Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **VENANCIO CORDOVA,** Complainant, v. **TRIPLE S CONTRACTORS, CORP., MICHAEL SACKARIS,** Respondents.	**NOTICE AND FINAL ORDER** Case No. 10175817

Federal Charge No. 16GB503130

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 May 31, 2017, by Robert M. Vespoli, 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 HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). 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: JUL 24 2017
Bronx, New York

HELEN DIANE FOSTER
COMMISSIONER

Division of
Human Rights

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **VENANCIO CORDOVA,** Complainant, v. **TRIPLE S CONTRACTORS, CORP., MICHAEL SACKARIS,** Respondents.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case No. **10175817**

SUMMARY

Complainant alleged that Respondents subjected him to unlawful discrimination in the workplace based on his race and national origin. Respondents defaulted, and an inquest was held. Complainant has proven his claim of discrimination, and he is awarded damages. A civil penalty is also assessed against Respondents.

PROCEEDINGS IN THE CASE

On July 1, 2015, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent Triple S Contractors, Corp. ("Triple S") with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

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

After due notice, the case came on for hearing before Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on August 29, 2016, November 9, 2016, and January 11, 2017.

On August 29, 2016, Complainant appeared for the public hearing. The Division appeared by Sandrea S. Oneil, Esq., Senior Attorney. Respondent Triple S did not appear. The presiding ALJ adjourned the public hearing until November 9-10, 2016, to allow Ms. Oneil time to prepare and serve an amendment to the complaint adding Respondent Michael Sackaris as an individual Respondent. (Tr. 6-8)

On November 9, 2016, Complainant and Ms. Oneil appeared for the scheduled public hearing. Respondents did not appear. At that time, service of said amendment to the complaint had not been completed. (Tr. 16) The presiding ALJ adjourned the public hearing until January 11-12, 2017. (Tr. 17)

On November 17, 2016, Ms. Oneil prepared and served the amendment to the complaint adding Respondent Sackaris as an individual Respondent. (Tr. 28; ALJ's Exh. 3)

On December 29, 2016, the Division duly served a Notice of Hearing on all parties containing the complaint and all amendments to the complaint. This document notified the parties of the date, time, and location of the public hearing scheduled for January 11-12, 2017. (Tr. 28; ALJ's Exh. 7)

On January 11, 2017, Complainant and Ms. Oneil appeared for the public hearing. Respondents did not appear. A default was entered, and an inquest was held. (Tr. 32)

Respondents had notice of the public hearing as the Notice of Hearing dated December 29, 2016, was duly served on them via the U.S. Postal Service. None of these documents were returned to the Division, and they are presumed to have been delivered. (Tr. 28-30; ALJ's Exh. 7)

The parties did not submit post-hearing briefs.

FINDINGS OF FACT

1. Complainant is Hispanic; his country of origin is Guatemala. (Tr. 46; ALJ's Exh. 1)

2. In or about April 2012, Respondent Sackaris hired Complainant to work for Respondent Triple S as a construction worker. (Tr. 35-36)

3. During the time that Complainant worked for Respondents, Respondent Sackaris was the owner of Respondent Triple S. (Tr. 40-41; ALJ's Exh. 1)

4. Complainant worked for Respondents at their office located at 601 Portion Road, Lake Ronkonkoma, New York. (Tr. 39; Complainant's Exh. 1)

5. Respondents initially paid Complainant $18.00 per hour. Shortly after Complainant began working for Respondents, they increased his pay to $20.00 per hour. (Tr. 37)

6. Complainant worked with many Hispanic co-workers, who were from different countries. (Tr. 44-46)

7. Complainant also worked with Caucasian co-workers, who were from the United States of America. (Tr. 45, 47)

8. Respondents paid Complainant's Caucasian co-workers their wages before they paid Complainant and his Hispanic co-workers their wages. (Tr. 48-51, 58)

9. Complainant did not receive overtime pay when he worked more than forty hours per week. (Tr. 51)

10. Complainant did not know whether his Caucasian co-workers received overtime pay when they worked more than forty hours per week. (Tr. 51)

11. Unlike his Caucasian co-workers, Complainant and his Hispanic co-workers consistently had a running balance of wages owed to them by Respondents. (Tr. 48-51)

12. Complainant kept his own records of the hours he worked and the back wages owed to him by Respondents. (Tr. 51-52; Complainant's Exh. 7)

13. By July 2014, Respondents had paid Complainant all of the back wages owed to him. (Tr. 70; Complainant's Exh. 6)

14. On or about August 14, 2014, Respondents again began to accrue back wages owed to Complainant. These back wages continued to accrue until the time Complainant stopped working for Respondents. (Tr. 70-71, 93; Complainant's Exh. 6)

15. On or about December 5, 2014, Complainant spoke to Respondent Sackaris about payment for the back wages owed to him. Respondent Sackaris assured Complainant that he was going to pay him on December 12, 2014. (Tr. 94-95)

16. On December 12, 2014, Respondents owed Complainant $3,640.00 in back wages. (Tr. 61, 68, 72)

17. On December 12, 2014, Complainant insisted that Respondent Sackaris pay him his back wages. Complainant told Respondent Sackaris that, unless he received payment for his back wages, he could not provide for his family and would have to find another job. (Tr. 71)

18. Respondent Sackaris told Complainant that he could not pay him. (Tr. 72)

19. On December 12, 2014, Complainant stopped working for Respondents. (Tr. 72)

20. On December 17, 2014, Complainant contacted Respondent Sackaris and requested payment for his back wages. Respondent Sackaris denied this request. (Tr. 72, 96; ALJ's Exh. 1)

21. Respondents also owed back wages to Complainant's Hispanic co-workers. Because Respondents did not pay these workers their back wages, many of them also stopped working for Respondents. (Tr. 44-45, 98)

22. From December 12, 2013, through December 12, 2014, Complainant worked an average of about thirty-nine hours per week. (Complainant's Exhibits 5, 6, 7)

23. One week after Complainant left Respondents' employ, he began working temporary jobs. (Tr. 75-76)

24. From the date Complainant left Respondents' employ, until the final date of the public hearing, Complainant earned between $300.00 and $600.00 per week working temporary jobs. Complainant could not provide any detailed information about his earnings after he left Respondents' employ. (Tr. 75-77)

25. During his employment with Respondents, Complainant and his co-workers often drove Respondents' work van. (Tr. 80-81)

26. Complainant received several traffic tickets while driving Respondents' work van. (Tr. 77, 79, 88)

27. Although Respondent Sackaris told Complainant he would help him pay the costs associated with these tickets, Respondent Sackaris did not do so. (Tr. 77-78, 83, 86, 88-89)

28. Complainant did not know whether Respondents reimbursed his Caucasian co-workers

when they received traffic tickets. (Tr. 81)

29. As a result of Respondents' actions toward him, Complainant felt "a lot of pressure" and had difficulty sleeping. Complainant, who had been a dedicated and loyal employee, also felt betrayed because Respondents treated him so poorly. (Tr. 89-90)

OPINION AND DECISION

Respondents had notice of the public hearing as the Notice of Hearing dated December 29, 2016, was duly served on them via the U.S. Postal Service. These documents were not returned to the Division, and they are presumed to have been delivered.

Respondents failed to appear before the Division to defend against the complaint. Respondents defaulted pursuant to 9 N.Y.C.R.R. § 465.11(e). The hearing proceeded on the evidence in support of the complaint pursuant to 9 N.Y.C.R.R. § 465.12(b)(3).

It is unlawful for an employer to discriminate against an employee on the basis of race or national origin. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). Complainant has the burden of establishing a prima facie case by showing that he is a member of a protected group, that he was qualified for the position he held, that he suffered an adverse employment action, and that Respondents' actions occurred under circumstances giving rise to an inference of unlawful discrimination. Once a prima facie case is established, the burden of production shifts to Respondents to rebut the presumption of unlawful discrimination by clearly articulating legitimate, nondiscriminatory reasons for their employment decision. The burden then shifts to Complainant to show that Respondents' proffered explanations are a pretext for unlawful discrimination. *See Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 629-30, 665 N.Y.S.2d 25, 29 (1997).

Complainant has established a prima facie case of discrimination based on race and national origin. Complainant is a member of protected classes because he is Hispanic. The fact that Complainant is Hispanic encompasses the protected classes of both race and national origin. *See Vill. of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016). Complainant is qualified to work as a construction worker, a position he held with Respondents for more than two and a half years.

Complainant suffered an adverse employment action when Respondents refused to pay him his wages and subjected him to a constructive discharge. In order to establish a claim of constructive discharge, Complainant must show that Respondents deliberately made his working conditions so intolerable that a reasonable person in his position would have felt compelled to resign. *See Lambert v. Macy's East, Inc.*, 84 A.D.3d 744, 746, 922 N.Y.S.2d 210, 212 (2d Dept. 2011). Respondents intentionally refused to pay Complainant his wages. As the balance Respondents owed Complainant continued to accrue, Complainant asked Respondent Sackaris to pay him his back wages. On December 12, 2014, Complainant told Respondent Sackaris that, unless he received payment for his back wages, he could not provide for his family and would have to find another job. Respondent Sackaris refused to pay Complainant, and Complainant stopped working for Respondents. Under these circumstances, a reasonable person would feel compelled to resign.

Finally, Complainant established an inference of unlawful discriminatory intent by showing that similarly situated Caucasian co-workers were treated more favorably. *See Washington County. v. New York State Div. of Human Rights*, 7 A.D.3d 895, 896, 776 N.Y.S.2d 650, 651 (3d Dept. 2004). Respondents paid Complainant's Caucasian co-workers their wages before they paid Complainant and his Hispanic co-workers their wages. Unlike his Caucasian

co-workers, Complainant and his Hispanic co-workers consistently had a running balance of wages owed to them by Respondents.

Accordingly, Complainant has established a prima facie case of discrimination based on race and national origin.

Respondents defaulted and did not meet their burden of coming forward with legitimate, nondiscriminatory reasons for their employment actions. Therefore, there is no need to proceed with an analysis of pretext. Accordingly, Complainant's claim of unlawful discrimination must be sustained.

Respondent Sackaris, who hired Complainant and held himself out to be the owner of Respondent Triple S, was the perpetrator of the unlawful discrimination and is individually liable along with Respondent Triple S. *See Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 543-44, 483 N.Y.S.2d 659, 661 (1984); *State Div. of Human Rights v. Koch*, 60 A.D.3d 777, 777-78, 875 N.Y.S.2d 180, 181 (2d Dept. 2009).

The Division is granted broad discretionary powers to redress an injury by way of an award of reasonable compensatory damages. *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 79, 436 N.Y.S.2d 231, 235 (1980). However, the award must bear a reasonable relationship to the wrongdoing, be supported by substantial evidence, and be comparable to awards for similar injuries. *State of New York v. New York State Div. of Human Rights*, 284 A.D.2d 882, 884, 727 N.Y.S.2d 499, 501 (3d Dept. 2001).

Complainant is entitled to compensation for back pay. On December 12, 2014, the date of Complainant's constructive discharge, Respondents owed Complainant $3,640.00 in back wages. When Complainant left Respondents' employ, he was earning an average of about $780.00 per week (i.e., 39 hours x $20 per hour). Had Complainant continued working for

Respondents until the final date of the public hearing, he would have earned approximately $85,020.00 ($780.00 x 109 weeks). Therefore, Complainant's gross lost wages are $88,660.00 ($85,020.00 + $3,640.00).

One week after Complainant separated from Respondents' employ, he began working temporary jobs. Complainant continued to do this until the final date of the public hearing. During the post-separation time period, Complainant mitigated his damages by earning between $300.00 and $600.00 per week. Because Complainant could not provide any detailed information about his post-separation earnings, it is reasonable to limit his recovery by using the high end of the mitigation range. Therefore, Complainant's post-separation earnings are valued at $64,800.00 ($600.00 x 108 weeks). Subtracting this amount from Complainant's gross lost wages leaves a net loss of $23,860.00 ($88,660.00 - $64,800.00). Complainant is entitled to interest on this back pay amount from December 28, 2015, a "reasonable intermediate date." *Aurecchione v. New York State Div. of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002); CPLR § 5001(b).

The record does not show that Respondents treated Complainant differently than similarly situated co-workers outside of his protected classes with regard to the payment of overtime and the reimbursement of costs associated with traffic tickets. Therefore, Complainant cannot recover damages for these claims in this forum.

Complainant is also entitled to recover compensatory damages for mental anguish caused by Respondents' 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 anti-discrimination 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 No. 196 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 Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991).

As a result of Respondents' actions toward him, Complainant felt "a lot of pressure" and had difficulty sleeping. Complainant was a dedicated and loyal employee; he felt betrayed because Respondents treated him so poorly. The record contains no proof of the duration, severity, or consequences of Complainant's condition. Accordingly, the Division finds that an award of $4,000.00 for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See Niagara Falls v. New York State Div. of Human Rights*, 94 A.D.3d 1442, 1444, 943 N.Y.S.2d 321, 323 (4th Dept. 2012) ("Absent any further evidence of mental anguish and humiliation, and absent testimony or evidence concerning the depth thereof experienced by complainant, we conclude that the maximum amount that may be awarded for mental anguish and humiliation is $4,000.").

Human Rights Law § 297.4(e) requires that "any civil penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article." The additional factors that determine the appropriate amount of a civil penalty are the goal of deterrence, the nature and circumstances of the violation, the degree of Respondents' culpability, any relevant

history of Respondents' actions, Respondents' financial resources, and other matters as justice may require. *See Gostomski v. Sherwood Terrace Apartments*, DHR Case Nos. 10107538 and 10107540 (November 15, 2007), *aff'd*, *Sherwood Terrace Apartments v. New York State Div. of Human Rights*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009).

Human Rights Law § 297.4(c)(vi) authorizes the Division to assess civil fines and penalties, "in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious."

A civil penalty is appropriate in this matter. The record shows that Respondents intentionally withheld wages from Complainant because of his race and national origin. Respondents' actions were deliberate, resulted in Complainant's constructive discharge, and caused economic and emotional harm to Complainant.

It is also noted that Respondents have demonstrated no remorse and have chosen not to participate in Division proceedings.

There is nothing in the record showing that Respondents were adjudged to have committed any previous, similar violation of the Human Rights Law or that they are incapable of paying a penalty.

To vindicate the public interest and deter future violations of the Human Rights Law, a civil penalty of $10,000.00 is appropriate in this case.

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 Respondents, and their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and

IT IS FURTHER ORDERED, that Respondents shall take the following actions 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 an award of lost wages in the amount of $23,860.00. Interest shall accrue on the award at the rate of nine (9) percent per annum from December 28, 2015, a reasonable intermediate date, until the date payment is actually made by Respondents;

2. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay Complainant an award of compensatory damages for mental anguish and humiliation in the amount of $4,000.00. Interest shall accrue on the award at the rate of nine (9) percent per annum from the date of the Commissioner's Order until payment is actually made by Respondents;

3. The aforesaid payments to Complainant shall be made by Respondents in the form of a certified check made payable to the order of Complainant, Venancio Cordova, and delivered by certified mail, return receipt requested, to Sandrea S. Oneil, Esq., Senior Attorney, New York State Division of Human Rights, 50 Clinton Street, Room 301, Hempstead, New York 11550. Respondents shall furnish written proof to Caroline Downey, Esq., General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of their compliance with the directives contained within this Order;

4. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay a civil penalty to the State of New York in the amount of $10,000.00 for having violated the Human Rights Law. Payment of the civil penalty shall be made in the form of a certified check, made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, Esq., General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Interest shall accrue on this award at the rate of nine (9) percent per annum from the date of the Commissioner's Order until payment is actually made by Respondents;

5. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall prominently post a copy of the Division's poster (available at the Division's website at www.dhr.ny.gov) in their place of business where employees are likely to view it. Respondents shall also promulgate policies and procedures for the prevention of unlawful discrimination in accordance with the Human Rights Law. Respondents shall provide proof of the aforementioned to the Division upon written demand; and

6. Respondents shall cooperate with representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: May 31, 2017
Hauppauge, New York

Robert M. Vespoli
Administrative Law Judge