

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS  
on the Complaint of

GARNETT HALL,

Complainant,

v.

GARCIA BUILDING MANAGEMENT CORP., 1049  
FOX STREET HDFC,

Respondents.

NOTICE AND  
FINAL ORDER

Case No. 10114580

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 30, 2008, by Rosalie Wohlstatter, 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"). 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 28 2008**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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DIVISION OF HUMAN RIGHTS**

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on the Complaint of

**GARNETT HALL,**

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v.

**GARCIA BUILDING MANAGEMENT  
CORP., 1049 FOX STREET HDFC,**

Respondents.

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

Case No. 10114580

Complainant, a building superintendent, charged Respondents, a building owner and a property management company, with unlawfully discriminating against him on the basis of race when his employment was terminated. Respondents argued that the Division did not have jurisdiction over the complaint because neither the management company nor the building owner was Complainant's employer within the meaning of the Human Rights Law. The record establishes that neither party was an employer under the Human Rights Law. Accordingly, the Complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On November 1, 2006, 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 Rosalie Wohlstatter, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on April 2 and 3, 2008.

Complainant and Respondents appeared at the hearing. The Division was represented by Bellew S. McManus, Esq. Respondents were represented by Eric Wughalter, Esq. Both parties were given the opportunity to submit post-hearing briefs; however, neither did so.

### FINDINGS OF FACT

1. On January 16, 2006, Complainant, who is black, began working as a superintendent at 1049 Fox Street, Bronx, New York, a residential co-operative building; at that time, the managing agent for the building was Best Ever Management. (ALJ’s Exh. 1; Tr. 26)
2. On January 16, 2006, until the date of the hearing, 1049 Fox Street HDFC (“the HDFC”) owned 1049 Fox Street; the HDFC had tenant shareholders and a Board of Directors. (ALJ’s Exh. 5, Respondent’s Exh.10; Tr. 157)
3. The members of the Board of Directors, who were tenants in the building, were not compensated for their duties in any way. (Tr.166-68)
4. On September 1, 2006, Garcia Building Management Corporation (“Garcia Management”) entered into a contract with the HDFC in which Garcia Management agreed to manage 1049 Fox Street. (Respondent’s Exh. 10; Tr. 36)
5. Complainant’s salary was paid by the HDFC. (Complainant’s Exhs. 1, 3, 5)
6. When Garcia Management began to perform work for the HDFC, the vice-president of the HDFC, Humberto Hernandez, asked the property manager, Luis Garcia, to meet with him

and some other board members in order to discuss Complainant's poor work performance. (Tr. 164-66)

7. In October of 2006, when Complainant's work performance did not improve, the board members of the HDFC decided that Complainant's employment should be terminated. (Tr. 300)

8. On October 27, 2006, Complainant's employment was terminated. (ALJ's Exh. 1)

9. The Division counsel stipulated that Garcia Management was not Complainant's employer. (Tr. 19)

10. Garcia Management did not do any day-to-day supervision of Complainant. (Tr. 108)

11. The HDFC employed, at most, two persons at any one time: a porter and/or a superintendent. (Tr. 199-201)

### OPINION AND DECISION

#### Respondent Garcia Management

The Human Rights Law prohibits an employer from discharging an employee on the basis of race. N. Y. Executive Law § 296.1. The statute defines employer by making reference solely to the number of persons employed. It does not say what is needed to for an employer-employee relationship to exist. N. Y. Executive Law §292.5. However, the New York courts have generally considered four elements in determining whether an employer and employee relationship exists for purposes of the Human Rights Law. These elements are the selection of the employee, the payment of wages to the employee, the power to dismiss the employee, and control over the employee's conduct. *See SDHR (Emrich) v. GTE*, 109 A.D. 2d 1082, 487 N.Y. S. 2d 234 (4<sup>th</sup> Dept. 1985). The most important of these elements is control over the employee's conduct. *Id.*

Looking at these factors, Garcia Management was not Complainant's employer. The HDFC, and not Garcia Management, paid Complainant's salary; Garcia Management, was not the property manager when Complainant was retained; the HDFC and not Garcia Management, made the decision to terminate Complainant; and Garcia Management exercised little day to day control over Complainant's conduct. The complaint against Garcia Management must, therefore, be dismissed.

Respondent HDFC

The HDFC, which paid Complainant's salary, monitored his work performance and, ultimately, terminated his employment, did meet the above criteria to be Complainant's employer. However, an employer with fewer than four employees is specifically exempted from the Human Rights Law. N. Y. Executive Law § 292.5 Since the HDFC employed, at the most, two people at any one time, it is not an employer under the Human Rights Law. Therefore, the complaint against the HDFC, must also be 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 the complaint be and the same hereby is, dismissed.

DATED: June 3, 2008  
Bronx, New York

  
Rosalie Wohlstatler  
Administrative Law Judge