ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of MELISSA FULLER, Complainant, v. LEVEL ACRES MARKET, INC., LEVEL ACRES LLC, KEVIN CLARK, OWNER, Respondents.	**NOTICE AND FINAL ORDER** Case No. 10146695

Federal Charge No. 16GB101778

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 June 6, 2013, 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 AMENDMENT:

- Considering the goal of deterrence, the nature and circumstances of the violation,

the degree of Respondents' culpability, and Respondents' financial resources, $20,000 is a more appropriate civil fine and penalty. *See Noe v. Kirkland*, 101 A.D.3d 1756, 1758 (4th Dept. 2012) ($20,000 civil fine and penalty confirmed); *Div. of Human Rights v. Stennett*, 98 A.D.3d 512, 514 (2d Dept. 2012) ($25,000 civil fine and penalty confirmed). Respondents shall be jointly and severally liable. Within 60 days of the date of this Order, Respondents shall pay the sum of $20,000 as a civil fine and penalty, by certified check payable to "State of New York" and delivered by certified mail, return receipt requested, to State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, NY 10458, attn: Caroline Downey, General Counsel. Interest shall accrue on this award at a rate of nine percent per annum from the date of this Order until full payment is made. The remainder of the Recommended Order is fully adopted hereby and made the Final Order of the Division.

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, <u>within sixty (60) days after service of this Order</u>. 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: 7/17/13
Bronx, New York

GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS on the Complaint of **MELISSA FULLER,** Complainant, v. **LEVEL ACRES MARKET, INC., LEVEL ACRES LLC, KEVIN CLARK, OWNER,** Respondents.	**RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER** Case No. **10146695**

SUMMARY

Complainant alleges that Respondent subjected her to sexual harassment in the workplace, and that Respondent terminated Complainant's employment in retaliation for Complainant's practice of documenting the sexual harassment. Respondent denies these allegations. Complainant has proven her case regarding sexual harassment, and damages are awarded. Complainant has failed to prove retaliation, and that claim is dismissed.

PROCEEDINGS IN THE CASE

On March 3, 2011, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents 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 Respondents 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on February 8 and 9, 2012, and May 10 and 11, 2012.

Complainant and Respondents appeared at the hearing. Complainant was represented by Raymond W. Bulson, Esq., and Joseph Miller, Esq. Respondents were represented by Kenneth C. Hyland, Esq.

On February 9, 2012, during the second day of the public hearing, the parties advised ALJ Groben that the matter had been settled. Subsequent communications from counsel to the ALJ indicated that the settlement had failed. The hearing resumed, and was completed on May 10 and 11, 2012.

Permission to file post-hearing briefs was granted, and both parties filed proposed findings of fact and conclusions of law. At the hearing, the parties stipulated to post-hearing submissions regarding the issue of the computer software system used by Respondent Level Acres LLC. Complainant's counsel submitted a letter dated July 19, 2012, and an affidavit of counsel with annexed documents, dated July 26, 2012. Respondents' counsel submitted a letter dated July 19, 2012 and a letter dated July 31, 2012. These post-hearing submissions were received and considered by the ALJ. (Tr. 754-57)

On May 17, 2012, after the close of the hearing, Complainant's attorney submitted an affidavit from Melanie Ingalls, a witness at the hearing. Complainant sought to have that document received in evidence against Respondents. By letter dated May 24, 2012,

Respondents' counsel opposed Complainant's request. By letter dated June 1, 2012, the ALJ denied Complainant's request.

FINDINGS OF FACT

1. Respondent Kevin Clark ("Clark") is the sole owner and member of Respondent Level Acres, LLC (the "LLC"). (Tr. 367, 631, 703-04)

2. The LLC owns and operates a mobile home park, comprised of approximately 156 units, at its premises in Wellsville, New York. The mobile home park's operations include a laundromat and golf driving range. (Tr. 14-15, 292, 703-05, 845)

3. Clark is the sole shareholder and president of Respondent Level Acres Market, Inc. (the "Market"). (Tr. 367, 703, 704-05)

4. Since August 12, 2010, the Market has operated a convenience store located on the premises of the LLC. The Market leases the convenience store premises from the LLC. (Tr. 15, 19, 73, 704-05, 810-11, 816-17, 832)

5. The LLC office and the Market store are in separate structures, approximately 100 yards from each other. (Tr. 17, 291-92, 420, 542-44, 717, 813) Office functions for the Market are generally conducted in the office of the LLC. (Tr. 17)

Respondents and Their Employees

6. Complainant was employed as the office manager of the LLC from on or about February 2, 2010, to January 28, 2011. (Tr. 14, 76, 263-64, 286, 705, 707-08)

7. Complainant's duties involved general managerial duties regarding the trailer park, accepting rent payments and evicting tenants. Clark was her supervisor. (Tr. 14, 15-16, 76-77, 286)

8. Complainant was also responsible for entering maintenance and repair requests from tenants of the LLC on a computer located in the LLC office. This information was entered using a commercial, server-based software program known as "Rent Manager," which recorded the requests in the order in which they were received, including such information as the tenant name, nature of the request, and date. The requests were then referred to the LLC's maintenance personnel. (Tr. 19-20, 161-62, 604-05, 744-46, 753, 834)

9. Between August 2010 and January 28, 2011, Complainant worked at the Market on approximately 20 occasions, at Clark's direction. Complainant paid bills, arranged for the Market payroll, operated the cash register, accepted rent payments for the LLC, and performed other duties. (Tr. 16, 70, 437, 524, 537, 541-42, 688)

10. Clark testified that he had asked Complainant to work at the Market approximately six times, performing minor duties "as an employee of the parent company," and that on other occasions she had worked at the Market on her own initiative, without Clark's permission. Clark further testified that on those latter occasions, he had ordered her back to the LLC office to work. Complainant denied this. (Tr. 72-73, 709-10, 812-13, 817) Based on the demeanor and behavior of the witnesses at the hearing, I find that Clark's testimony on this issue was not credible.

11. Complainant prepared sales tax reports for the Market. (Tr. 51-52, 814-16; Complainant's Exhibit 1)

12. The LLC and the Market filed separate tax returns, and maintained separate payroll systems through "Paychex," a commercial payroll system. However, the LLC paid employees of the Market on occasions when the Market account was not sufficient to make payroll. The accounts were then adjusted when the Market account was sufficient to reimburse the LLC. (Tr.

17-20, 69, 73-74, 271-72, 810-12) Clark's denial that the LLC occasionally paid employees of the Market was not credible.

13. William Whaley ("Whaley") was hired by the LLC in or about January of 2009. Clark was his supervisor. In July 2009, Whaley became the LLC's maintenance supervisor. Whaley's employment with the LLC ended on March 27, 2011. (Tr. 18, 26, 95, 284-85, 289, 318, 368) During his employment by the LLC, Whaley occasionally performed maintenance work at the Market. (Tr. 287-88, 306-07)

14. Both Complainant and Whaley were full-time employees, and both received their pay from the LLC. (Tr. 18, 52-53, 68-70, 292, 318-20, 367-68, 705-08, 710-12; Respondents' Exhibits 24 and 25) Complainant did not receive additional pay for her work at the Market. (Tr. 71-72)

15. During Complainant's employment, Jamie King ("King") performed maintenance tasks part-time for the LLC. King was still thus employed when Whaley's employment ended in 2011. (Tr. 194, 195, 285, 322, 713-14, 824-25)

16. There was no proof adduced at the hearing that Clark was on the payroll of either the LLC or the Market as an employee. (Tr. 811)

17. Melanie Ingalls ("Ingalls") was a part-time employee of the LLC beginning in August 2010, and ending in July 2011. (Tr. 18, 114-15, 657, 664, 667, 671, 677, 681, 824-25) Ingalls was also a tenant at the LLC during the period from January 2010 to March 2012. (Tr. 304-06, 664, 668)

18. Melissa White ("White") became a tenant of the LLC in January 2010. Shortly thereafter, she began working for both the LLC and the Market, and worked at least through

August 12, 2010. White moved out of her home at the LLC in August or September of 2010. (Tr. 22-23, 374-75, 383, 389, 404-05, 412-13, 772-73)

19. Brandi Baker ("Baker") was employed by Respondents from September 2010 through June 2011. Her duties involved work for both the Market and the LLC, including making bank deposits, scheduling for the Market, and working in the Market. (Tr. 419-420, 427-28, 437-38)

20. During this period, Baker was also a tenant of the LLC. Payment for Baker's services consisted of an abatement of her rent. (Tr. 420-22, 428-31, 438) Although Baker was employed continuously from September 2010 through June 2011, her employment was "off the books" until March 2011. (Tr. 419, 429)

21. Rebecca Hewlett ("Hewlett") was hired in April 2010 as the manager of the Market. Her employment was terminated in August of that year, just before the Market opened for business. (Tr. 74-76)

22. Tracy Costello ("Costello") was hired to work part-time at the Market in or about June 2010; her employment was terminated in December 2010. She was paid by the Market for her services. (Tr. 522-23, 531, 534-36)

23. Alesha Hull was an employee of the Market from August 2010 through October 2010. (Tr. 684-85, 687)

24. From its opening in August 2010 at least through the end of December 2010, the Market was open from 6:00 a.m. through 10:00 p.m. each day, seven days per week. The Market operated on the basis of three shifts, with generally one employee per shift. (Tr. 311-12, 524-25, 535) Testimony regarding the number of Market employees during this period ranged between a low of six and a high of eight employees. (Tr. 17-18, 522-24)

25. I find that during the 20 weeks between the opening of the market in August 2010 and the end of December 2010, the Market had at least one employee. I find that during the same period, the LLC had at least three employees.

Allegations of Sexual Harassment

26. In or about June 2010, Clark stated to Complainant that if more women "took it in the mouth, there would be a lot less kids." (Tr. 21, 58, 59) Clark's denial of this was not credible. (Tr. 716) Clark had made the same remark, in sum and substance, to other female employees of the LLC prior to Complainant's employment. (Tr. 473-74, 593-94)

27. The golf driving range at the LLC included a machine to wash golf balls. One of White's duties was to wash the golf balls. (Tr. 386-87) During the spring and summer of 2010, Clark was in the habit of saying to Complainant and White that his "balls (were) dirty" and that "my balls need to be washed." (Tr. 31-32, 384-85, 400)

28. Clark testified that either Complainant or White had initiated making remarks about washing balls as a joke which lasted about "one month," and that he had simply humored them in repeating it. (Tr. 727-28, 730-31) However, credible testimony indicated that Clark had made the same remarks to female employees prior to Complainant's employ. Clark's denial was not credible. (Tr. 288-89, 328, 561-63, 598-600)

29. In July 2010, when Clark, White, and Complainant worked together in the LLC office, Clark asked them to show him their "boobs." Clark's denial of this incident was not credible. (Tr. 28-30, 375-78, 715-16, 840)

30. In or about August 2010, while in the LLC office, Clark stated to Complainant and White that they were both "lesbians," a comment he made more than once. (Tr. 22-24, 379-81) Complainant felt uncomfortable and "sick." (Tr. 23)

31. Clark denied stating to Complainant and White that they were lesbians. (Tr. 715, 771) His testimony on this issue was not credible.

32. In or about August 2010, Clark and Complainant were in a golf cart at the driving range when Clark placed his hand on Complainant's left leg, and began to pull up her dress. When Clark stopped the cart momentarily, Complainant got out and walked away. (Tr. 24-25, 30-31)

33. Complainant promptly waved down Whaley, who was in the area, and told him about the incident. Whaley observed her to be "in tears." (Tr. 25-26, 253, 292-94, 351-52)

34. Clark denied that this incident had taken place. (Tr. 715, 716-17, 846-48) His testimony on this issue was not credible.

35. Whaley did not actually observe Clark harassing Complainant. However, he had previously found it necessary to tell Clark that he "needed to be careful" about the way Clark spoke to female employees. (Tr. 294)

36. In the fall of 2010, Clark stated to White and Complainant that they would receive a "boob job" as a Christmas bonus that year. (Tr. 60-62, 263, 378-79) I do not credit Clark's denial that he made this statement. (Tr. 716)

37. During the summer of 2010, on one occasion Clark invited Complainant to a local hotel to shower and have lunch. During that same time period, he also suggested to Complainant that she accompany him to a vacant unit in the LLC trailer park to take a shower. On the latter occasion, Complainant felt ill and "scared." (Tr. 26-28, 45-46, 245-46)

38. In July 2010, while in the LLC office, Clark stated to Complainant that if "you got laid you wouldn't look so damn miserable." (Tr. 32-33)

39. In August 2010, while Complainant and Clark were in the Market, Clark placed a pepperoni at his groin area and waved it around in a suggestive manner. (Tr. 35-36, 254)

40. Clark's denial of these incidents was not credible. (Tr. 715, 716, 718-26, 841)

41. On or about September 23, 2010, Complainant gave Clark a letter stating that she would quit in two weeks. The letter stated that Complainant was quitting because the hours required by her job had become a burden to Complainant and her family. (Tr. 40, 84, 113, 134-35; Complainant's Exhibit 3)

42. In October 2010, shortly before Complainant's planned last day of employment, she and Clark discussed Complainant staying on. Clark advised Complainant that she would be eligible for a Christmas bonus and paid vacation, and that he would attempt to help Complainant to arrange for child care to take some of the burden off her. Complainant told Clark that he must stop speaking to her and treating her in an unprofessional manner, to which Clark agreed. (Tr. 60, 62, 81, 84-90, 94-95, 100-04, 107-10, 113, 115, 767-71, 823-24; ALJ's Exhibit 2)

43. After a short respite, Clark resumed making sexual remarks to Complainant. (Tr. 104-05, 106, 118, 666) Complainant complained to Ingalls about Clark's harassment. (Tr. 663, 666)

44. In January 2011, Clark noticed a spot of lotion on Complainant's shirt and inquired whether she was giving "blow jobs" that day. (Tr. 33) That same month, Complainant was in the LLC office when Clark ran his hand up her leg. Complainant then left the office. (Tr. 33-35, 105) Clark's denial of these incidents was not credible. (Tr. 716, 718)

Complainant's Employment is Terminated

45. Complainant's last day of work was January 21, 2011. She was on vacation from January 24 through January 28, 2011. When Complainant returned to the LLC office to pick up her paycheck, she found a letter from Clark, terminating her employment effective January 28, 2011. (Tr. 46-47, 50, 263-64, 289-91, 349-50, 731-32; Complainant's Exhibit 1)

46. One of Complainant's responsibilities as the LLC office manager was to contact the utility company when a tenant left a unit in the mobile home park, so that the utilities would be switched over to the LLC's name in order to avoid shutoff of service for nonpayment. This was an important responsibility in the winter, because pipes could freeze, causing extensive damage. (Tr. 141-42, 346-47, 732-34)

47. While Complainant was on vacation, Clark found out that she had failed to notify the utility company regarding two units which had become vacant. Clark was angry about this, particularly because both of these units had frozen in December 2010, causing thousands of dollars in damages, and Clark had warned both Complainant and Whaley about the consequences of failing to switch the utilities. (Tr. 142-43, 298, 345-46, 732, 734-35, 736-37, 740-44, 848-49; Complainant's Exhibit 1, Respondents' Exhibits 29 and 30) Complainant's denial of this occurrence was not credible. (Tr. 48, 49-50, 140-144, 199-202, 229-32)

48. Complainant had also failed to conduct required background checks on prospective tenants, including a credit and criminal history, as she had been repeatedly directed by Clark, resulting in financial loss to the LLC. (Tr. 738-39; Complainant's Exhibit 1) In testimony at the hearing, Complainant became evasive when questioned about whether she had done the required background checks. Her testimony on this issue was not credible. (Tr. 54-56, 147)

49. Another of Complainant's responsibilities was to file an annual registration for the trailer park with the New York State Division of Housing and Community Renewal. (Tr. 47-48, 53) Complainant had previously failed to file the annual statement which could have resulted in a substantial fine to Respondents. (Tr. 737-38; Complainant's Exhibit 1) Complainant's testimony regarding this incident was not credible. (Tr. 48-49, 53, 145-46)

50. On another occasion, Complainant had failed to file a sales-tax report and payment for the Market. (Tr. 737; Complainant's Exhibit 1) Complainant's denial of this incident was not credible. (Tr. 51-52)

51. Complainant had also shared confidential tenant information with a third party, resulting in a confrontation between the third party and the tenant. (Tr. 740; Complainant's Exhibit 1) Complainant testified that this incident had not occurred until after she was terminated from her position, an assertion clearly contradicted by Clark's mention of this incident in the termination letter. Complainant's denial of this incident was not credible. (Tr. 202, 204, 205-06; Complainant's Exhibit 1)

52. While Complainant was on vacation, Clark made the determination to terminate her employment, and announced that to Whaley. (Tr. 736) Hearing of this, Ingalls approached Clark, and informed him that Complainant had removed confidential files from the LLC office; had attempted to recruit Ingalls, while at work, to observe and report on Clark's activities to Complainant; had questioned female tenants of the LLC regarding Clark's activities and attempted to recruit them to sign false statements about Clark; and made surreptitious recordings of persons while at work. Clark included these charges in his termination letter. (Tr. 440-41, 659-61, 667-668, 736, 738-39, 819-21; Complainant's Exhibit 1)

53. Complainant denial of these charges was not credible. Complainant admitted that she had attempted to recruit persons to make surreptitious recordings of activities at the LLC. (Tr. 53-54, 56-57, 146-48, 176-77, 190-91)

54. Clark also ascertained that Complainant had failed to enter tenant maintenance and repair requests into the Rent Manager system during the entire month of December 2010. (Tr. 491-92, 758-62, 764-66, 781-87; Respondents' Exhibit 5)

55. Complainant alleged that Clark had falsified the Rent Manager computer records in order to indicate that she had not properly entered the service and repair requests. However, she could not remember whether she had actually entered any maintenance requests during the month of December 2010. (Tr. 19-20, 161-62, 167, 172-75, 272-75; Respondents' Exhibit 5) Complainant's testimony on this issue was not credible.

56. Complainant testified that beginning in August or September 2010, she had made contemporaneous written notes of sexual harassment by Clark; that Clark knew of said activity although he had never seen her engaged in taking notes, and that he stated to unnamed persons that he had fired her because of it. Complainant was unable to produce those notes at the hearing, stating that she had destroyed them. (Tr. 57, 91-94, 182, 186, 256-62, 270-71, 273-74; ALJ Exhibit 2) Complainant's testimony on this issue was not credible.

57. After her termination, Complainant contacted various tenants of the mobile home park attempting to convince them that there were title problems with their trailers and that they had paid too much for the trailers; organized a public protest demonstration against Clark at the LLC and provided written notice of that demonstration to the bank which held the mortgage on the LLC; and contacted numerous state and municipal officials regarding alleged deficiencies and/or illegalities in the way that Clark ran the LLC. At the public hearing, Complainant denied that she had engaged in these activities in an effort to hurt Clark. Complainant's testimony on this issue was contradictory and not credible. (Tr. 155, 158-61, 207-09, 220-24, 802-03, 806-07; Respondents' Exhibit 4)

OPINION AND DECISION

Pursuant to the Human Rights Law, it is an unlawful discriminatory practice for an

employer "because of the... sex... of any individual to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Human Rights Law § 296.1 (a).

Complainant's Employer

The term "employer" under the Human Rights Law does not include an employer with fewer than four employees. Human Rights Law § 292.5. To determine whether a respondent has four or more employees, the Division considers all those employed during the calendar year in which the discrimination allegedly occurred and the preceding calendar year. Temporary and part-time workers are included, but the division does not count "casual" employees. *Dembek v. Clemson Park Condominium*, DHR Case No. 10118173 (March 22, 2010). In making this determination, the Division utilizes federal precedent under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

Under Title VII, a business is considered an employer if it has the minimum number of employees "for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e (b). Adapting the standard for the Division's purposes, a Respondent will be considered an employer under the Human Rights Law if it had four or more employees for 20 weeks or more during 2011 (the year in which Complainant's employment was terminated), 2010 (the year in which Complainant alleges that she was subject to discrimination in the form of sexual harassment) or 2009, the calendar year preceding the alleged discrimination.

During the period from the beginning of August 2010 through the end of December 2010, a 20 week period, the LLC had at least three employees, while the Market had at least one employee.

Testimony indicated that the LLC and the Market were legally distinct entities. However, under certain circumstances, two or more formally distinct entities may be so interrelated that they are treated as a single employer, otherwise referred to as an integrated enterprise, for the purposes of antidiscrimination law. To determine whether entities are sufficiently related to constitute a single employer, four factors are considered: (1) the interrelatedness of the businesses operations; (2) whether there is common management of the various entities; (3 whether there is centralized control of labor relations; and (4) whether there is common ownership of the businesses. *Regan v. In the Heat of the Night, Inc.*, 1995 WL 413249 (S.D.N.Y. 1995), *Copley v. Morality in Media, Inc.*, 1981 WL 118 (S.D.N.Y. 1981). A complainant need not show that each factor exists in order to establish an integrated enterprise, nor is there any one factor a complainant must show. *Regan v. In the Heat of the Night, Inc.*, citing *Armbruster v. Quinn*, 711 F.2d 1332 (6th Cir. 1983). The general rule is that the term "employer" should be liberally construed to affect the remedial purposes of the antidiscrimination laws. *Brower-Coad v. Fundamental Brokers, Inc.*, 856 F. Supp. 147, 150 (S.D.N.Y. 1993).

In the instant case, both the LLC and the Market were managed, controlled for the purpose of labor relations, and owned by Clark. Although these entities were legally separate and each filed its own tax return, it is clear that the two entities were closely interrelated. Monies from the accounts of the LLC were occasionally advanced to pay employees of the Market, and employees were switched back and forth between the two entities depending on day to day needs. It is clear that the separation between the two entities was porous, and the legal formality of independent corporate operations and identity was not observed. I conclude that for the purposes of this case, the LLC and the Market constituted an integrated enterprise. Therefore, Complainant's employer had at least four employees during the time relevant to this complaint.

Sexual harassment : Hostile Work Environment

Sexual harassment has been recognized as a form of sex discrimination which is actionable under the Human Rights Law. A claim of sexual harassment may be established as a result of *quid pro quo* sexual harassment or as a result of a hostile work environment. *Matter of Father Belle Community Center v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744, *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997). In the instant case, Complainant alleges that she was subjected to a hostile work environment.

In order to prevail in a case of hostile work environment sexual harassment, a complainant bears the burden of establishing that: (1) she belongs to a protected group; (2) she was the subject of unwelcome harassment; (3) the harassment was based on her status as a member of a protected group; (4) the harassment affected a term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take remedial action. *Pace v. Ogden Svces. Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999). Whether a workplace may be viewed as hostile or abusive-both from a reasonable person standpoint as well as from the victim's subjective perspective-can be determined only by considering the totality of the circumstances. *Matter of Father Belle Community Center v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744, *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997). Complainant must also demonstrate that the conduct was sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive work environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986).

In the instant case, the Complainant is female and thus a member of a protected class. The record demonstrates that on numerous occasions during an approximately six-month period

of Complainant's employment, Clark, the sole owner and supervisor of both the LLC and the Market, subjected her to unwelcome crude sexual remarks and jokes, invited her on two occasions to have intercourse with him, asked Complainant to show him her breasts, and, on two occasions, touched Complainant in an intimate manner without her consent. Clark persisted in this behavior even after Complainant had asked him to stop. Clark's behavior created a hostile work environment. This claim is sustained.

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. New York State Division 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).

Respondent's actions and words made Complainant feel "uncomfortable," "sick,"

"scared," and on one occasion reduced her to tears. In light of the emotional anguish and humiliation resulting from the inappropriate conduct and physical contact, an award of $15,000 is appropriate (see *New York State Div. of Human Rights v. Stoute*, 36 A.D.3d 257, 826 N.Y.S.2d 122 (2d Dept. 2006) (award of $10,000 for mental anguish resulting from sexual harassment without physical contact), *West Taghkanic Diner II, Inc. v. New York State Div. of Human Rights*, 105 A.D.3d 1106, 962 N.Y.S.2d 748 (3d Dept. 2013) (award of $20,000 for retaliatory termination, and sexual harassment with physical contact).

Pursuant to § 297 of the Human Rights Law, the Division may assess civil fines and penalties. With reference to the instant case, I find that a civil fine will be appropriate to deter Respondent Clark from future discriminatory behavior. Respondent's discriminatory words and actions were deliberate, and resulted in humiliation to Complainant. Evidence adduced at the hearing indicated that Respondent Clark's financial resources included ownership of real property and improvements, in the form of the mobile home park and associated buildings, and that Respondent Clark had engaged in harassing behavior before. Under the circumstances, a civil fine of $1,000 for Respondent Clark is appropriate. Because of the closely held nature of both corporate Respondents and their complete domination by Respondent Clark, I find that civil fines and penalties for the remaining corporate Respondents are not necessary to deter future misbehavior.

Retaliation

It is an unlawful discriminatory practice for an employer to retaliate or discriminate against an employee because she has opposed any practices forbidden under the Human Rights Law or because she has filed a complaint, testified or assisted in any proceeding under the Human Rights Law. Human Rights Law § 296(7).

In order to establish a prima facie case of retaliation, a complainant must show that: (1) she engaged in activity protected by Human Rights Law § 296; (2) respondent was aware that she participated in the protected activity; (3) she suffered 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, 66, 644 N.Y.S.2d 864 (3d Dept. 1996).

In the instant case, Complainant suffered an adverse employment action when her employment was terminated by Respondents. However, Complainant failed to demonstrate that she engaged in protected activity and that Respondents knew of same. Further, Respondents presented legitimate, nondiscriminatory reasons for Complainant's termination. Complainant's non-performance of the duties of her job, and her deliberate misbehavior while on the job, constituted sufficient reasons for Respondents to terminate her employment. This claim is dismissed.

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; and

IT IS FURTHER ORDERED, that Respondents shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this order:

1. Within 60 days of the date of the Commissioner's Order, Respondents shall pay to Complainant the sum of $15,000 without any holdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondents' unlawful discrimination. Interest shall accrue on the award at a rate of 9 per cent per annum from the date of the Commissioner's Order until payment is actually made by Respondents.
2. Within 60 days of the date of the Commissioner's Order, Respondent Clark shall pay the sum of $1,000 as a civil fine and penalty, by certified check made out to the "State of New York" and delivered by certified mail, return receipt requested, to the offices of the Commissioner of the Division of Human Rights at One Fordham Plaza, 4th floor, Bronx, New York 10458.
3. Respondents shall furnish written proof to the New York State Division of Human Rights, Compliance Unit, Att'n Barbara Buoncristiano, One Fordham Plaza, 4th floor, Bronx, New York 10458, of their compliance with the directives contained in this Order.

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

DATED: May 31, 2013
Bronx, New York

Michael T. Groben
Administrative Law Judge