



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

ORLANDO COLON and ADAM W. BARGY,
Complainants,

v.

GPA DEVELOPMENT CORPORATION, GPA
INVESTMENT CORPORATION, GRAIG ARCURI,
INDIVIDUALLY,

Respondents.

NOTICE AND
FINAL ORDER

Case No. 10122321 and
10122322

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on July 1, 2011, by Michael T. Groben, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENTS:

- Graig Arcuri was correctly added as an individual respondent in these proceedings pursuant to *MTA Trading, Inc. v. Kirkland*, 84 A.D.3d 811 (2d Dept.

2011), a matter with a similar procedural history.

- Further, Arcuri was properly added per the relation back doctrine. *See Rio Mar Rest. v. N.Y. State Div. of Human Rights*, 270 A.D.2d 47, 48 (1st Dept. 2000) (“The Division properly amended the complaint to add [Respondent] as an individual respondent since the amendment related back to the original complaint and did not prejudice him, the initial filing ... having placed him on notice that his personal conduct toward complainant was the underlying issue in the case”). The claims against Arcuri arose out of the same transactions or occurrences as those against Respondent GPA Development Corporation. Arcuri should have known, but for Complainants’ mistake in omitting him as a respondent, the proceeding would have been timely commenced against him as well. And, in his capacity as president of GPA Development, who was aware of the discrimination and failed to take remedial action, he was united in interest with GPA Development. The original complaints put him on notice that his own conduct might be at issue. *See Murphy v. Kirkland*, 88 A.D.3d 267, 276-77 (2d Dept. 2011). Arcuri has suffered no prejudice in this proceeding. He appeared for the February 28, 2011, hearing and defended against the complaints (Tr. 52-54, 58-63). Though he chose to appear without counsel, he had an opportunity to, and did cross examine witnesses (Tr. 9, 26, 30, 34-39, 44, 67). Arcuri offered no proof that he suffered any prejudice in not having originally been named. No attempt was made to demonstrate or articulate changed circumstance. No subpoenas were issued. No evidence was presented that any necessary witnesses were needed but unavailable. No proof of lost, missing or unattainable evidence was offered. *See*

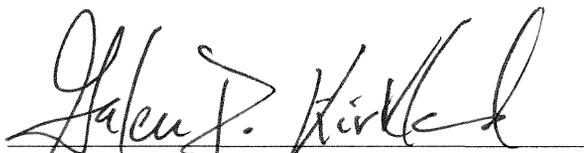
Campbell v. Coughlin, 1994 WL 114831, at *3 (S.D.N.Y. 1994) (“In order to show actual prejudice, defendants must demonstrate some undue disadvantage suffered by them in the presentation of the merits of their defense if the Court were to grant Plaintiff’s motion.” (citations omitted)). Indeed, Graig Arcuri fully participated in the hearing after he was named and failed to offer sufficient proof to defeat the claim.

In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: 2/1/12
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

ADAM W. BARGY and ORLANDO COLON,
Complainants,

v.

**GPA DEVELOPMENT CORPORATION,
GPA INVESTMENT CORPORATION,
GRAIG ARCURI, INDIVIDUALLY.**
Respondents.

**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case Nos. 10122322 and 10122321

SUMMARY

Complainants charge Respondents with unlawful discriminatory practices relating to employment. Complainants also allege that Respondents terminated their employment because they opposed discrimination in the workplace. The complaints are sustained as against Respondents GPA Development Corporation and Graig Arcuri, and Complainants are awarded damages. The complaints are dismissed with respect to Respondent GPA Investment Corporation.

PROCEEDINGS IN THE CASE

On December 20, 2007, Complainants each filed separate verified complaints with the New York State Division of Human Rights ("Division"), charging Respondent GPA Development Corporation with unlawful discriminatory practices relating to employment and retaliation in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law"). Both complaints were subsequently amended.

After investigation, the Division found that it had jurisdiction over both complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred both cases to public hearing.

After due notice, both cases came on for hearing before Michael T. Groben, an Administrative Law Judge (“ALJ”) of the Division. The public hearing session for both matters was held on August 25, 2009.

Both Complainants appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq. Respondent did not file an answer to either complaint and did not appear at the public hearing. ALJ Groben declared a default and proceeded to hear evidence in support of the complaints.

Permission to file post-hearing briefs was granted, and the Division timely filed proposed findings of fact and conclusions of law for both Complainants.

ALJ Groben found for Complainants and awarded damages in a Recommended Order dated December 31, 2009. The Recommended Order was adopted and issued by Commissioner Kirkland in a Notice and Final Order dated March 15, 2010.

A compliance hearing was held before ALJ Spencer D. Phillips on December 22, 2010. ALJ Phillips found that it was not feasible to proceed against Respondent GPA Development Corporation in court to enforce the Commissioner’s Order.

The Commissioner then issued a Notice of Reopening dated January 20, 2011, ordering that the matter be reopened pursuant to the Division's Rules of Practice, and amending the complaints and caption to include GPA Investment Corporation, and Graig Arcuri, individually, as Respondents. The Notice further directed that these cases be scheduled for a hearing in order to provide Respondent GPA Investment Corporation an opportunity to answer the charge that it

is a successor-in-interest to the originally named corporate Respondent, and to provide Respondent Graig Arcuri with an opportunity to examine witnesses and present evidence in defense of the merits of the complaint.

Pursuant to the Notice, a hearing was held on February 28, 2011 before ALJ Groben. Both Complainants appeared. The Division appeared by Richard Van Coevering, Esq. Respondents appeared pro se by Respondent Graig Arcuri.

At the public hearing, Arcuri moved to dismiss the charges against himself and Respondent GPA Investment Corporation. Decision on the motion was reserved.

Permission to file post-hearing briefs was granted. The Division and Respondents GPA Investment Corporation and Graig Arcuri filed proposed findings of fact and conclusions of law.

FINDINGS OF FACT

Respondents GPA Development and Graig Arcuri

1. Respondent GPA Development (“GPA Development”) was a construction company, with headquarters in Castleton-on-Hudson, New York. Complainant Orlando Colon (“Colon”), a Hispanic man, began work for GPA Development as a carpenter on or about December 6, 2006.

(ALJ's Exhibit 3; Tr. I 10-11, Tr. II 27)¹

2. Complainant Adam W. Bargy (“Bargy”), also a construction worker, began work for GPA Development on or about January, 2007. (Tr. I 40, Tr. II 19-21) I observed that Bargy is a Caucasian.

¹ The transcript of the proceedings of the August 25, 2009, hearing will be referenced as “Tr. I,” the transcript of the February 28, 2011, hearing will be referenced as “Tr. II.”

3. GPA Development failed to file an answer to either verified complaint. Despite being served with several hearing notices in each Complainant's case, GPA Development did not appear at the August 25, 2009, public hearing. These notices were sent to the address listed for GPA Development by regular mail. They were not returned, and are presumed to have been received. (ALJ's Exhibits 2, 3, 6, 7, 10; Tr. I 4-5)

4. In or about November of 2007, Colon and Bargy were employed by GPA Development at a worksite in Ithaca, New York (the "Ithaca project"). GPA Development rented rooms in a local hotel for its workers during this job. Colon shared a room with another worker, John Sitron ("Sitron"). (Tr. I 11-14, 41-42)

5. Colon's foreman was Doug Andross ("Andross"); Andross' supervisor was Bo Brennan ("Brennan"). (Tr. 10, Tr. II 20, 21, 24, 52) Respondent Graig Arcuri ("Arcuri") was GPA Development's president. (ALJ's Exhibit 2)

Hostile Work Environment-Sex; Retaliation

6. Andross had the responsibility of assigning GPA Development's workers to hotel rooms during the Ithaca project. (Tr. I 43)

7. Bargy was assigned to a room with Andross. On or about November 2, 2007, Andross permitted his new girlfriend "Jen", who was not employed by GPA Development, to sleep in the room. (Tr. 43-44). The next day, Bargy complained to Brennan about this; he then complained to Andross the following week. (Tr. I 44-45)

8. On or about November 6, 2007, the room assignments were changed so that Bargy shared a room with Sitron, and Colon shared a room with Andross. (Tr. I 14-15, 20-21, 45-46) Andross again allowed Jen to stay in the room overnight. That night, Andross and Jen began having sexual intercourse in the room in Colon's presence. Because he did not want to be present

in the room during this activity, Colon left the room and stayed in a neighboring room with Sitron and Bargy. (Tr. I 14, 15-16, 17-18, 46, 47)

9. The next day, Colon complained to Andross that keeping his girlfriend in the room was “not professional” and that Colon did not believe that his “stuff was secure” with her there. Andross told Colon that he would have to put up with it. (Tr. I 16, 18-19)

10. That same day, Colon also complained to Brennan about Jen’s presence in the room. Brennan advised that he would speak to Arcuri about the matter. (Tr. I 19-20)

11. Colon continued to stay with Sitron until on or about November 20, 2007. (Tr. I 21-22)

12. On or about November 20 or 21, 2007, Colon complained to Arcuri about Andross keeping his girlfriend in the room. Arcuri promised to take action regarding the situation but never did so. (Tr. I 20, 24)

13. After a brief vacation for Thanksgiving, Colon returned to work at the Ithaca project. He was assigned to share a room with Bargy and Andross, who again allowed Jen to sleep in the room. (Tr. I 22-23, 48-49)

14. Colon again complained to Andross and Arcuri, who again took no action to remove Jen from the room. (Tr. I 23-25, 26-27) Andross then stated to Bargy and Colon that Jen would leave in one more week. (Tr. I 25-26, 27, 51) Colon agreed to this because he felt he had "no choice" in the matter. However, after that week Jen continued to stay in the room. (Tr. I 26, 27-28, 51)

15. Complainants complained to Arcuri of the hostile work environment on several occasions. When Complainant Colon spoke to Arcuri the first time, Arcuri agreed to take action to resolve the situation. However, nothing was done to remove Jen. Colon again complained to

Arcuri, who promised to “get back to” him. Arcuri never did. (Tr. I 46-47, 49-50, 58-59, Tr. II 52-54, 61, 65-67)

16. On or about the night of December 19, 2007, Bargy and Colon were talking in their room. Jen was in the room, and was attempting to sleep. Jen was apparently angered by Bargy and Colon talking, and she left the room, slamming the door on her way out. (Tr. I 29, 52)

17. The next day, after Colon and Andross argued about whether Colon should allow Jen to use his coffee cup instead of Colon using it himself, Andross told Colon and Bargy that they were “inconsiderate” and fired them. (Tr. I 28-29, 40, 50-51, 52) I find that Bargy and Colon were fired by Andross because they had complained about being forced to sleep in the hotel room with Jen, and because Jen had complained to Andross about the December 19, 2007 incident.

18. Arcuri was informed of Complainants’ termination directly by telephone call from both Complainants, however, he did not take any action to reinstate them. (Tr. I 30-31, Tr. II 58-60, 61-62, 67)

Hostile Work Environment-Race/Color

19. During Colon’s employment with GPA Development, Andross routinely referred to him as a “fucking Puerto Rican.” Colon complained to Andross about this, but Andross continued to refer to him this way. When asked at the public hearing whether he had mentioned Andross’s name-calling to anyone or complained about it to anyone else, Colon at first denied that he had done so. When asked again, Colon claimed that he had complained to Brennan. (Tr. I 36-39) Colon’s testimony on this issue was contradictory.

20. During Colon’s employment with GPA Development, his relationship with his girlfriend suffered because when she telephoned him at the hotel, she could hear Jen and her

friends talking in the background and believed that Colon was unfaithful to her. As a result, she mistrusted him, their relationship deteriorated to the point that she left him, and he felt that he had "lost (his) family". (Tr. I 34-36)

21. Colon made \$15 per hour full time working for GPA Development, for a total of \$600 per week. (Tr. I 31) After leaving GPA Development's employ, Colon looked for work but was unable to find any. He collected unemployment benefits commencing in December 2007, at \$320 per week for approximately 21 weeks until in or about June of 2008. (Complainant's Exhibit 3; Tr. I 31-32)

22. Colon was then employed at Wright Remodeling starting in or about June of 2008, at a wage of \$11 per hour. (Tr. I 32-33) He was employed there until August of 2008, when he quit and went to work for Arrow Tech (sic), making \$15 per hour. After working at Arrow Tech for a few months, he resumed receiving unemployment compensation. (Tr. I 33-34)

23. Bargy made \$15.50 per hour full time while working for GPA Development, for a total of \$620 per week. After he was fired, Bargy looked for work but was unable to find any. (Tr. I 53) He then received unemployment benefits until approximately November of 2008, earning a total of approximately \$10,362 in unemployment payments during that period. (Complainant's Exhibit 2; Tr. I 54) He then began full-time employment with Summer Stream Storefront Remodeling. Bargy earned \$11.75 per hour working for Summer Stream. He quit that job after one week because he was required to stay in a motel room and refused to do so. (Complainant's Exhibit 1, 2; Tr. I 53-55, 56-57)

24. In late November 2008, Bargy worked for Rochester Dreams (sic) for approximately three to four weeks at a wage of \$15 per hour. (Tr. I 54-55) He then began working for John

Hollins at a wage of \$15 per hour. He was employed by John Hollins at the time of the hearing.
(Tr. I 55-56)

25. While Bargy was working for GPA Development, his girlfriend became aware that women were staying in his motel room. This caused difficulties between Bargy and his girlfriend. Since being fired by GPA Development, Bargy has been apprehensive about staying in motel rooms while at a job. (Tr. I 57-58)

Successor Corporation

26. Neither Bargy nor Colon received any payment from GPA Development pursuant to the award of damages of the Commissioner's March 15, 2010, Notice and Final Order. (Tr. II 25-26, 29)

27. Respondent GPA Development was a New York corporation. Its chief executive officer was Alla Arcuri, and its president was Respondent Arcuri. GPA Development was dissolved by the filing of a certificate of dissolution with the New York State Department of State on October 16, 2009. (Respondents' Exhibit 1A; Tr. II 4)²

28. Prior to its dissolution, GPA Development was a construction company. (Tr. II 46)

29. As president of GPA Development at the time of the initial August 25, 2009, public hearing, Arcuri received notice of that hearing and chose not to attend. Arcuri was not named as a Respondent at that time. (Tr. II 44-45)

² Exhibits introduced at the February 28, 2011, hearing will be denoted by an exhibit number and the letter "A."

30. Arcuri is the president of Respondent GPA Investment Corporation (“GPA Investment”). Its chief executive officer is Alla Arcuri. GPA Investment is a corporation of the state of Nevada, created on or about January 16, 2009. (Complainant's Exhibit 1A; Tr. II 4, 46-47)

31. Both Arcuri and GPA Investment filed verified answers to the amended complaints. (ALJ's Exhibits 5A, 6A)

32. GPA Investment was formed to manage properties in Nevada. It is not licensed to do business in New York, has no employees and is not currently active. GPA Investment has never done work similar to that engaged in by GPA Development. (Tr. II 46-48)

33. Both Bary and Colon were aware of certain assets held by GPA Development, including a trailer, a truck, and construction equipment. Neither one knew whether any of these assets were obtained by either Arcuri or GPA Investment upon the dissolution of GPA Development. (Tr. II 21-23, 27-30)

34. Arcuri credibly testified that the trailer and truck had been his personal property. He denied that either he or GPA Investment received any of GPA Development's assets, and further testified that GPA Development had no assets upon its dissolution. No evidence was presented to the contrary. (ALJ's Exhibit 4A; Tr. II 34, 45-46, 49-51)

OPINION AND DECISION

The Motion to Dismiss

Respondents GPA Investment and Arcuri move to dismiss the charges against them, due to the Division's failure to name them in the complaint within one year of the alleged discriminatory acts. With respect to Arcuri, he was aware of the discriminatory conduct, and he

was on notice of these proceedings. The fact that he chose not to retain counsel or to participate in the August 25, 2009 public hearing does not absolve him of potential responsibility for discriminatory conduct. GPA Investment also received notice, through its common ownership and management with GPA Development, of the proceedings. It is well settled that the Division has the authority and duty to determine the proper parties in a proceeding and to amend the complaint as appropriate. *MTA Trading Inc., v. Kirkland*, 84 A.D.3d 811, 922 N.Y.S.2d 488 (2d Dept. 2011); *Chansamone v. NRG Northeast AFF Service Inc.*, 2010 WL 2671784 (W.D.N.Y. 2010). The motion is denied.

Hostile Work Environment-Sex

Both Complainants allege that Respondents subjected them to discrimination because of sex by requiring them to stay in a hotel room with their foreman and his girlfriend. In making these allegations, Complainants present a claim of a hostile work environment. In order to sustain such a claim, each Complainant must demonstrate that he was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of his employment and create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Community Center v. N. Y. State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997). The fact that all of Respondents' employees and principals involved in the instant case were male, including the Complainants, does not obviate their claim. "The law forbids not only opposite-sex sexual harassment in the workplace, but same-sex harassment as well." *State Div. of Human Rights v. Stoute*, 36 A.D.3d 257, 263, 826 N.Y.S.2d 122, 126 (2d Dept. 1997).

In the instant case, Respondents required Complainants to stay in a room with their foreman and his girlfriend. On occasion, the couple engaged in sexual intercourse while Complainants were present in the room. The girlfriend frequently invited her female friends to the room. In addition to their concerns about the lack of privacy, the Complainants were also concerned that the girlfriend might steal from them.

The Human Rights Law prohibits behavior that is objectively and subjectively offensive, such that a reasonable person would find a conduct hostile or abusive, and such that the plaintiff did, in fact perceive it to be so. *Father Belle Community Center v. N. Y. State Div. of Human Rights*, 221 A.D.2d 44 at 50-51. Respondents' practice of forcing Complainants, as a condition of their employment, to reside in a hotel room with female strangers, particularly when the foreman and his girlfriend engaged in sexual intercourse in their presence, was objectionable, humiliating and degrading to Complainants. The evidence adduced at the hearing proved that Complainants had complained regarding these accommodations to their foreman, to their supervisor, and to Arcuri, to no avail. Respondents ignored Complainants' pleas for help. I find that Complainants were subjected to a hostile work environment.

Race/Color Discrimination

Complainant Colon's foreman routinely referred to him as a "fucking Puerto Rican", and Colon was discharged from his employment. Colon thereby has alleged both a racially discriminatory employment action, and also a hostile work environment.

In order to establish a prima facie case of racial discrimination in employment, a complainant must show that (1) he is a member of a protected class; (2) he was qualified to hold the position; (3) he was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to

an inference of discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

Complainant is a Hispanic man, and thus a member of a protected class, his testimony demonstrated that he was qualified to hold his position, and his termination from employment constitutes an adverse employment action. However, Complainant submitted no evidence connecting the insensitive remarks made by his foreman to his termination. His co-worker and fellow complainant Bargy, a Caucasian, was discharged along with him, and, it appears, for the same reason: he had objected to the presence of his foreman's girlfriend and her female friends in his hotel room. Colon failed to present any evidence that his termination was due to racial animus.

A racially hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 310, 786 N.Y.S.2d 382, 394 (2004).

Although the offensive remarks were made on a frequent basis, Complainant Colon did not show, or even allege, that these remarks interfered in any way with his job performance. In addition, the use of racial slurs and insults by a supervisor without the knowledge or acquiescence of the employer does not constitute an unlawful discriminatory practice actionable under the Human Rights Law. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 at 311. Colon's testimony as to whether or not he had ever complained to his foreman's supervisor Brennan regarding these remarks was contradictory and not credible. Colon failed to present a prima facie case of a racially hostile work environment.

Retaliation

In order to establish a prima facie case of retaliation, a complainant must show that (1) he engaged in activity protected by Human Rights Law § 296; (2) the respondent was aware that he participated in the protected activity; (3) he suffered from an adverse employment action, and, (4) there is a causal connection between the protected activity and the adverse action. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999) (citing *Fair v. Guiding Eyes for the Blind*, 742 F. Supp. 151, 154 (S.D.N.Y. 1990); *Matter of Town of Lumberland v. New York State Div. of Human Rights*, 229 A.D.2d 631, 636, 644 N.Y.S.2d 864, 869 (3d Dept. 1996).

Colon's claim of retaliation due to race/color discrimination and a racially hostile working environment fails because, as set forth above, he failed to present convincing proof that he had engaged in a protected activity by notifying Respondents of his foreman's discriminatory remarks.

The retaliation claims of both Complainants for sex discrimination are sustained. Complainants' employment was terminated, an adverse job action, thus satisfying the third prong cited in *Pace, supra*. In order for a complainant to prevail in a retaliation claim, it is not necessary to prove that the practice complained of was, in fact, unlawful and discriminatory. However, a complainant must demonstrate a reasonable belief that respondent committed an unlawful discriminatory practice in order to make out a claim for retaliation. *Edwards v. Board of Trustees.*, 254 A.D.2d 709, 677N.Y.S.2d 868 (4th Dept. 1998); *New York State Office of Mental Retardation and Developmental Disabilities v. New York State Div. of Human Rights*, 164 A.D.2d 208, 563 N.Y.S.2d 286 (3d Dept. 1990). The reasonableness of the complainant's belief is to be assessed in light of the totality of the circumstances. *Galdieri-Ambosini v. National*

Realty & Development Corp., 136 F.3d 276 (2d Cir.1998).

As set forth above, Complainants were subjected to a hostile work environment. Implicit in the requirement that the employer have been aware of the protected activity is the requirement that it understood, or could reasonably have understood, that the conduct complainants opposed was prohibited by the statute. *Id at 291*. In the instant case, the Complainants made it known to their employer on several occasions that they objected to the presence of female strangers in their hotel room. Respondents' practice of forcing their employees to sleep in a room with strangers of the opposite sex is so clearly objectionable to a person of normal sensibilities that Respondents could and should reasonably have recognized that the practice was discriminatory and in violation of the law.

Respondent Arcuri was president of GPA Development, and the record demonstrates that he was involved in its operations on a day-to-day basis. Arcuri received notice of the discriminatory behavior, and took no effective measures to stop it. When Complainant Colon informed him that the discriminatory behavior was continuing, he promised to get back to Complainant, but never did. When notified by the Complainants that they had been fired, he took no action to reinstate them or to otherwise ameliorate the harm inflicted on them by Respondents' retaliatory action. As owner and president of GPA Development, Arcuri is individually liable for the discrimination and retaliation. *Patrowich v. Chemical Bank*, 63 N.Y2d 541, 483 N.Y.S.2d 659(1984). The claim against Respondent Arcuri is sustained, and damages are awarded.

Successor Corporation

The test for successor liability developed by the federal courts in employment discrimination cases under title VII is appropriate in this case. *Forrest v. Jewish Guild for the*

Blind, 3 N.Y.3d 295, 305 [n. 3], 786 N.Y.S.2d 382 (2004); *MTA Trading Inc., v. Kirkland*, 84 A.D.3d 811, 922 N.Y.S.2d 488 (2nd Dept. 2011).

The courts have identified nine factors that may be considered in determining whether to impose successor liability: (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there is been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether the new employer uses the same or substantially the same workforce, (6) whether the new employer used the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether the new employer uses the same machinery, equipment and methods of production and (9) whether the new employer produces the same product. *MTA Trading Inc.*, 84 A.D.3d 811, quoting *Equal Employment Opportunity Commission v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 at 1094 (6th Cir. 1974).

In the instant case, GPA Investment clearly had notice of the charge because it shared its president and executive officer with GPA Development. It does not appear that GPA Development is able to provide relief because it is defunct, and there was no evidence of ongoing operations. With respect to the last seven of the nine factors, however, there was no proof that GPA Investment continued the business operations of the defunct corporation, or that it shared anything in common with GPA Development, other than the owner and officer as noted above. The proof adduced at the public hearing did not demonstrate that GPA Investment was a successor corporation to GPA Development, and the claim is dismissed with respect to GPA Investment.

Damages

A complainant is entitled to recover compensatory damages for mental anguish caused by

a respondent's unlawful conduct. In considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record and comparable to awards for similar injuries. *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

Because of the “strong antidiscrimination policy” of the Human Rights Law, a complainant seeking an award for pain and suffering “need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision.” *Batavia Lodge v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, “(m)ental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct.” *New York City Transit Authority v. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). The severity, frequency, and duration of the conduct may be considered in fashioning an appropriate award. *New York State Department of Correctional Services v. New York State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

In the absence of medical testimony or extensive lay testimony regarding Complainants’ emotional distress and humiliation, each is awarded the sum of \$4,000 as an amount which is reasonably related to Respondents’ discriminatory conduct, and consistent with case law. *Quality Care, Inc. v. Rosa*, 194 A.D.2d 610, 599 N.Y.S.2d 65 (2d Dept. 1993) (award could not exceed \$5,000 in the absence of, among other things, any medical treatment); *Club Swamp Annex v. White*, 167 A.D.2d 400, 561 N.Y.S.2d 609 (2d Dept. 1990) (\$5,000 award based solely on the victim's testimony).

The Human Rights Law provides various remedies to restore victims of unlawful discrimination to the economic position that they would have held had their employers not

subjected them to unlawful conduct. Human Rights Law § 297.4(c). Awards of back pay compensate a complainant for any loss of earnings and benefits sustained from the date of the adverse employment action until the date of the verdict. *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403 (S.D.N.Y. 1996). An award of pre-determination interest of 9 per cent per annum, accruing from a reasonable intermediate date, complements the back pay award and is appropriate. *Aurecchione v. New York State Div. of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002).

The record demonstrates that Colon was paid \$15 per hour as a full-time employee. There was no testimony regarding overtime. Assuming a 40 hour week, his weekly wage would have been \$600. After Respondents fired him, Colon received unemployment benefits for approximately 21 weeks or until about June, 2008, and during that period earned \$320 per week, or \$280 less per week than he would have while working for Respondents, for total damages of \$5,880. From June through July 2008 he earned \$11 per hour at another employer, four dollars per hour less than he earned while working for Respondents, or \$440 per week. Colon's damages for this eight week period total \$1,280. In August 2008, Colon found comparable full-time employment. His total lost wages are \$7,160.

Bargy earned \$15.50 per hour while working for Respondents. There was no testimony regarding overtime. Assuming a 40 hour week, his weekly wage would have been \$620. After Respondents fired him, Bargy earned a total of \$10,362 in unemployment compensation before finding work in November of 2008. Thus, his lost wages for the period of January through October 2008 (approximately 40 weeks at \$620 per week) total some \$24,800. Deducting his unemployment compensation benefits from that, yields a total figure for lost wages between January and November 2008 of \$14,438. In November 2008, Bargy worked for approximately

one week at an hourly wage of \$11.75 (\$3.25 per hour less than he had been making while working for Respondents) and his lost wages for that 40 hour week total \$130. Later that month, he found employment at \$15 an hour, approximately the same wages he earned while working for Respondent. Bargy's total lost wages are \$14,568.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the complaint against Respondent GPA Investment Corporation is dismissed because it is not a successor in interest to Respondent GPA Development Corporation; and

IT IS FURTHER ORDERED, that Respondents GPA Development Corporation and Graig Arcuri, are proper Respondents; and

IT IS FURTHER ORDERED, that Respondents GPA Development Corporation and Graig Arcuri, their agents, representatives, employees, successors, assigns, shall cease and desist from discriminatory practices in employment; and

IT IS FURTHER ORDERED, that Respondents GPA Development Corporation and Graig Arcuri shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay Complainant Colon the amount of \$7,160 as an award of back pay. Respondents shall also pay Complainant Bargy the amount of \$14,568 as an award of back pay. Respondents shall pay pre-judgment interest on said awards at the rate of nine (9) percent per annum from reasonable intermediate dates as follows: April 15, 2008 for Complainant Colon, and June 1, 2008 for Complainant Bargy, in accordance with C.P.L.R. 5004;

2. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay Complainant Colon, as an award of compensatory damages for mental pain and suffering, the sum of \$4,000. Respondents shall also pay Complainant Bargy, as an award of compensatory damages for mental pain and suffering, the sum of \$4,000. Respondents shall pay interest on said awards at the rate of nine (9) percent per annum from the date of the Commissioner's Order, in accordance with C.P.L.R. § 5002;
3. Respondents shall pay post-judgment interest in accordance with C.P.L.R. § 5002;
4. The aforesaid payments shall be made by Respondents in the form of certified checks made payable to the order of each Complainant and delivered by certified mail, return receipt requested, to the New York State Division of Human Rights, Attn: Richard J. Van Coevering, Esq., Walter J. Mahoney State Office Building, 65 Court St., Suite 506, Buffalo, NY 14202;
5. Respondents shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: June 29, 2011
Bronx, New York

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end.

Michael T. Groben
Administrative Law Judge