

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

YURI GUTKIN,

Complainant,

v.

T.D.A. TRADING CORP., MTA TRADING INC.,
AS SUCCESSOR-IN-INTEREST, DAVID ALBILIA,
Respondents.

NOTICE AND
FINAL ORDER

Case No. 10114508

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 August 4, 2009, by Robert J. Tuosto, 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:

- Due to a typographical error, the summary of the Recommended Order indicates that “both TDA and Albilgia are liable to Complainant for the relief stated in the APO.” Respondents are liable to Complainant for the relief stated in the Commissioner’s Final Order.

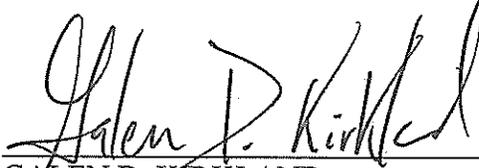
- On March 17, 2008, the Commissioner did not reverse the ALJ's January 17, 2008, Recommended Order, as stated in the August 4, 2009, Recommended Order. The Commissioner declined to adopt the January 17 Recommended Order, instead adopting the February 20, 2008, Alternative Proposed Order.
- Respondents, their agents, representatives, employees, successors and assigns shall have sixty days to fully comply with all of the affirmative provisions contained in the original Final 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: **SEP 17 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**T.D.A. TRADING CORP., MTA TRADING
INC., AS SUCCESSOR-IN-INTEREST,
DAVID ALBILIA,**

Respondents.

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

Case No. 10114508

SUMMARY

Complainant sought compliance with the directives of the Commissioner's Final Order as against the original Respondent, T.D.A. Trading Corp. ("TDA"). On January 30, 2009 the complaint was amended to add M.T.A. Trading, Inc. ("MTA") and David Albilias as respondents. MTA was added as a successor in interest. Upon their default, both TDA and Albilias are liable to Complainant for the relief stated in the APO. Complainant has also proven successor liability as to MTA.

PROCEEDINGS IN THE CASE

On October 26, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent TDA 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 TDA had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

A public hearing was held on November 19, 2007. Complainant appeared at the public hearing. TDA failed to appear. On January 17, 2008 Administrative Law Judge (“ALJ”) Thomas Protano issued a Recommended Order (“RO”) dismissing the complaint. (ALJ Exh. 5)

On March 17, 2008 the Commissioner issued a Final Order which reversed ALJ Protano’s RO and, among other things, awarded Complainant \$1,800 in lost wages and \$10,000 as compensatory damages for mental anguish, with interest. (ALJ Exh. 6)

On December 24, 2008 TDA was sent notice of a compliance hearing. (ALJ Exh. 1) Said hearing was scheduled for January 14-15, 2009.

After due notice, the compliance hearing came on for hearing before ALJ Robert J. Tuosto. A public hearing session was held on January 14, 2009. (ALJ Exh. 1)

On January 30, 2009 the complaint was amended by Division counsel to add MTA, as a successor-in-interest, and Albilia as Respondents. The amended complaint was subsequently served on all Respondents, and the case re-noticed with the amended caption. (ALJ Exhs. 2, 3)

Additional public hearing sessions were held on May 15, 2009 and June 12, 2009. (ALJ Exhs. 3, 4)

Complainant and MTA appeared at the compliance hearing. The Division was represented by Arlyne R. Zwyer, Esq. MTA was represented by Andrew Citron, Esq., New York, N.Y. Maximo Masri appeared as MTA’s principal.

Permission to file post-hearing briefs was granted. Counsel for MTA filed a post-hearing brief that was not considered as it was transmitted after the close of business on the date specified for submission.

FINDINGS OF FACT

1. Complainant sought compliance as against all Respondents concerning the relief originally awarded in the Commissioner's Final Order of March 17, 2008. (ALJ Exhs. 1, 2, 6)

2. In its verified Answer MTA denied each and every allegation in the amended complaint. (Respondent's Exh. 1)

Background

3. Complainant has never received the money that he was originally awarded as part of the Commissioner's Final Order. (Tr. 6)

4. Neither TDA nor Albilgia have ever appeared despite being served with notice. (ALJ Exhs. 1, 3, 4)

TDA

5. In or about March, 2005, Complainant stopped working for TDA. Albilgia was TDA's president. Maximo Masri was described as Albilgia's "right hand". (Tr. 15, 106-07, 124)

6. As of January, 2009, the N.Y.S. Department of State listed TDA as an "inactive" domestic business corporation. It is unknown from the record the exact date that TDA became inactive. (Complainant's Exh. 4)

7. The 'portfolio.com' internet website listed TDA as a technology company, Albilgia as its corporate president, and its corporate address as 428 Willoughby Street, Brooklyn, New York 11205 ("the Willoughby address"). (Complainant's Exh. 5)

8. The 'bizsearch.com' internet website listed TDA, and Albilgia as its "contact person".

(Complainant's Exh. 6)

9. The 'merchantcircle.com' internet website listed TDA at the Willoughby address.

(Complainant's Exh. 7)

MTA

10. As of January, 2009 MTA was located at the same Willoughby address as TDA prior to TDA's having become inactive. (Complainant's Exh. 2)

11. As of January, 2009 the N.Y.S. Department of State listed MTA as an "active" domestic business corporation, with Masri listed as its agent for service of process. (Complainant's Exh. 3)

12. Masri, MTA's owner, told Complainant that he had purchased merchandise, *i.e.*, lab supplies, chemistry and photographic paper, cameras, batteries, cassettes, films and tapes, from TDA for sale by MTA. MTA sells the same merchandise as TDA. (Complainant's Exh. 5; Tr. 15, 109-12, 115-17, 120-23, 125-26)

OPINION AND DECISION

The Human Rights law provides that the Division "shall investigate whether the Respondent is complying with the terms of [its]...order" and "[u]pon a finding of noncompliance,...shall take appropriate action to assure compliance." Human Rights Law § 297.7; *see also* 9 NYCRR 465.18.

Complainant seeks compliance with the directives of the Commissioner's Final Order as against TDA, as well as MTA, as successor-in-interest, and Albilis.

The default of TDA and Albilis lead to the conclusion that both are liable to Complainant for the relief stated in the Commissioner's Final Order.

Liability as to MTA, as successor in interest, can only be predicated upon a showing of “substantial continuity of identity” between TDA and its putative corporate successor, MTA. *E.E.O.C. v. McMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1089 (6th Cir. 1974)(successor liability discussed as to the Human Rights Law’s Title VII federal analogue) .

The factors to be considered in determining whether there has been corporate successorship for liability purposes in a labor context include: 1) whether the successor company had notice of the charge; 2) the ability of the predecessor to provide relief; 3) whether there has been a substantial continuity of business operations; 4) whether the new employer used the same plant; 5) whether he uses the same or substantially the same work force; 6) whether he used the same or substantially the same supervisory personnel; 7) whether the same jobs exist under substantially the same working conditions; 8) whether he uses the same machinery, equipment and methods of production; and 9) whether he produces the same product. *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union*, 417 U.S. 249, 256-258 (1974).

Here, the record shows that MTA had notice of Complainant’s desire to hold it liable for the relief awarded to him in the Commissioner’s Final Order; as an inactive corporate concern, TDA may likely no longer have the wherewithal by which to provide relief. There has been a substantial continuity of business operations given that MTA is maintained at the same Willoughby address as TDA had been, MTA and TDA sell the same merchandise, and MTA sells merchandise purchased directly from TDA after its apparent dissolution. At least one former TDA employee, MTA’s present owner Masri, was the “right hand” of TDA’s president; this suggested that Masri previously held a supervisory position. Taken together, these facts establish that MTA closely resembled TDA, and that there is a substantial continuity of identity

between both such that successor liability should attach to the former.

Alternatively, the effect of failing to hold MTA liable for the unlawful discrimination of its predecessor could emasculate the provisions of the Human Rights Law. *E.E.O.C.*, at 1091. Additionally, the equities of the matter favor successor liability because, given the continuity of identity between the two, it is the successor that would benefit from the unlawfully discriminatory practices of its predecessor if it is allowed to evade liability. *Id.* at 1092.

Therefore, MTA is also liable to Complainant for the relief awarded to him in the Commissioner's Final Order.

ORDER

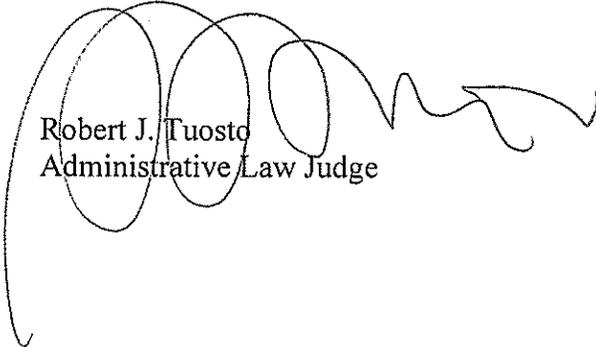
On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that Respondents, its agents, representatives, employees, successors and assigns shall cease and desist from unlawfully discriminating in employment in violation of the Human Rights Law; it is further

ORDERED, that Respondents, its agents, representatives, employees, successors and assigns shall take the following actions to effectuate the purposes of the Human Rights Law:

1. Respondents shall, within thirty (30) days of the date of this Order, fully comply with all six of the affirmative actions provisions contained in the Commissioner's Final Order of March 17, 2008.

DATED: August 4, 2009
Bronx, New York


Robert J. Tuosto
Administrative Law Judge