICHAEL GROSECLOSE, RODOLFO
32 DELEMONS, PIO MOREL, ABIGAIL CLAUDIO, MALICK DIOUF, DAVID
33 OTTO, ALEJANDRO MORALES, VICTOR DIAZ, PAUL PETROSINO,
34 EDUARDO GONZALEZ, JR., JOSE BONILLA-REYES, VINCENT PEREZ,
35 MARTIN GONZALEZ, CALVIN ADAMS, WILLIAM FRITZ, KATHERINE
36 HALPERN, CHRISTIAN TEJADA, EDWARD STOKES, PLINIO MEDINA,
37 TOWANA STARKS, LAWSON HOPKINS, RUBEN M. ALEMAN, EUGENE
38 RYBACKI, EARL CROSS, MANOLO HIRALDO, ROBERT HAIRSTON,
39

40 *Plaintiffs,*
41

-v.-

JOHN CATSIMATIDIS,

Defendant-Appellant.

GRISTEDE'S OPERATING CORP., GRISTEDE'S FOODS NY, INC.,
NAMTOR, INC., GRISTEDE'S FOODS, INC., CITY PRODUCE OPERATING
CORP.,

Defendants-Counter-Claimants,

GALLO BALSECA, JAMES MONOS,

*Defendants.**

Before:

WESLEY AND HALL, *Circuit Judges*, GOLDBERG, *Judge.***

A class of current and former employees of Gristede's supermarkets sued several corporate and individual defendants for alleged violations of the Fair Labor Standards Act and the New York Labor Law. The United States District Court for the Southern District of New York (Crotty, J.) granted partial summary judgment for the plaintiffs, concluding that John Catsimatidis, the owner, president, and CEO of Gristede's, was the plaintiffs' "employer" under both laws. Catsimatidis appeals, and we AFFIRM IN PART, VACATE IN PART, AND REMAND.

*The Clerk of Court is directed to amend the caption as listed above.

**The Honorable Richard W. Goldberg, of the United States Court of International Trade, sitting by designation.

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2
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9 *Beck PLLC, Washington, D.C.; Adam T. Klein,*
10 *Justin M. Swartz, Molly A. Brooks, Outten &*
11 *Golden LLP, New York, NY, on the brief) for*
12 *Appellees.*
13

14 RACHEL GOLDBERG, *Attorney, Office of the Solicitor*
15 *(M. Patricia Smith, Solicitor of Labor,*
16 *Jennifer S. Brand, Associate Solicitor, Paul*
17 *L. Frieden, Counsel for Appellate Litigation,*
18 *on the brief), for Amicus Curiae Secretary of*
19 *Labor.*
20

21 Tsedeye Gebreselassie, *Catherine K. Ruckelshaus,*
22 *National Employment Law Project, New York, NY,*
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24 *Brandworkers International, Restaurant*
25 *Opportunities Center New York, Chinese Staff*
26 *and Workers Association, National Mobilization*
27 *Against Sweatshops, National Employment Law*
28 *Project, Legal Aid Society of New York, Urban*
29 *Justice Center, Asian American Legal Defense*
30 *and Education Fund.*
31

32
33
34 WESLEY, *Circuit Judge.*
35

36 After the failure of a settlement in a wage-and-hour
37 case brought by a group of employees of Gristede's
38 supermarkets, the plaintiff employees moved for partial
39 summary judgment on the issue of whether John Catsimatidis,
40 the chairman and CEO of Gristede's Foods, Inc., could be

1 held personally liable for damages. The case turns on
2 whether Catsimatidis is an "employer" under the Fair Labor
3 Standards Act ("FLSA"), 29 U.S.C. § 203(d), and the New York
4 Labor Law ("NYLL"), N.Y. Lab. Law §§ 190(3), 651(6). The
5 United States District Court for the Southern District of
6 New York (Crotty, J.) granted partial summary judgment for
7 the plaintiffs on the issue, establishing that Catsimatidis
8 would be held jointly and severally liable for damages along
9 with the corporate defendants. See *Torres v. Gristede's*
10 *Operating Corp.*, No. 04 Civ. 3316(PAC), 2011 WL 4571792
11 (S.D.N.Y. Sept. 9, 2011) ("*Torres III*"). Catsimatidis
12 appeals. We affirm the district court's decision so far as
13 it established that Catsimatidis was an "employer" under the
14 FLSA; we vacate and remand the grant of partial summary
15 judgment on plaintiffs' NYLL claims.

16 **Background**

17 Catsimatidis is the chairman, president, and CEO of
18 Gristede's Foods, Inc., which operates between 30 and 35
19 stores in the New York City metro area and has approximately
20 1700 employees. Although a series of mergers and
21 acquisitions has complicated the question of which companies
22 are responsible for the Gristede's business and

1 supermarkets, the parties have not made corporate structure
2 the focus of this case. They essentially agree that
3 Catsimatidis is the owner and corporate head of all
4 implicated companies, but they dispute the manner and degree
5 of his control over the stores and employees.

6 In 2004, a group of then-current and former employees
7 of Gristede's supermarkets sued several companies involved
8 in operating the stores. The employees also sued three
9 individual defendants: Catsimatidis, Gristede's District
10 Manager James Monos, and Gristede's Vice President Gallo
11 Balseca. The district court certified a class composed of
12 "[a]ll persons employed by defendants as Department Managers
13 or Co-Managers who were not paid proper overtime premium
14 compensation for all hours that they worked in excess of
15 forty in a workweek any time between April 30, 1998 and the
16 date of final judgment in this matter (the 'class period')."
17 *Torres v. Gristede's Operating Corp.*, No. 04 Civ. 3316 (PAC),
18 2006 WL 2819730, at *11 (S.D.N.Y. Sept. 29, 2006) ("*Torres*
19 *I*") (quotation marks omitted). In this decision, the court
20 noted that the parties disputed the duties of co-managers
21 and department managers, though the scope of plaintiffs'
22 duties are not at issue in this appeal.

1 After two-and-a-half years of litigation, the district
2 court granted summary judgment for the plaintiffs on their
3 FLSA and NYLL claims, which concerned reduction of hours,
4 withholding of overtime, misclassification as exempt
5 employees, and retaliation. See *Torres v. Gristede's*
6 *Operating Corp.*, 628 F. Supp. 2d 447, 461-63, 475 (S.D.N.Y.
7 2008) ("*Torres II*"). The court held that plaintiffs were
8 entitled to liquidated damages, the amount of which would be
9 determined in future proceedings. *Id.* at 462 n.14, 465.
10 Plaintiffs reserved the right to move separately for a
11 determination that the individual defendants were
12 individually liable as joint employers. *Id.* at 453 n.2.

13 Following the summary judgment order, the parties
14 reached a settlement agreement, which the district court
15 approved. The corporate defendants later defaulted on their
16 payment obligations under the agreement. Defendants sought
17 to modify the settlement, but the district court denied
18 their request. Plaintiffs then moved for partial summary
19 judgment on Catsimatidis's personal liability as an
20 employer.

21 The district court granted the motion for reasons both
22 stated on the record at the conclusion of oral argument on

1 the motion, see Special App'x at 43-46, and memorialized in
2 a written decision, see *Torres III*. The reasons included
3 the fact that Catsimatidis "hired managerial employees,"
4 "signed all paychecks to the class members," had the "power
5 to close or sell Gristede's stores," and "routinely
6 review[ed] financial reports, work[ed] at his office in
7 Gristede's corporate office and generally preside[d] over
8 the day to day operations of the company." *Torres III*, 2011
9 WL 4571792, at *2. According to the district court, "[f]or
10 the purposes of applying the total circumstances test, it
11 does not matter that Mr. Catsimatidis has delegated powers
12 to others[; w]hat is critical is that Mr. Catsimatidis has
13 those powers to delegate." *Id.* (citation omitted). The
14 court concluded that "[t]here is no area of Gristede's which
15 is not subject to [Catsimatidis's] control, whether [or not]
16 he chooses to exercise it," and that, therefore,
17 Catsimatidis "had operational control and, as such, [] may
18 be held to be an employer." *Id.* at *3.¹

¹In its oral ruling and accompanying order, the district court granted summary judgment finding Catsimatidis individually liable as an "employer" under the NYLL, but the court did not explain its reasons beyond what might be inferred from its discussion setting forth its reasoning in the FLSA context. See *Torres III*, 2011 WL 4571792, at *1; Special App'x at 46-47.

1 **Discussion²**

2 **I. Definition of "employer" under the FLSA**

3 The Supreme Court has recognized "that broad coverage
4 [under the FLSA] is essential to accomplish the [statute's]
5 goal of outlawing from interstate commerce goods produced
6 under conditions that fall below minimum standards of
7 decency." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471
8 U.S. 290, 296 (1985). Accordingly, the Court "has
9 consistently construed the Act liberally to apply to the
10 furthest reaches consistent with congressional direction."
11 *Id.* (quotation marks omitted). "The common law agency test
12 was found too restrictive to encompass the broader
13 definition of the employment relationship contained in the
14 [FLSA]." *Frankel v. Bally, Inc.*, 987 F.2d 86, 89 (2d Cir.
15 1993). Instead, the statute "defines the verb 'employ'

²"We review an award of summary judgment *de novo*, and we will uphold the judgment only if the evidence, viewed in the light most favorable to the party against whom it is entered, demonstrates that there are no genuine issues of material fact and that the judgment was warranted as a matter of law." *Barfield v. NYC Health & Hosps. Corp.*, 537 F.3d 132, 140 (2d Cir. 2008) (citing Fed R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). "The nonmoving party must set forth specific facts showing that there is a genuine issue for trial, and this Court must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor." *Rubens v. Mason*, 527 F.3d 252, 254 (2d Cir. 2008) (internal quotation marks and citation omitted).

1 expansively to mean 'suffer or permit to work.'" *Nationwide*
2 *Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (quoting
3 29 U.S.C. § 203(g)). Unfortunately, however, the statute's
4 definition of "employer" relies on the very word it seeks to
5 define: "'Employer' includes any person acting directly or
6 indirectly in the interest of an employer in relation to an
7 employee." 29 U.S.C. § 203(d). The statute nowhere defines
8 "employer" in the first instance.

9 The Supreme Court noted early on that the FLSA contains
10 "no definition that solves problems as to the limits of the
11 employer-employee relationship under the Act." *Rutherford*
12 *Food Corp. v. McComb*, 331 U.S. 722, 728 (1947). The Court
13 has also observed "that the 'striking breadth' of the FLSA's
14 definition of 'employ' 'stretches the meaning of 'employee'
15 to cover some parties who might not qualify as such under a
16 strict application of traditional agency law principles' in
17 order to effectuate the remedial purposes of the act.'" *Barfield*,
18 537 F.3d at 141 (quoting *Darden*, 503 U.S. at 326)
19 (internal citation omitted).

20 "Accordingly, the Court has instructed that the
21 determination of whether an employer-employee relationship
22 exists for purposes of the FLSA should be grounded in

1 'economic reality rather than technical concepts.'" *Id.*
2 (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S.
3 28, 33 (1961)). The "economic reality" test applies equally
4 to whether workers are employees and to whether managers or
5 owners are employers. See *Herman v. RSR Sec. Servs. Ltd.*,
6 172 F.3d 132, 139 (2d Cir. 1999).

7 "[T]he determination of the [employment] relationship
8 does not depend on such isolated factors" as where work is
9 done or how compensation is divided "but rather upon the
10 circumstances of the whole activity." *Rutherford*, 331 U.S.
11 at 730. Some early cases concerned managerial efforts to
12 distance themselves from workers in an apparent effort to
13 escape the FLSA's coverage. For example, in *Goldberg*, the
14 Supreme Court considered whether a manufacturing cooperative
15 was an "employer" of "homeworker" members who created
16 knitted and embroidered goods in their homes and were paid
17 by the month on a rate-per-dozen basis. 366 U.S. at 28-29.
18 The Court concluded that this constituted an employer-
19 employee relationship because management's authority made
20 "the device of the cooperative too transparent to survive
21 the statutory definition of 'employ' and the Regulations
22 governing homework." *Id.* at 33. "In short, if the

1 'economic reality' rather than 'technical concepts' is to be
2 the test of employment, these homeworkers are employees."
3 *Id.* (internal citations omitted). Similarly, the Court
4 noted in *Rutherford* that "[w]here the work done, in its
5 essence, follows the usual path of an employee, putting on
6 an 'independent contractor' label does not take the worker
7 from the protection of the Act." 331 U.S. at 729.

8 The Second Circuit "has treated employment for FLSA
9 purposes as a flexible concept to be determined on a case-
10 by-case basis by review of the totality of the
11 circumstances"; we have "identified different sets of
12 relevant factors based on the factual challenges posed by
13 particular cases." *Barfield*, 537 F.3d at 141-42.

14 In *Carter v. Dutchess Community College*, 735 F.2d 8 (2d
15 Cir. 1984), we identified factors that are likely to be
16 relevant to the question of whether a defendant is an
17 "employer." In that case, prison inmates teaching classes
18 in a program that was managed by a college claimed the
19 college was their employer. The district court rejected
20 this assertion because "the college had only qualified
21 control over the inmate instructors; the Department of
22 Correctional Services always maintained ultimate control."

1 *Barfield*, 537 F.3d at 142 (describing *Carter*) (quotation
2 marks omitted). This Court, however, concluded that the
3 "ultimate control" rule "would not comport with the
4 'remedial' purpose of the FLSA, which Congress intended to
5 'have the widest possible impact in the national economy.'" *Id.*
6 (quoting *Carter*, 735 F.2d at 12). Instead, we
7 established four factors to determine the "economic reality"
8 of an employment relationship: "whether the alleged employer
9 (1) had the power to hire and fire the employees, (2)
10 supervised and controlled employee work schedules or
11 conditions of employment, (3) determined the rate and method
12 of payment, and (4) maintained employment records." *Id.*
13 (quoting *Carter*, 735 F.2d at 12).³

14 *Barfield* also discusses the factors this court has used
15 "to distinguish between independent contractors and
16 employees," 537 F.3d at 143 (citing *Brock v. Superior Care*,

³ Although the *Carter* court did not ultimately conclude that the prisoners were employees of the college, it noted that the following facts about the college "may be sufficient to warrant FLSA coverage" and certainly presented issues of material fact on the subject: the college "made the initial proposal to 'employ' workers; suggested a wage as to which there was 'no legal impediment'; developed eligibility criteria; recommended several inmates for the tutoring positions; was not required to take any inmate it did not want; decided how many sessions, and for how long, an inmate would be permitted to tutor; and sent the compensation directly to the inmate's prison account." 735 F.2d at 15.

1 *Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988)), and "to assess
2 whether an entity that lacked formal control nevertheless
3 exercised functional control over a worker," *id.* (citing
4 *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir.
5 2003)).³ None of the factors used in any of these cases,
6 however, comprise a "rigid rule for the identification of an
7 FLSA employer." *Id.* "To the contrary, . . . they provide
8 'a nonexclusive and overlapping set of factors' to ensure
9 that the economic realities test mandated by the Supreme
10 Court is sufficiently comprehensive and flexible to give

³ In *Zheng*, the court considered whether a garment manufacturer that contracted out the last phase of its production process to workers including the plaintiffs was an "employer" under the FLSA. It concluded that the relevant factors in such an instance were

(1) whether [the manufacturer]'s premises and equipment were used for the plaintiffs' work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to [the manufacturer]'s process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the [manufacturer] or [its] agents supervised plaintiffs' work; and (6) whether plaintiffs worked exclusively or predominantly for [the manufacturer].

Zheng, 355 F.3d at 72. These factors highlight the flexible and comprehensive nature of the economic realities test in determining when an entity is an "employer" (in this case, whether the manufacturer was a "joint employer" along with another corporation) but are not directly implicated here.

1 proper effect to the broad language of the FLSA.” *Id.*
2 (quoting *Zheng*, 355 F.3d at 75-76).

3 **a. Individual liability**

4 None of the cases above dealt specifically with the
5 question we confront here: whether an individual within a
6 company that undisputedly employs a worker is personally
7 liable for damages as that worker’s “employer.” The only
8 case from our Circuit to confront the question squarely is
9 *RSR*, 172 F.3d 132. *RSR* provided guards, pre-employment
10 screening, and other security services. It was sued for
11 FLSA violations with regard to its security guards. Its
12 chairman of the board, Portnoy, was found by the district
13 court after a bench trial to be an “employer” under the
14 statute. We affirmed, in a decision that both applied the
15 four-factor test from *Carter* and noted other factors bearing
16 upon the “overarching concern [of] whether the alleged
17 employer possessed the power to control the workers in
18 question.” *Id.* at 139.

19 As background, we noted that “[a]lthough Portnoy
20 exercised broad authority over *RSR* operations . . . , he was
21 not directly involved in the daily supervision of the
22 security guards.” *Id.* at 136. Nonetheless, because “he was

1 the only principal who had bank credit, he exercised
2 financial control over the company." *Id.* "Thus, he had
3 authority over" the operations manager, who directly
4 supervised the guards. *Id.* "Portnoy kept himself apprised
5 of RSR operations by receiving periodic reports [including]
6 work orders, memos, investigation reports, and invoices
7 concerning the business operations, as well as weekly
8 timesheets of [a manager's] duties." *Id.* at 137. He also
9 "referred a few individuals to RSR as potential security
10 guard employees," "assigned guards to cover specific
11 clients, sometimes set the rates clients were charged for
12 those services, gave [a manager] instructions about guard
13 operations, and forwarded complaints about guards to" a
14 manager. *Id.*

15 Portnoy also "signed payroll checks on at least three
16 occasions" and "established a payment system by which
17 clients who wanted undercover operatives would pay"
18 Portnoy's separate labor-relations firm. *Id.* Additionally,
19 Portnoy "represented himself to outside parties as" being
20 "the 'boss' of RSR" by "allowing his name to be used in
21 sales literature, by representing to potential clients that
22 he was a principal with control over company operations . .

1 . and by giving [a manager] instructions with respect to []
2 clients' security needs." *Id.*

3 We determined that at least three of the four *Carter*
4 factors applied. First, Portnoy had hired employees, and
5 although this "involved mainly managerial staff, the fact
6 that he hired individuals who were in charge of the guards
7 [was] a strong indication of control." *Id.* at 140. Second,
8 Portnoy had, "on occasion, supervised and controlled
9 employee work schedules and the conditions of employment."
10 *Id.* Third, he had "participate[d] in the method of
11 pay[ing]" the guards, even though he was not involved in
12 determining their salaries, because he had previously
13 "ordered a stop to the illegal pay practice of including
14 security guards on 1099 forms as independent contractors,"
15 and he "had the authority to sign paychecks throughout the
16 relevant period." *Id.* Although there was no evidence that
17 Portnoy had been involved in maintaining employment records,
18 we confirmed that the fact that "this fourth factor is not
19 met is not dispositive." *Id.* The "'economic reality' test
20 encompasses the totality of circumstances, no one of which
21 is exclusive." *Id.* at 139. In sum, we determined that
22 Portnoy was "not only a 50 percent stockowner; he had direct

1 involvement with the security guard operations from time to
2 time and was generally involved with all of RSR's
3 operations." *Id.* at 141.

4 *RSR* also highlighted two legal questions relevant here.
5 The first concerns the scope of an individual's authority or
6 "operational control" over a company - at what level of a
7 corporate hierarchy, and in what relationship with plaintiff
8 employees, must an individual possess power in order to be
9 covered by the FLSA? The second inquiry, related but
10 distinct, concerns hypothetical versus actual power: to what
11 extent and with what frequency must an individual actually
12 use the power he or she possesses over employees to be
13 considered an employer?

14 **i. Operational control**

15 In addition to applying the *Carter* test, *RSR* noted the
16 district court's recognition that Portnoy exercised direct
17 authority over the two persons most responsible for managing
18 the security guards, as well as the fact that "[b]ecause
19 [Portnoy] controlled the company financially, it was no idle
20 threat when he testified that he *could have* dissolved the
21 company if [one of the managers] had not followed his
22 directions." *Id.* at 140 (emphasis added). Accordingly, we

1 emphasized that we rejected Portnoy's argument "that
2 evidence showing his authority over management, supervision,
3 and oversight of RSR's affairs in general is irrelevant, and
4 that only evidence indicating his direct control over the
5 guards should be considered." *Id.* We concluded that this
6 formulation "ignores the relevance of the totality of the
7 circumstances in determining Portnoy's operational control
8 of RSR's employment of the guards." *Id.* We also noted that
9 "operational control" had been cited as relevant by other
10 circuits considering the question of individual liability
11 under the FLSA. *See id.*

12 "Operational control" is at the heart of this case.
13 Catsimatidis's core argument is that he was a high-level
14 employee who made symbolic or, at most, general corporate
15 decisions that only affected the lives of the plaintiffs
16 through an attenuated chain of but-for causation. Although
17 Catsimatidis undisputedly possessed broad control over
18 Gristede's corporate strategy, including the power to decide
19 to take the company public, to open stores, and to carry
20 certain types of merchandise, he contends that a FLSA
21 "employer" must exercise decision-making in a "day-to-day"
22 capacity. Appellant's Br. at 3. By this, he appears to

1 mean decisions about individual store-level operations,
2 close to, if not actually including, the particular working
3 conditions and compensation practices of the employees
4 themselves. Plaintiffs counter that many cases have found
5 individuals with "operational control" on a more general
6 level to be employers. Appellees' Br. at 28-31.

7 Most circuits to confront this issue have acknowledged
8 - and plaintiffs do not dispute - that a company owner,
9 president, or stockholder must have at least some degree of
10 involvement in the way the company interacts with employees
11 to be a FLSA "employer." Many cases rely on *Wirtz v. Pure*
12 *Ice Co.*, 322 F.2d 259, 262 (8th Cir. 1963), for this
13 proposition. In *Wirtz*, the court concluded that the
14 individual defendant was not an employer even though he was
15 the "controlling stockholder and dominating figure" because
16 although he "could have taken over and supervised the
17 relationship between the corporation and its employees had
18 he decided to do so," he did not. *Id.* (quotation marks
19 omitted). The defendant visited the facility at issue a few
20 times per year but "had nothing to do with the hiring of the
21 employees or fixing their wages or hours," and he "left the
22 matter of compliance with the Fair Labor Standards Act up to

1 the various managers of the businesses in which he had an
2 interest." *Id.* at 262-63. The court noted, however, that
3 if it were to consider "a combination of stock ownership,
4 management, direction and the right to hire and fire
5 employees, then a contrary conclusion would be well
6 supported." *Id.* at 263.

7 In *RSR*, we cited three cases with holdings in
8 accordance with *Wirtz* in resolving the "operational control"
9 issue. First, in *Donovan v. Sabine Irrigation Co.*, 695 F.2d
10 190, 194-95 (5th Cir. 1983), the Fifth Circuit determined
11 that an individual without an interest in the employer
12 corporation could be held liable if he "effectively
13 dominates its administration or otherwise acts, or has the
14 power to act, on behalf of the corporation vis-a-vis its
15 employees" - or if he lacked that power but "independently
16 exercised control over the work situation." The *Sabine*
17 court found the individual defendant liable because he
18 "indirectly controlled many matters traditionally handled by
19 an employer in relation to an employee (such as payroll,
20 insurance, and income tax matters)," noting also that the
21 defendant's "financial gymnastics directly affected Sabine's
22 employees by making it possible for Sabine to meet its

1 payroll and keep its employees supplied with the equipment
2 and materials necessary to perform their jobs." *Id.* at 195.
3 (quotation marks omitted).

4 Second, in *Dole v. Elliott Travel & Tours, Inc.*, 942
5 F.2d 962, 966 (6th Cir. 1991), the Sixth Circuit was unmoved
6 by the protestations of an individual defendant who
7 testified that he "made major corporate decisions" but "did
8 not have day-to-day control of specific operations." The
9 court found that the defendant's responsibilities, which
10 included determining employee salaries, constituted
11 "operational control of *significant aspects* of the
12 corporation's day to day functions." *Id.* (quotation marks
13 omitted) (emphasis in original).

14 Finally, in *Donovan v. Agnew*, 712 F.2d 1509, 1511 (1st
15 Cir. 1983), the First Circuit imposed liability on
16 individual defendants "who together were President,
17 Treasurer, Secretary and sole members of the Board" of the
18 defendant company. One of the defendants had been
19 "personally involved in decisions about layoffs and employee
20 overtime hours," *id.*, and the defendants together had
21 "operational control of significant aspects of the
22 corporation's day to day functions, including compensation

1 of employees, and [] personally made decisions to continue
2 operations despite financial adversity during the period of
3 nonpayment," *id.* at 1514.

4 Plaintiffs in our case place particular emphasis on the
5 statement by the *Agnew* court that "[t]he overwhelming weight
6 of authority is that a corporate officer with operational
7 control of a corporation's covered enterprise is an employer
8 along with the corporation, jointly and severally liable
9 under the FLSA for unpaid wages."⁴ *Id.* at 1511. Although
10 this appears to suggest that any amount of corporate control
11 is sufficient to establish FLSA liability, the First Circuit
12 warned against taking the FLSA's coverage too far, noting
13 that "the Act's broadly inclusive definition of 'employer'"
14 could, if "[t]aken literally and applied in this context[,]
15 . . . make any supervisory employee, even those without any

⁴ This language was cited by our Circuit in a case concerning the meaning of the word "employer" in the context of the Employee Retirement Income Security Act ("ERISA"), in which we noted that "[i]n FLSA cases, courts have consistently held that a corporate officer with operational control who is directly responsible for a failure to pay statutorily required wages is an 'employer' along with the corporation, jointly and severally liable for the shortfall." *Leddy v. Standard Drywall, Inc.*, 875 F.2d 383, 387 (2d Cir. 1989) (citing *Agnew*, 712 F.2d at 1511). Because *Leddy* did not require or contain any actual analysis of the FLSA, however, this statement does not constitute a holding that liability on the basis of "operational control" requires an individual to have been directly responsible for FLSA violations.

1 control over the corporation's payroll, personally liable
2 for the unpaid or deficient wages of other employees." *Id.*
3 at 1513.

4 Drawing on this language, the First Circuit later
5 concluded that individuals who had "exercised some degree of
6 supervisory control over the workers" and been "responsible
7 for overseeing various administrative aspects of the
8 business" but had not demonstrated other important
9 characteristics - "in particular, the personal
10 responsibility for making decisions about the conduct of the
11 business that contributed to the violations of the Act" -
12 were not personally liable under the FLSA. *Baystate*
13 *Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 678 (1st
14 Cir. 1998). The court rejected an "expansive application of
15 the definition of an 'employer'" that would find that "the
16 significant factor in the personal liability determination
17 is simply the exercise of control by a corporate officer or
18 corporate employee over the 'work situation.'" *Id.* at 679.
19 No other decision has gone as far as *Baystate*; most courts
20 have endeavored to strike a balance between upholding the
21 broad remedial goals of the statute and ensuring that a
22 liable individual has some relationship with plaintiff
23 employees' work situation.

1 For example, in *Gray v. Powers*, 673 F.3d 352, 354-57
2 (5th Cir. 2012), the court found that the co-owner of a
3 company that owned a nightclub was not a bartender's
4 "employer" despite being a signatory on the corporate
5 account and "occasionally sign[ing] several pages of pre-
6 printed checks." The individual defendant had little
7 control over the bar and its employees except to direct a
8 bartender to serve certain customers on several occasions
9 when he was at the bar. *Id.* at 354. Similarly, in *Patel v.*
10 *Wargo*, 803 F.2d 632, 638 (11th Cir. 1986), the Eleventh
11 Circuit held that an individual who was both president and
12 vice president of a corporation, as well as a director and
13 principal stockholder, was not an employer because he did
14 not "have operational control of significant aspects of [the
15 company's] day-to-day functions, including compensation of
16 employees or other matters 'in relation to an employee.'"

17 By contrast, in *Reich v. Circle C. Investments, Inc.*,
18 998 F.2d 324, 329 (5th Cir. 1993), the court found that a
19 non-owner of a company that had invested in a nightclub had
20 exercised sufficient "control over the work situation" as
21 the "driving force" behind the company. The court cited
22 evidence that the individual hired employees, gave them

1 instructions (including specific songs for dancers'
2 routines), and signed their payroll checks. *Id.* He had
3 also removed money from corporate safes, "ordered one
4 employee to refrain from keeping records of the tip-outs,"
5 and "spoke[n] for [the company] during the Secretary's
6 investigation of possible FLSA violations." *Id.*

7 These cases reaffirm the logic behind our holding in
8 *RSR*, which focused on defendant Portnoy's "operational
9 control of *RSR's* employment of the guards," see *RSR*, 172
10 F.3d at 140 (emphasis added), rather than simply operational
11 control of the company. Evidence that an individual is an
12 owner or officer of a company, or otherwise makes corporate
13 decisions that have nothing to do with an employee's
14 function, is insufficient to demonstrate "employer" status.
15 Instead, to be an "employer," an individual defendant must
16 possess control over a company's actual "operations" in a
17 manner that relates to a plaintiff's employment. It is
18 appropriate, as we implicitly recognized in *RSR*, to require
19 some degree of individual involvement in a company in a
20 manner that affects employment-related factors such as
21 workplace conditions and operations, personnel, or
22 compensation - even if this appears to establish a higher

1 threshold for individual liability than for corporate
2 "employer" status.

3 The fundamental concern in the initial cases construing
4 the FLSA was preventing a business entity from causing
5 workers to engage in work without the protections of the
6 statute. It was an "economic reality" that the "homework"
7 cooperative in *Goldberg* functioned as the workers' employer
8 because it paid them to create clothing, even if the
9 compensation structure technically circumvented agency-law
10 concepts of formal employment. See *Goldberg*, 366 U.S. at 31
11 (stating that the Court would be "remiss . . . if we
12 construed the Act loosely so as to permit this homework to
13 be done in ways not permissible under the Regulations"); see
14 also *United States v. Rosenwasser*, 323 U.S. 360, 363 (1945)
15 ("A worker is as much an employee when paid by the piece as
16 he is when paid by the hour."). This concern is not as
17 pressing when considering the liability for damages of an
18 individual within a company that itself is undisputedly the
19 plaintiffs' employer.

20 Even in the individual-liability context, however, "the
21 remedial nature of the [FLSA] . . . warrants an expansive
22 interpretation of its provisions so that they will have 'the

1 widest possible impact in the national economy.'" *RSR*, 172
2 F.3d at 139 (quoting *Carter*, 735 F.2d at 12). Nothing in
3 *RSR*, or in the FLSA itself, requires an individual to have
4 been personally complicit in FLSA violations; the broad
5 remedial purposes behind the statute counsel against such a
6 requirement. The statute provides an empty guarantee absent
7 a financial incentive for individuals with control, even in
8 the form of delegated authority, to comply with the law, and
9 courts have continually emphasized the extraordinarily
10 generous interpretation the statute is to be given. Nor is
11 "only evidence indicating [an individual's] direct control
12 over the [plaintiff employees] [to] be considered." *RSR*,
13 172 F.3d at 140. Instead, "evidence showing [an
14 individual's] authority over management, supervision, and
15 oversight of [a company's] affairs in general" is relevant
16 to "the totality of the circumstances in determining [the
17 individual's] operational control of [the company's]
18 employment of [the plaintiff employees]." *Id.*

19 A person exercises operational control over employees
20 if his or her role within the company, and the decisions it
21 entails, directly affect the nature or conditions of the
22 employees' employment. Although this does not mean that the

1 individual "employer" must be responsible for managing
2 plaintiff employees - or, indeed, that he or she must have
3 directly come into contact with the plaintiffs, their
4 workplaces, or their schedules - the relationship between
5 the individual's operational function and the plaintiffs'
6 employment must be closer in degree than simple but-for
7 causation. Although the answer in any particular case will
8 depend, of course, on the totality of the circumstances, the
9 analyses in the cases discussed above, as well as the
10 responsibilities enumerated in the *Carter* factors, provide
11 guidance for courts determining when an individual's actions
12 rise to this level.

13 **ii. Potential power**

14 In *RSR*, we noted that "operational control" need not be
15 exercised constantly for an individual to be liable under
16 the FLSA:

17 [Employer] status does not require continuous
18 monitoring of employees, looking over their
19 shoulders at all times, or any sort of absolute
20 control of one's employees. Control may be
21 restricted, or exercised only occasionally,
22 without removing the employment relationship from
23 the protections of the FLSA, since such
24 limitations on control do not diminish the
25 significance of its existence.

26
27 172 F.3d at 139 (quotation marks and alteration omitted).

1 The district court in this case appears to have relied on
2 this language in stating that "[w]hat is critical is that
3 Mr. Catsimatidis has [certain] powers to delegate" and that
4 "[t]here is no area of Gristede's which is not subject to
5 his control, whether [or not] he chooses to exercise it."
6 *Torres III*, 2011 WL 4571792 at *2-3. The parties also
7 dispute the importance of evidence indicating that
8 Catsimatidis only rarely exercised much of the power he
9 possessed.

10 Employer power that is "restricted or exercised only
11 occasionally" does not mean "never exercised." In *Donovan*
12 *v. Janitorial Services, Inc.*, 672 F.2d 528, 531 (5th Cir.
13 1982), the Fifth Circuit noted that the company owner's
14 "considerable investment in the company gives him ultimate,
15 if latent, authority over its affairs," and the fact that he
16 had "exercised that authority only occasionally, through
17 firing one employee, reprimanding others, and engaging in
18 some direct supervision of Johnson Disposal drivers, does
19 not diminish the significance of its existence." In
20 *Superior Care*, this court noted that although
21 representatives of the defendant business, a nurse-staffing
22 company, visited job sites only infrequently, the company

1 had "unequivocally expressed the right to supervise the
2 nurses' work, and the nurses were well aware that they were
3 subject to such checks as well as to regular review of their
4 nursing notes." 840 F.2d at 1060. "An employer does not
5 need to look over his workers' shoulders every day in order
6 to exercise control." *Id.* Similarly, in *Carter*, we
7 rejected the proposition that the community college was not
8 employing prison inmates solely because the prison had
9 "ultimate control" over the prisoners, reasoning that the
10 community college also made decisions that affected the
11 prisoners' work. 735 F.2d at 13-14.

12 The Eleventh Circuit has squarely held that even when a
13 defendant "could have played a greater role in the day-to-
14 day operations of the [] facility if he had desired, . . .
15 unexercised authority is insufficient to establish liability
16 as an employer." *Alvarez Perez v. Sanford-Orlando Kennel*
17 *Club, Inc.*, 515 F.3d 1150, 1161 (11th Cir. 2008). The
18 *Alvarez* court found that an officer in a company that owned
19 a kennel club was not an employer, in part because even
20 though he might have had the authority to do so, he "had not
21 taken part in the day-to-day operations of the facility, had
22 not been involved in the supervision or hiring and firing of
23 employees, and had not determined their compensation." *Id.*

1 Unlike *Alvarez*, *RSR* does not state unambiguously that
2 unexercised authority is insufficient to establish FLSA
3 liability, and we see no need to do so here in light of the
4 evidence of the authority that Catsimatidis *did* exercise.
5 Nonetheless, all of the cases discussed indicate that the
6 manifestation of, or, at the least, a clear delineation of
7 an individual's power over employees is an important and
8 telling factor in the "economic reality" test. Ownership,
9 or a stake in a company, is insufficient to establish that
10 an individual is an "employer" without some involvement in
11 the company's employment of the employees.

12 **II. Catsimatidis as "employer"**

13 "Using this 'economic reality' test, we must decide
14 whether [Catsimatidis] is an employer under the FLSA." See
15 *RSR*, 172 F.3d at 140. Is there "evidence showing his
16 authority over management, supervision, and oversight of
17 [Gristede's] affairs in general," see *id.*, as well as
18 evidence under the *Carter* framework or any other factors
19 that reflect Catsimatidis's exercise of direct control over
20 the plaintiff employees?
21
22

1 **a. Catsimatidis's overall authority**

2 Catsimatidis is the chairman, president, and CEO of
3 Gristede's Foods, Inc. Joint App'x 1016.⁵ He does not
4 report to anyone else at Gristede's. *Id.* at 1794.
5 Catsimatidis personally owns the building in which
6 Gristede's headquarters is located. *Id.* at 1789-90. His
7 office is in that building, shared with Charles Criscuolo,
8 Gristede's COO. *Id.* at 1793-94. Catsimatidis was "usually
9 there for part of the day, at least [four] days a week."
10 *Id.* at 1334. The human resources and payroll department is
11 located in the same building. *Id.* at 1794-5. Regarding his
12 duties, Catsimatidis testified: "I do the banking. I do the
13 real estate. I do the financial. . . . I come up with
14 concepts for merchandising. . . . I'm there every day if
15 there is a problem," including problems with buildings,
16 problems with the "Department of Consumer Affairs,
17 governmental relations," and "[p]roblems with vendors,
18 relationships with vendors, it takes up most of the time."
19 *Id.* at 1800-01.

⁵Although Catsimatidis's and other employees' functions within Gristede's appear to have shifted during the lengthy pendency of this lawsuit, all references are to the period relevant to the case.

1 A series of subordinate managers reported to
2 Catsimatidis but did not appear to have an extensive amount
3 of interaction with him. Catsimatidis spoke to Criscuolo
4 every day because they shared an office. *Id.* at 1797.
5 Catsimatidis testified that Vice President Gallo Balseca
6 "runs operations" and was "in the stores every day," and
7 that the district managers reported to Balseca. *Id.* at
8 1796. Balseca reported to Criscuolo, but Catsimatidis
9 rarely spoke directly to Balseca. *Id.* at 1794, 1797.
10 Catsimatidis testified that the company's director of
11 security "reports to the chief operating officer on a day-
12 to-day basis, but if there is something he thinks I should
13 know about, he would call and tell me." *Id.* at 1809.
14 Catsimatidis occasionally sat in on merchandising and
15 operations meetings. *Id.* at 1799.

16 Catsimatidis stayed apprised of how Gristede's was
17 doing, reviewing the overall profit and loss statements as
18 well as the "sales to purchases" statements of particular
19 stores. He received "weekly gross margin reports from all
20 the perishable departments" and "a comprehensive P[rofit]
21 and L[oss] report on a quarterly basis" that he studied in
22 depth and sometimes used to make general recommendations.

1 *Id.* at 1849. As Executive Director of Human Resources and
2 Asset Protection Renee Flores stated, "if there is a store
3 that buys more than they sell, and it's a consistent thing,
4 he may say, 'You know what, you might want to take a look at
5 that, because they're buying more than they're selling.'" *Id.*
6 at 1450-51.

7 Catsimatidis testified that he made "big picture"
8 "merchandising decisions, like do we, for the next six
9 months, push Coca-Cola or push Pepsi-Cola?" and "the
10 decisions on having pharmacies in the stores." *Id.* at 1815.
11 He testified that after making this sort of decision, he
12 would tell Criscuolo or "yell it out when they have the
13 [merchandising meeting]" in their shared office. *Id.* at
14 1816. He might also "yell out to go out and do more sales."
15 *Id.* at 1817.

16 In general, employees agreed, as Executive Vice
17 President Robert Zorn testified, that Catsimatidis "has
18 whatever privileges an owner of a company has" to "make
19 ultimate decisions as to how the company is run," and that
20 there was "no reason to believe that if he chose to make a
21 decision anybody there has the power to override him."
22 *Id.* at 1329. They also agreed that Catsimatidis has the

1 power to "shut down a store" or "sell a store if he felt
2 that was the appropriate thing to do." *Id.* at 1370.⁶

3 **b. Involvement with stores**

4 Although Catsimatidis did not exercise managerial
5 control in stores on the day-to-day level of a manager, the
6 evidence demonstrates that he exercised influence in
7 specific stores on multiple occasions. For example, he made
8 suggestions regarding how products are displayed in stores.
9 In general, he testified that he focused on "driv[ing]
10 sales, driv[ing] product, get[ting] more sales out of the
11 stores" through techniques such as "buying a Coca-Cola at
12 [the] right price, and [] put[ting] it on a front end
13 display at the right price." *Id.* at 1819.

⁶At oral argument and in its written decision, the district court placed substantial reliance on an affidavit that Catsimatidis submitted in a separate lawsuit, a trademark action brought by Trader Joe's Company after it found out about a Gristede's plan to re-open a former Gristede's store under the name "Gristede's Trader John's." The district court emphasized that the affidavit, which discussed the process by which Catsimatidis had come up with the idea, indicated that Catsimatidis has the power to "set prices for goods offered for sale," "select the decor for the stores," and "control any store's signage and advertising." *Torres III*, 2011 WL 4571792, at *1. Although the parties dispute the significance and admissibility of the affidavit, it is not necessary to our decision. The affidavit indicates that Catsimatidis had the power to open a new store that was generally intended to offer "items at prices materially lower than comparable items in our other Gristede[']s stores." Joint App'x 3752. This only underscores the implication of the evidence we have already discussed: that Catsimatidis possessed the ability to control Gristede's operations at a high level.

1 Catsimatidis testified specifically that "when [he]
2 used to go around the stores, [he] used to make comments to
3 the store managers about displays," telling them, for
4 example, "if you put up this product, you might sell \$100 a
5 week." *Id.* at 1828. He would make visits to "five or ten"
6 stores on Saturday mornings, staying about ten minutes in
7 each one. *Id.* He referred to these as "just [] goodwill
8 visit[s], merchandising, sales, what are we doing right,
9 what are we doing wrong, what can we do better." *Id.* at
10 1831-32. His deposition also contained the following
11 exchange:

12 Q: Why did you want to visit every store?

13
14 A: To check the merchandising.

15
16 Q: Can't the store managers take care of that
17 themselves?

18
19 A: If the store managers did it perfectly, then I
20 wouldn't have to visit the stores.

21
22 Q: But you have a level of trust in the store managers,
23 right?

24
25 A: You hope so, yes.

26
27 Q: Why do you think it was necessary for the president
28 of the company to go around to all these stores?

29
30 A: For the same reason Sam Walton went and visited his
31 stores.

32
33 Q: What reason is that?

1
2 A: You just get a better feeling for merchandising. Sam
3 Walton was a great merchandiser.
4

5 Q: On the Saturday morning visits to the stores, what
6 did you do?
7

8 A: I walked in, introduced myself to the manager, most
9 of them I knew, and just we would talk about
10 merchandising. I would say is this selling, is this
11 not selling, are you missing any products that you
12 think you should have? And I would - I felt I would
13 get input from store managers on merchandising
14 problems.
15

16 *Id.* at 1829-30.

17 Catsimatidis would also address problems that occurred
18 in individual stores. For example, he testified that if a
19 vendor called him and said there was a problem, "[m]aybe
20 that he was supposed to have a display and not have a
21 display," he would not get involved personally but would
22 refer the issue to Criscuolo. *Id.* at 1827. Catsimatidis
23 testified that "if a store didn't look clean, or if it was
24 very cluttered, [he] would make the comment about it . . .
25 to the store manager, and then follow up and say it to
26 [Criscuolo]." *Id.* at 1831. On one occasion, he went to a
27 store and was "annoyed" that a type of fish he tried to buy
28 was not in stock, so he "sent an e-mail to the meat
29 director, copy to his boss, . . . sent one to the store
30 manager, and sent one to the district manager." *Id.* at

1 1882. Catsimatidis commented that the emails were his
2 attempt to "bring[] it to their attention that the
3 department looked bad" and that he "would hope the
4 supervisor or the merchandisers would fix it." *Id.* at 1883.

5 Additionally, Catsimatidis testified that the company's
6 system automatically forwards him copies of any consumer
7 complaints, which he then forwards by email "to the
8 responsible parties . . . with a comment of 'What the hell
9 is happening?'" *Id.* at 1821. For example, he might forward
10 a complaint about a store being dirty, and he sent a
11 complaint about lids not fitting coffee cups to the deli
12 director. *Id.* He testified, "I figured if they think I
13 know about the problem, they'll work harder towards fixing
14 it." *Id.* at 1822. When asked why this was, he said, "I
15 guess they want to keep the boss happy, and I want to keep
16 the consumers happy," and that "one of my jobs is how to get
17 the consumers in our stores, and how to keep them in our
18 stores." *Id.* at 1823. He has directed similar complaints
19 to store managers. *Id.* at 1825.

20 Mitchell Moore, a former store manager, testified that
21 Catsimatidis asked him to get involved with a "reset" at a
22 particular store, meaning an effort to "change the store

1 around, move items around the store, allocation, bring in
2 new items." *Id.* at 1418. Moore also testified that
3 Catsimatidis, while walking through a store, might "want me
4 to change a display around or to make it fuller or to put a
5 different variety in there," or to "put signs on certain
6 items, give them a good deal on it" if he wanted Moore to
7 "push a particular item." *Id.* at 1421-22. Zorn said that
8 he had seen Catsimatidis go to stores for grand openings or
9 reopenings, "walk up and down the aisles . . . ask[]
10 questions about - you know, he sees a product that is new
11 and asks, you know - you know, who we buy that from and, you
12 know, comments on the store decor," although Zorn noted that
13 Catsimatidis was "there more in a PR capacity than a
14 management type capacity." *Id.* at 1352-53.

15 **c. The Carter factors**

16 The first element of the *Carter* test considers whether
17 the individual defendant "had the power to hire and fire
18 employees." *Barfield*, 537 F.3d at 142 (quotation marks
19 omitted). The evidence demonstrates that Catsimatidis
20 possesses, but rarely exercises, the power to hire or fire
21 anyone he chooses. He testified, "I guess I can fire the
22 people that directly report to me," which he said would

1 include "only maybe four or five" employees such as the COO
2 and CFO. Joint App'x 1863. He testified in 2005 that he
3 could not remember having fired anyone in five or six years.
4 *Id.* at 1862. In *RSR*, we emphasized that the hiring and
5 firing of "individuals who were in charge of [the plaintiff
6 employees] is a strong indication of control." *RSR*, 172
7 F.3d at 140.

8 Zorn testified that Catsimatidis had hired him and
9 "obviously would" have the authority to hire and fire
10 others, "but he doesn't get involved in that." Joint App'x
11 1338. For example, when Zorn was "involved in letting go
12 long-time employees for various reasons," he let
13 Catsimatidis know "as a courtesy" and fired the employees
14 even if Catsimatidis "wasn't happy about it." *Id.* at 1343.
15 On one occasion when both Zorn and Catsimatidis interviewed
16 a potential manager, Catsimatidis "was in favor of it but he
17 left the decision to" Zorn. *Id.* at 1342. Catsimatidis
18 promoted Deborah Clusan from director of payroll to director
19 of payroll and human resources. *Id.* at 476. He promoted
20 Moore to store manager from night manager. Moore testified
21 that Catsimatidis "came to speak with me, asked me what my
22 background was, . . . and then the next day the vice

1 president called me, and told me that I would be starting in
2 the Store 504 the next day." *Id.* at 1412, 1415. Moore,
3 like other employees, indicated that he "view[ed] Mr.
4 Catsimatidis as [his] boss" and that Catsimatidis would have
5 the power to fire a store employee. *Id.* at 1425-26.

6 The second *Carter* factor asks whether the individual
7 defendant "supervised and controlled employee work schedules
8 or conditions of employment." *Barfield*, 537 F.3d at 142
9 (quotation marks omitted). Plaintiffs overstate the
10 importance of the two pieces of evidence on which they rely
11 for this factor. Although they state in their brief that
12 Catsimatidis said he "has handled complaints from Gristede's
13 workers' union representatives 'every week for as long as I
14 could remember,'" Appellees' Br. at 39, this
15 mischaracterizes Catsimatidis's testimony; he stated that he
16 had not been personally involved in union negotiations or
17 discussions of problems, see Joint App'x 1802-03, 1812,
18 1876. Plaintiffs also assert that Catsimatidis "authorized
19 an application for wage subsidies and tax credits on behalf
20 of Gristede's employees." Appellees' Br. at 39. The
21 evidence reflects only that Catsimatidis signed the
22 application for tax credits to which Gristede's was entitled

1 for employing people "coming off of Social Services, off of
2 welfare." Joint App'x at 482-83. Moreover, plaintiffs do
3 not indicate how this affected their "work schedules or
4 conditions of employment." Although Catsimatidis's
5 involvement in the company and the stores as discussed above
6 demonstrates some exercise of operational control, it does
7 not appear to relate closely to this factor of the
8 *Carter* test.

9 The third factor asks whether the individual defendant
10 "determined the rate and method of payment." *Barfield*, 537
11 F.3d at 142 (quotation marks omitted). The district court
12 and plaintiffs emphasize the fact that Catsimatidis's
13 electronic signature appears on paychecks. This - like all
14 factors - is not dispositive. See *Gray*, 673 F.3d at 354.
15 Nonetheless, we held in *RSR* that "[t]he key question is
16 whether [the defendant] had the authority to sign paychecks
17 throughout the relevant period, and he did." *RSR*, 172 F.3d
18 at 140.

19 *RSR* also focused on the fact that the defendant
20 "controlled the company financially." *Id.* It is clear that
21 Catsimatidis possessed a similar degree of control. He
22 testified that he keeps track of "payroll" as "a line item

1 on accounting" and "a part of profit and loss," to know what
2 percentage of Gristede's sales and expenses payroll
3 comprises, but he does not get involved with individual
4 salaries or schedules. Joint App'x at 1834-35. Although he
5 did not speak to his managers "about people getting paid,"
6 *id.* at 1834, he knew that employees were paid on time
7 "[b]ecause the unions would have come down on us real hard"
8 if there was a problem. *Id.* at 1852. Catsimatidis
9 explained that he might also learn about a problem "[i]f I
10 walked down the aisle, and the employee saw me, they might
11 complain," although the official procedure for such
12 complaints involved the employees' union and store manager.
13 *Id.* at 1866-67. Catsimatidis set up a meeting between
14 lower-level managers and an outside payroll company, *id.* at
15 1452-53, and although he did not know specifically "if
16 George Santiago in the store got a paycheck that week," his
17 "rules are if somebody works, they get paid," *id.* at 469.
18 The district court also noted that Catsimatidis stated "in
19 open Court in this proceeding that he could shut down the
20 business, declare bankruptcy, as well as provide the
21 personal signature necessary for a bank letter of credit to
22 be issued in favor of Gristede's," *Torres III*, 2011 WL

1 4571792, at *1, which further demonstrates the kind of
2 financial control emphasized in *RSR*.

3 The fourth *Carter* factor asks whether the individual
4 defendant "maintained employment records." *Barfield*, 537
5 F.3d at 142 (quotation marks omitted). Plaintiffs offer
6 only that "Catsimatidis works in the same office where
7 employment records are kept" and promoted the payroll
8 director, Appellees' Br. at 41, essentially admitting that
9 Catsimatidis did not meet this factor. In sum, the evidence
10 - much of it Catsimatidis's own testimony - indicates that
11 Catsimatidis meets the first and third *Carter* factors.

12 **d. Totality of the circumstances**

13 There is no question that Gristede's was the
14 plaintiffs' employer, and no question that Catsimatidis had
15 functional control over the enterprise as a whole. His
16 involvement in the company's daily operations merits far
17 more than the symbolic or ceremonial characterization he
18 urges us to apply. Unlike the defendant in *Wirtz*, who
19 visited his company's facilities only a few times a year,
20 Catsimatidis was active in running Gristede's, including
21 contact with individual stores, employees, vendors, and
22 customers. Catsimatidis dealt with customer complaints, in-

1 store displays and merchandising, and the promotion of store
2 personnel. That he may have done so "only occasionally"
3 does not mean that these actions are irrelevant, see *RSR*,
4 172 F.3d at 139, especially when considered in the context
5 of his overall control of the company.

6 Although there is no evidence that he was responsible
7 for the FLSA violations - or that he ever directly managed
8 or otherwise interacted with the plaintiffs in this case -
9 Catsimatidis satisfied two of the *Carter* factors in ways
10 that we particularly emphasized in *RSR*: the hiring of
11 managerial employees, and overall financial control of the
12 company. See *id.* at 136-37, 140 (finding that the
13 individual defendant "exercised financial control over the
14 company" and "frequently" gave instructions to subordinate
15 managers); see also *Donovan v. Grim Hotel Co.*, 747 F.2d 966,
16 972 (5th Cir. 1984) (noting that the individual defendant
17 was the "'top man'" in a hotel company who "held [the
18 hotels'] purse-strings and guided their policies" and that
19 the hotels "speaking pragmatically, . . . functioned for the
20 profit of his family"). This involvement meant that
21 Catsimatidis possessed, and exercised, "operational control"
22 over the plaintiffs' employment in much more than a "but-

1 for" sense. His decisions affected not only Gristede's
2 bottom line but individual stores, and the personnel and
3 products therein.

4 We recognize that the facts here make for a close case,
5 but we are guided by the principles behind the liquidated
6 damages provision of the FLSA in resolving the impact of the
7 totality of the circumstances described herein. The Supreme
8 Court has noted that "liquidated damages as authorized by
9 the FLSA are not penalties but rather compensatory damages
10 'for the retention of a workman's pay which might result in
11 damages too obscure and difficult of proof for estimate
12 other than by liquidated damages.'" *Republic Franklin Ins.*
13 *Co. v. Albemarle County Sch. Bd.*, 670 F.3d 563, 568 (4th
14 Cir. 2012) (quoting *Brooklyn Sav. Bank v. O'Neil*, 324 U.S.
15 697, 707 (1945)); see also *Marshall v. Brunner*, 668 F.2d
16 748, 753 (3d Cir. 1982) (noting that liquidated damages "are
17 compensatory, not punitive in nature").

18 As counsel for *amicus curiae* the Secretary of Labor
19 explained at oral argument, the purpose of the FLSA is not
20 to punish an employer but to remunerate aggrieved employees.
21 Considered in the context of the expansive interpretation
22 that courts have afforded the statute, this policy reasoning

1 particularly counsels in favor of finding that Catsimatidis
2 was an "employer" given the failure of the settlement
3 between the corporate defendants and the plaintiff
4 employees. Catsimatidis was not personally responsible for
5 the FLSA violations that led to this lawsuit, but he
6 nonetheless profited from them. And although the Gristede's
7 Supermarkets business entity appears to have been larger
8 than other businesses discussed in the cases that have
9 considered this question, the company was not so large as to
10 render Catsimatidis's involvement a legal fiction. The
11 company is not public. Its stores, in which Catsimatidis
12 actively exercised his influence, are all in the New York
13 City metropolitan area, as are the company headquarters,
14 where he worked almost daily. In sum, as the district court
15 concluded, "it is pellucidly clear that he is the one person
16 who is in charge of the corporate defendant."⁷ *Torres III*,
17 2011 WL 4571792, at *3.

18

⁷The district court's decision indirectly referenced statements made by Catsimatidis in open court at a hearing on the settlement agreement to the effect that he was "here to speak for 1,700 employees that [sic] their jobs . . . on the line," that he "represent[ed] the 1,700 current employees," and that he was "their employer." Joint App'x 3594-95. We do not, of course, afford these statements weight as legal conclusions, but they are telling.

1 Although we must be mindful, when considering an
2 individual defendant, to ascertain that the individual was
3 engaged in the culpable company's affairs to a degree that
4 it is logical to find him liable to plaintiff employees, we
5 conclude that this standard has been met here.

6 Catsimatidis's actions and responsibilities - particularly
7 as demonstrated by his active exercise of overall control
8 over the company, his ultimate responsibility for the
9 plaintiffs' wages, his supervision of managerial employees,
10 and his actions in individual stores - demonstrate that he
11 was an "employer" for purposes of the FLSA.

12 **III. New York Labor Law**

13 The NYLL defines "employer" as "any person . . .
14 employing any individual in any occupation, industry, trade,
15 business or service" or "any individual . . . acting as
16 employer." N.Y. Lab. Law. §§ 190(3), 651(6). The
17 definition of "employed" under the NYLL is that a person is
18 "permitted or suffered to work." *Id.* § 2(7).

19 The district court granted partial summary judgment in
20 plaintiffs' favor on their NYLL claims, but neither its oral
21 nor its written decision contained any substantive
22 discussion of the issue. Plaintiffs assert that the tests

1 for "employer" status are the same under the FLSA and the
2 NYLL, but this question has not been answered by the New
3 York Court of Appeals. Defendants respond that corporate
4 officers cannot be held liable under the NYLL simply by
5 virtue of their status, but plaintiffs are arguing that
6 Catsimatidis should be held liable "not as [a] corporate
7 officer[] or shareholder[], but as [an] employer[]." See
8 *Chu Chung v. New Silver Palace Rest., Inc.*, 272 F. Supp. 2d
9 314, 318 (S.D.N.Y. 2003).

10 Plaintiffs also contend in their response brief that
11 "there is no need to also establish [Catsimatidis's] status
12 as an employer under state law" because the settlement
13 agreement establishes that he will be personally liable "'if
14 the Court holds John Catsimatidis to be an
15 employer'-period." Appellees' Br. at 41-42 (quoting
16 Settlement Agreement § 3.1(H)). Defendants do not respond
17 to this in their reply brief.

18 In light of the possible disagreement between the
19 parties regarding the need for us to decide this issue of
20 state law, and particularly in light of the absence of
21 discussion of the issue in the district court's decision, we
22 vacate the grant of summary judgment in plaintiffs' favor on

1 the NYLL claims and remand to the district court. The case
2 will return to the lower court in any event for a
3 determination of damages in light of our holding today; in
4 the process, the parties and the district court may
5 determine (1) whether the NYLL question requires resolution,
6 and (2) what that resolution should be.

7 **Conclusion**

8 We have examined all of Catsimatidis's arguments on
9 appeal and find them to be without merit. For the foregoing
10 reasons, the judgment of the district court granting partial
11 summary judgment in favor of plaintiffs is **AFFIRMED IN PART,**
12 **VACATED IN PART, AND REMANDED.**