

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JACQUES B. HERIVEAUX,

Complainant,

v.

ULTIMATE AIRCRAFT APPEARANCE CORP.,

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 5806132

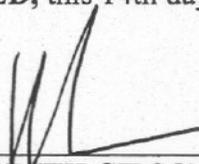
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on May 21, 2007, by Migdalia Pares, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given 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 KUMIKI GIBSON, 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, this 14th day of June, 2007.



KUMIKI GIBSON
COMMISSIONER

TO:

Complainant

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Respondent

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STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

JACQUES B. HERIVEAUX,
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v.

ULTIMATE AIRCRAFT APPEARANCE
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RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER

Case No. 5806132

SUMMARY OF CASE

Complainant alleged that Respondent unlawfully discriminated against him by subjecting him to a hostile work environment based on his race and national origin in violation of the Human Rights Law. Complainant also alleged that Respondent retaliated against him for opposing discriminatory practices. The Division finds that there was insufficient evidence in the record to substantiate a hostile work environment because of race. The Division finds that Respondent did discriminate against Complainant by subjecting him to a hostile work environment because of his national origin, and by retaliating against him for opposing discriminatory practices resulting in lost wages and extensive pain and suffering. Complainant is entitled to a back wage award of \$52,040.42 plus nine percent interest, and compensatory damages for pain and suffering in the amount of \$100,000.00.

PROCEEDINGS IN THE CASE

On August 8, 2002, Complainant Jacques Benson Heriveaux, filed a verified complaint, with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to employment in violation of N.Y. Executive Law,

article 15 (Human Rights Law). On October 10, 2002, the complaint was amended to add the charge of retaliation. (ALJ's Exhibits I, XX, Tr. 13, 34).

On May 3, 2004, after investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondent had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

On March 18, 2005, the Calendar Unit issued a Notice of Hearing scheduling a preliminary conference on April 12, 2005, with Ronald A. Gregg, an Administrative Law Judge ("ALJ") of the Division. The Notice of Hearing is hereby admitted in evidence as A.L.J.'s Exhibit VII.

On April 7, 2005, Respondent by its counsel, Richard A. Kraslow, Esq., requested an adjournment of the April 12, 2005 Preliminary Conference on the grounds that he was engaged in another matter. In support of his request, Kraslow filed an affidavit of actual engagement. ALJ Gregg granted the adjournment. Kraslow's April 7, 2005, letter and attached affidavit are hereby admitted in evidence as A.L.J.'s Exhibit IX.

On May 3, 2005, the Calendar Unit, by Deborah Jamison, sent a letter to the parties advising them that the matter was rescheduled for May 12, 2005, at 11:00 A. M. via telephone. Jamison's May 3, 2005, letter is hereby admitted in evidence as A.L.J.'s Exhibit X.

On May 12, 2005, Respondent and its counsel failed to appear for the telephone conference. ALJ Gregg scheduled the case for public hearing on October 17, 18, 24 and 25, 2005. A.L.J. Gregg's Preliminary Conference Notes are hereby admitted in evidence as A.L.J.'s Exhibit XI.

On May 13, 2005, Kraslow sent a letter to ALJ Gregg advising him that at 11:00 A.M. on May 12, 2005, he was engaged in another matter. In his correspondence Kraslow asserted that

on May 12, 2005, at 11:10 A.M. he left repeated telephone messages with the Division requesting that the conference call be made to his cellular phone number. Kraslow did not disclose the telephone number or the name of the person with whom he left the telephone messages. Kraslow requested that the conference call be rescheduled for another date and for a time after 2 P.M. Kraslow's May 13, 2005, letter is hereby admitted in evidence as A.L.J.'s Exhibit XII.

On August 30, 2005, the Calendar Unit, by Nolan Harris, sent a letter to the parties advising them that the matter was scheduled for a public hearing on October 17, 18, 24 and 25, 2005. Harris' letter dated August 30, 2005, is hereby admitted in evidence as A.L.J.'s Exhibit XIII.

On September 15, 2005, Kraslow sent a letter to ALJ Gregg advising that he was otherwise engaged on October 18 and 25, 2005, and would not appear on those dates. Kraslow indicated he would appear on October 17 and 24, 2005. Kraslow's letter dated September 15, 2005, is hereby admitted in evidence as A.L.J.'s Exhibit XIV.

On October 6, 2005, the Calendar Unit, by Deborah Jamison, advised the parties that the public hearing was scheduled for October 17 and 24, 2005. The parties were further advised not to appear on October 18 and 25, 2006. (ALJ Exhibit IV; Tr. 15)

On October 14, 2005, Kraslow advised Harris that he anticipated that he would call Carlos Bravo as a witness and that Bravo required a Spanish interpreter. Kraslow's October 14, 2005, letter is hereby admitted in evidence as A.L.J.'s Exhibit XV.

On October 17 and 24, 2005, ALJ Gregg held public hearings. Complainant and Respondent appeared at the hearing. The Division was represented by former General Counsel, Gina M. Lopez-Summa, Esq., by Marilyn Balcacer, Esq., of counsel.

On October 24, 2005, the matter was adjourned and was scheduled to continue on January 6, 2006. (Tr. 132, 304)

On January 5, 2006, ALJ Gregg vacated the public hearing scheduled for January 6, 2006, and instructed the Calendar Unit to reschedule the matter for March 7 and 9, 2006. ALJ Gregg's instructions to the Calendar Unit are hereby admitted in evidence as A.L.J.'s Exhibit XVI.

On January 9, 2006, the Calendar Unit, by Nolan Harris, sent a letter to the parties advising them that the matter was scheduled to continue on March 7 and 9, 2006. Harris' January 9, 2006, letter is hereby admitted in evidence as A.L.J.'s Exhibit XVII.

On March 7, 2006, ALJ Gregg continued the public hearing and adjourned the March 9, 2006, public hearing date in order to allow an opportunity for the parties to submit medical documentation. The parties agreed to continue the public hearing on April 27, 2006. (Tr. 457)

On April 27, 2006, the public hearing concluded and ALJ Gregg advised counsel to file post-hearing briefs on August 15, 2006, and directed counsel to serve post-briefs on each other simultaneously. (Tr. 645).

On August 11, 2006, Respondent, by Kraslow filed its post-hearing brief.

On August 15, 2006, Division Counsel, by Balcacer, advised that the Division's Legal Bureau was not served with a copy of Respondent's post-hearing brief. Division Counsel's letter dated August 15, 2006, is hereby admitted in evidence as A.L.J.'s Exhibit XVIII

On September 21, 2006, Kraslow objected to Division Counsel's request for an extension of time to file its post-hearing brief. Kraslow's letter dated September 21, 2006, is hereby admitted in evidence as A.L.J.'s Exhibit XIX.

On October 30, 2006, Balcacer filed the Division's post-hearing brief.

ALJ Gregg left state service and former Executive Deputy Commissioner Edward A. Friedland, reassigned the case to the undersigned for preparation of this recommended order.

FINDINGS OF FACT

1. On August 8 and October 10, 2002, Complainant charged Respondent with violations of the Human Rights Law, premised upon the claims that: 1) Respondent created and condoned a hostile work environment because of his race and national origin; 2) Respondent reduced his work hours in retaliation for complaining about the hostile work environment; and 3) Respondent terminated Complainant after seven years of employment in retaliation for filing a complaint with the Division. (A.L.J.'s Exhibit's I)

2. Complainant seeks to recover damages for lost wages and pain and suffering alleging that the hostile work environment and subsequent retaliatory termination caused him to be unemployed for a period of time and resulted in prolonged emotional distress so severe that it necessitated several psychiatric hospital admissions, the taking of medically prescribed anti-depressants and psychiatric therapy.

3. Respondent denied the charges and affirmatively defends by arguing that; 1) Complainant refused to adequately perform his employment responsibilities; 2) Complainant's conduct was insubordinate, noncompliant and prevented him from adequately performing his employment responsibilities.

4. Complainant is a black man of Haitian national origin. (A.L.J.'s Exhibit I; Tr. 24, 581)

5. Respondent has contracts to clean aircrafts. (Tr. 540) Respondent hired airplane cleaners as "on-call." (Tr. 23, 24, 541) "On-call" was a term meaning no scheduled hours within which employees would work. Employees are "on call" 24 hours a day, seven days a week. An "on-call" cleaning crew is called to report to work when an airplane lands. (Tr. 541, 598)

6. During the relevant time, Christopher J. Sparacino, was the president of Respondent Corporation. (Tr. 539, 558, 579) During the relevant time, Michael Sparacino was vice president of Respondent Corporation. (Tr. 579, 592, 618) Both are of Italian national origin. (Tr. 276) M. Sparacino is involved in the day to day operations of Respondent Corporation. (Tr. 593)

7. During the relevant time Respondent employed Carlos Bravo in the capacity of manager. (Tr. 543) Bravo is of Hispanic national origin. (Tr. 277) Most of Respondent's employees were Hispanic and only spoke Spanish. Bravo translated for these employees. (Tr. 43) Bravo's responsibility was to oversee and make sure that all procedures were being followed by the cleaning crew. (Tr. 543) Bravo would personally check on the progress of the cleaning crews. (Tr. 26)

8. On March 22, 1995, Respondent hired Complainant as an "on-call" airplane cleaner. (Tr. 540) During the relevant time, Bravo was Complainant's immediate supervisor. Complainant interacted with Bravo on a daily basis. (Tr. 26, 575) Bravo would call Complainant at home or by beeper and inform him when he was to report to work. (Tr. 40-42) Complainant never refused to come to work whenever Respondent called. (Tr. 43, 210)

9. From 1995 to 2000, the number of hours Complainant worked varied from four to 17 hours in one day. As a result, Complainant's weekly hours varied from 40 to 50 and sometimes 80 hours per week. (Tr. 31) During his testimony, C. Sparacino initially denied that "on-call" employees could work 60 to 80 hours in one week. (Tr. 583) However, he later admitted that "on call" employees could work more than 40 hours per week. (Tr. 584)

10. Complainant's rate of pay progressed from \$6.35 an hour to \$12.00 an hour. (Tr. 27) M. Sparacino admitted that Complainant worked 40 hours per week and that overtime was

available. (Tr. 617) Based on a 40 hour week at \$12.00 an hour, Complainant's weekly salary is therefore calculated as \$480.00 per week. Therefore, Complainant's yearly rate of compensation is calculated as \$24,960.00. (Tr. 27, 617)

11. C. Sparacino characterized Complainant's job performance as "excellent." (Tr. 542). M. Sparacino asserted that he "never had any problems" with Complainant. (Tr. 542) I find Complainant's job performance was satisfactory. (Tr. 542)

Hostile Work Environment Claim

12. I find that Respondent did not have an anti-harassment policy and complaint procedure. (Tr. 546, 589, 590)

13. On one occasion in the winter of 2000, Complainant arrived late at his work assignment at La Guardia Airport and Bravo pulled out a knife. (Tr. 53, 64-65) As he pulled out the knife, Bravo said to Complainant, "I'm going to kill you, you Haitian punk." (Tr. 65) Complainant ran away and the airport security guard called the police. The police wanted to arrest Bravo, but C. Sparacino told Complainant not to file a complaint because he did not want the company to have a bad reputation. (Tr. 53, 64-65) C. Sparacino did not discipline Bravo. Instead he asked Complainant and Bravo to "shake hands" and "make peace." (Tr. 65)

14. From 2000 to 2002, Complainant complained to C. Sparacino 15 to 20 times regarding Bravo's continuing harassment in the form of uttering derogatory ethnic slurs. (Tr. 67)

15. In January of 2002, Complainant complained to C. Sparacino about Bravo's harassing conduct and requested that he speak to Bravo to stop the harassing conduct. (Tr. 67-68) C. Sparacino did talk to Bravo. (Tr. 68) Bravo's harassing conduct did not improve. (Tr. 68) Complainant continued to complain. (Tr. 53, 68-69)

16. Complainant asserted that C. Sparacino fired Bravo in response to his complaints. (Tr. 54-55) C. Sparacino corroborated that he once terminated Bravo's employment because he was "displeased with the way he was managing [the] organization ... in regard to equipment and managing." (Tr. 587) However, M. Sparacino rehired Bravo one month later because he needed a Spanish-speaking manager to talk to the employees. (Tr. 54)

17. When Bravo returned to work Bravo continued to call Complainant a "Haitian punk" whenever he saw him. (Tr. 56)

18. On July 18, 2002, Complainant left his work site to go to the bathroom. When he returned, Bravo was heading towards the airplane and Complainant did not hear Bravo calling him over the noise of the airplane engine. When Complainant reached Bravo, he heard Bravo say to him "Haitian Punk." Bravo then spat on Complainant's face while saying, "I'm your boss and you follow my rules ... I called you and you did not answer me." Complainant described Bravo's voice as very hard and loud. (Tr. 44-45, 69-71, 80-82, 436) Complainant explained to Bravo that he did not hear because of the noise of the airplane engine. Bravo called M. Sparacino. (Tr. 70-71,80-82)

19. M. Sparacino went to the work site and described Complainant as "agitated" and stating that he did not hear Bravo calling him. (Tr. 601) Complainant complained to M. Sparacino about Bravo's national origin slurs and the spitting incident. M. Sparacino directed Complainant to go home. (Tr. 70, 71, 80, 81, 82) M. Sparacino corroborated that he took Complainant back to the office "had a little discussion, and told [Complainant] to go home and to wait for his call for tomorrow." (Tr. 602-03)

20. The next day, Complainant and Bravo reported to M. Sparacino. Complainant complained again about Bravo's repeated national origin slurs and the spitting incident. (Tr. 72,

74, 82, 112) In response to Complainant's complaints, M. Sparacino told Complainant that "he couldn't do anything about that because Bravo was his superior." (Tr. 112)

21. M. Sparacino suspended Complainant for seven days for not responding to Bravo when called. (Tr. 82, 99, 604) Based on Complainant's rate of pay of \$12.00 an hour for 40 hours per week, Complainant lost \$480.00 in salary due to this suspension.

22. I find incredible M. Sparacino's testimony that Complainant did not bring to his attention concerns regarding intimidation or harassment by Bravo. (Tr. 596)

23. I also find incredible M. Sparacino's testimony that the July 19, 2002, meeting included C. Sparacino and Van Russo. (Tr. 603-04) C. Sparacino's testimony contradicted M. Sparacino's testimony when he testified that he did not know that Complainant had been suspended. (Tr. 575)

24. Christopher J. Sparacino testified that Respondent's Director of Operations, Michael Van Russo, was in charge of investigating and imposing employee suspensions. (Tr. 575-76) I find incredible C. Sparacino's testimony that Michael Van Russo investigated Complainant's complaints against Bravo. (Tr. 575-76) I also find incredible C. Sparacino's testimony that Van Russo "went through procedures" to investigate and then suspend Complainant. (Tr. 575-77) However, Respondent did not produce procedures or records that substantiated C. Sparacino's assertion that Van Russo conducted an investigation into the complaints. (Tr. 577)

25. On July 21, 2002, Complainant filed a criminal complaint with the Port Authority Police Department (PAPD) against Bravo charging him with harassment. (Complainant's Exhibit 14; Tr. 79, 96, 111-12, 147-48) In the criminal complaint, Complainant charged that Bravo was harassing him in the form of verbal abuse. Complainant further charged that Bravo spat in his face on July 18, 2002. (Complainant's Exhibit 14) The criminal complaint evidences

that Complainant reported to the police that Bravo's verbal abuse and threats caused him annoyance, alarm and concern for his safety. Complainant further reported to the PAPD that Bravo threatened him with a knife two years earlier, but that he did not press charges at the request of Respondent's management. (Complainant's Exhibit 14) The PAPD went to the work site and interviewed Bravo. (Tr. 60)

26. When Complainant returned to work after the seven day suspension, he reported to M. Sparacino who asked him why he complained to the PAPD. Complainant explained that Bravo did not stop calling him "Haitian punk" and had spat on his face. (Tr. 148-49) On July 29, 2002, Complainant advised the PAPD that he no longer wished to pursue the matter. (Complainant's Exhibit 14)

27. After July 18, 2002, and thereafter, Bravo continued to call Complainant "Haitian punk" and "pussy" whenever he saw him. (Tr. 51, 60, 83, 97-99, 436-37)

28. Complainant perceived Bravo to be a violent person. (Tr. 100, 112-13)

Retaliation Claim

29. After Complainant complained to Respondent's managers about Bravo threatening him with a knife in the winter of 2000, Bravo began to reduce Complainant's hours. Complainant's 2001 W-2 issued by Respondent confirms that Complainant earned \$18,228.75 in 2001. This confirms a reduction in his weekly work hours affecting his salary. At a rate of \$12.00 an hour for 40 hours per week, Complainant should have earned \$24,960.00. This supports Complainant's contention that Bravo retaliated against him by reducing his work hours and, therefore, reducing his yearly salary by \$6,731.25. (Complainant's Exhibit 8; Tr. 27, 617)

30. From the day Complainant returned from suspension on July 26, 2002, to August 1, 2002, a total of seven days, Bravo called Complainant to work a total of 37.5 hours instead of 40.

I find that Complainant's 40 hour week was reduced by two and a half hours. Two and a half hours at the rate of \$12.00 an hour resulted in a salary reduction of \$30.00 in Complainant's weekly salary. (Complainant's Exhibit 2; Respondent's Exhibits 4, 5; Tr. 45, 112, 115, 127-28, 606-10)

31. Bravo did not call Complainant to come in to work on August 1, 2002. (Respondent's Exhibits 4, 5) On August 1, 2002, Complainant went to C. Sparacino to complain about Bravo calling him names and reducing his work hours. (Tr. 153-54) I find incredible C. Sparacino's testimony denying he had conversations with Complainant regarding the reduction of his work hours. (Tr. 590)

32. From August 2, 2002, to August 9, 2002, a total seven days, Bravo called Complainant to work a total of 33 hours instead of 40. I find that Complainant's 40 hour week was reduced by seven hours. Seven hours at the rate of \$12.00 an hour resulted in a salary reduction of \$84.00 in Complainant's weekly salary. (Complainant's Exhibit 2; Respondent's Exhibits 4, 5; Tr. 45, 112, 115, 127-28, 606-10)

33. C. Sparacino admitted he was not present when Bravo interacted with Complainant. (Tr. 554, 572, 573) Respondent still employs Bravo. (Tr. 567) Bravo has been with the company for 12 years continuously other than he one month during which he was terminated. (Tr. 620)

34. On August 8, 2002, Complainant filed a verified complaint with the Division. (A.L.J.'s Exhibit I, XX) C. Sparacino was "upset" and "shocked to hear" that Complainant filed a complaint with the Division. (Tr. 84, 574, 578) M. Sparacino admitted that C. Sparacino had a conversation with Complainant after he learned of the Division complaint. (Tr. 586) M. Sparacino called Complainant and told him that he was no longer needed because he complained

to the Division. (Tr. 84-85, 129-30, 161) I find incredible M. Sparacino's testimony that he did not call Complainant to advise him of his employment termination. (Tr. 613)

35. Respondent asserted that Complainant was terminated because he was an "on-call" employee who failed to be available for work when he was called. M. Sparacino admitted that he called Complainant. However, I find incredible his testimony that the call occurred on August 10, 2002, and that during this call he asked Complainant to report to work. (Tr. 610) I find incredible M. Sparacino's testimony that he called Complainant again for the same reason on August 11 and 12, 2002. (Tr. 611)

36. In support of his termination decision, C. Sparacino testified that Van Russo was in charge of investigating and imposing suspension or termination on an employee who failed to report to work or be available to report to work. (Tr. 575-76, 598) In furtherance of this reason for termination, Respondent offered Respondent's Exhibit 3, Van Russo's alleged termination of Complainant. (Respondent's Exhibit 3; Tr. 599) In Respondent's Exhibit 3, Van Russo stated that Complainant was unavailable by telephone and had failed in his obligations as an "on-call" employee. This position is contradicted by M. Sparacino's testimony given that he admitted he spoke to Complainant via telephone. (Tr. 599, 611)

37. According to C. Sparacino, Van Russo "went through procedures" to investigate Complainant's alleged failure to report to work. As per C. Sparacino, the word "procedures" meant that Van Russo interviewed and asked questions of the employees, the manager and supervisor as to what actually happened at the time. (Tr. 576-77) However, C. Sparacino later contradicted himself and testified that he never spoke to Van Russo about Complainant. (Tr. 577) Respondent did not have records of the alleged interviews conducted by Van Russo. (Tr. 577) Respondent did not call Van Russo as a witness.

Back Pay Claim

38. The 2001 Form W-2 Respondent issued to Complainant indicated that Complainant earned \$18,228.75 in wages from Respondent. Bravo's failure to call Complainant to work caused a yearly reduction in Complainant's salary of \$6,731.25. (Complainants' Exhibit 8; Tr. 27, 617)

39. The 2002 Form W-2 Respondent issued to Complainant indicated that Complainant earned \$9,175.88 in wages from Respondent. This represented wages earned until termination on August 9, 2002. (Complainant's Exhibit 9)

40. In 2002, the NYS Department of Labor-Unemployment Insurance issued to Complainant unemployment compensation benefits in the amount of \$3,230.00. (Complainant's Exhibit 6)

41. Had Complainant remained employed with Respondent his 2002 earnings at the rate of \$12.00 an hour for 40 hours a week would have been \$24,960.00. (Tr. 27, 617)

42. In 2002, Complainant lost a total of \$12,554.12. (Complainant's Exhibits 8, 9)

43. In 2003, Complainant earned \$2,623.18 in wages from employment with Top Notch Services, Inc. (Complainant's Exhibit 10) Had Complainant remained employed with Respondent he would have earned \$24,960.00. (Complainant's Exhibit 8) In 2003, Complainant lost a total of \$22,337.00.

44. In 2004, Complainant earned \$14,570.71 in wages from employment with Top Notch Services, Inc. (Complainant's Exhibit 11) Had Complainant remained employed with Respondent he would have earned \$24,960.00. (Complainant's Exhibit 8) In 2004, Complainant lost a total of \$10,419.29.

45. Therefore, Complainant's lost wages total \$52,041.66. (\$12,554.12 + \$22,337.00 + \$10,419.29 + \$6,731.25=\$52,041.66)

46. Complainant produced no further evidence of his wages and thus damages can not be determined after 2004.

Emotional Distress Claim

47. Prior to the harassment and termination, Complainant did not have symptoms of depression. (Complainant's Exhibits 15 and 18; Tr. 181) During the last of year of employment with Respondent, Complainant began to experience depression and anxiety caused by Bravo's harassment. (Complainant's Exhibit 15, 18)

48. When Bravo spat at him and called him names Complainant felt humiliated, threatened, low, sick and suicidal. (Tr. 71, 99) Complainant's condition worsened when Michael Sparacino told him that his employment was terminated because he complained to the Division. (Complainant's Exhibits 15, 18; Tr.181, 99-100)

49. Complainant expressed how Respondent's discriminatory conducted affected him as follows:

I was devastated when that situation occurred because I love my work and I did not want to lose my job. So when that incident happened and I get spit over my face, I lost my job, I became depressed and I became suicidal, and I wanted to kill myself ... I lost my appetite and I did not want to eat. I was always in bed. And I was always by the window trying to jump out of the window and my wife had to be (sic) hiding the knives. ... For two years I was feeling that way ... I had to go to therapy and I had to (sic) counselor talk to me and prescribe medication in order to take me out of that state of mind. ... the Cipro and a sleeping pill ... they prescribe to me in order to sleep... I was taking two different types of medications ... (T. 163, 167-71)

50. After the termination, Complainant experienced feelings of depression which resulted in several hospitalizations for psychiatric treatment. (Complainant's Exhibits 15 and 18; Tr.

168-71, 174-75, 177-79, 181) On September 14, 2002, Complainant was admitted to New York Methodist Hospital ("NYMH") due to severe depressive symptoms. (Complainant's Exhibits 15, 18) Complainant was hospitalized at NYMH's psychiatric ward for one week. (Tr. 175-78) Complainant's predominant depressive symptom was suicidal feelings. (Complainant's Exhibits 15, 18) The symptoms for which Complainant was admitted to NYMH included feelings of hopelessness, suicidal feelings, sleep disturbance, fear and anxiety, difficulty with managing day-to-day life and household responsibilities, adjusting to the loss of the job, lack of self-confidence, feeling bad about himself and feelings of confusion. (Complainant's Exhibit 15)

51. At NYMH, Complainant was diagnosed with major depression characterized by sleep disturbance, appetite disturbance, poor reality testing, hallucinations, paranoid delusions, depressed mood, impaired judgment, suicidal thoughts/gestures. (Complainant's Exhibit 15) Complainant was treated with psychiatric drug therapy, sleep, individual and group therapy sessions. (Complainant's Exhibit 15) On September 21, 2002, seven days after admission, NYMH discharged Complainant from inpatient psychological treatment. (Complainant's Exhibit 15) Upon discharge, doctors at NYMH prescribed to Complainant a regimen of continued psychological therapy as an out patient at Brooklyn Center for Psychotherapy ("BCP"). (Complainant's Exhibit 15) Upon discharge, the doctors also prescribed Effexor, Risperidol, Zocor, and Ativan. (Complainant's Exhibit 18)

52. The symptoms of depression continued and included disturbance of appetite, feelings of sadness/depression, loss of energy/fatigue, anxiety, sleep disturbance, uncontrollable bouts of crying, worry/ruminations, and losing weight. (Complainant's Exhibit 18)

53. Complainant expressed his feelings as follows: "I thought of committing suicide, to blow my head with a gun, didn't want to eat and lost weight. I felt bothered too much with what took place." (Complainant's Exhibit 18)

54. On September 23, 2002, Complainant commenced outpatient individual psychological treatment at BCP. (Complainant's Exhibit 18) On October 7, 2002, Complainant's treating psychologist, Dr. Michael Boehm, a staff psychologist at BCP, sent a letter to Joseph H. Kaufman, regional director of the Division. (Complainant's Exhibit 3) In the October 7, 2002 letter, Dr. Boehm advised that Complainant was participating in individual psychotherapy and pharmacotherapy at BCP for symptoms of depression and anxiety. Dr. Boehm further advised that Complainant indicated that his symptoms were exacerbated by his reported experience of unlawful discrimination while employed with Respondent. (Complainant's Exhibit 3)

55. After termination, Complainant suffered financial crises and was without medical coverage. (Complainant's Exhibit 18) The symptoms of depression affected Complainant's ability to contribute financially to his family's well-being. (Complainant's Exhibit 18) Complainant experienced feelings of financial worry and the financial setback affected his family. (Complainant's Exhibit 18) Complainant's lack of medical coverage and insufficient financial resources prevented him from continuing treatment after discharge. (Complainant's Exhibit 18) Complainant was approved for the Medicaid insurance program. On April 15, 2003, he continued psychological therapy at BCP for treatment for his symptoms of depression. (Complainant's Exhibit 18)

56. On September 1, 2003, Complainant was still in need of continued psychological therapy. (Complainant's Exhibit 18) On September 16, 2003, Complainant's outpatient psychological treatment stopped. (Complainant's Exhibit 18) On October 6, 2003, BCP

indicated on Complainant's medical chart that medical treatment ended after 18 sessions because Complainant obtained employment and his work schedule prevented him from continuing treatment. (Complainant's Exhibit 18)

57. On or about June 17, 2004, Complainant's wife was so concerned for his mental health that she took him to see doctors at Kings County Hospital. Complainant was then transferred to Gracie Square Hospital ("GSH") for inpatient psychiatric treatment. At the time, Complainant was suffering from deep depression. (Tr. 178) On June 17, 2004, Complainant was admitted to GSH for psychiatric treatment lasting one week. (Tr. 177-78) The admission documents state that Complainant was "depressed for several weeks, with feelings of hopelessness, helplessness and suicidal thoughts. He was paranoid and agitated." Complainant was admitted because of "potentially destructive behavior toward self, others or property." Attending physician, Juan Baturone, M.D., prescribed individual psychotherapy, group therapy and anti-depressants Lexapro and Zyprexa. After six days, Complainant was discharged and directed to receive aftercare at the Flatland Guidance Center ("FGC") with Mia Montgomery, CSW. (Complainant's Exhibit 17) During the six day hospitalization Complainant attended daily therapy sessions. (Complainant's Exhibit 17)

58. On June 23, 2004, Complainant was discharged from GSH. (Complainant's Exhibit 17) The discharge instructions directed Complainant to take Zyprexa and Lexapro and to continue outpatient psychiatric therapy at FGC with Montgomery. (Complainant's Exhibits 16 and 17)

59. On June 25, 2004, Complainant continued his outpatient psychological therapy with Montgomery. (Complainant's Exhibit 16) The notes Montgomery entered in Complainant's medical chart indicate that Complainant's depression was related to the loss of his job with

Respondent. (Complainant's Exhibit 16) Complainant attended psychological sessions with Montgomery once a month from August, 2004 to April, 2005. Complainant stopped the sessions when his insurance changed from Medicaid to another insurance not accepted by FGC.

(Complainant's Exhibit 16) On June 7, 2005, Montgomery reported that Complainant's treatment was terminated because Complainant no longer reported depressive symptoms, and because he changed his insurance carrier from Medicaid to one not accepted by FGC. However, Complainant was referred to another service and directed to continue taking his medications.

(Complainant's Exhibit 16)

60. Randy Heriveaux, Complainant's wife, credibly testified that she witnessed Complainant's demeanor and emotional reactions to the incidents at work. Heriveaux observed Complainant to be "very upset" on the day that Bravo pulled a knife on him. (Tr. 208-209) Heriveaux frequently heard Complainant's complaints about Bravo's mistreatment and name-calling, and that Bravo would call him "stupid Haitian," "pussy Haitian" and other names. (Tr. 209-13, 257-58)

61. Heriveaux observed Complainant's demeanor when he returned home on the day that Bravo spat on his face. Heriveaux observed Complainant to be "very, very upset" "hurt" and she observed him becoming depressed because he was suspended from work for one week. (Tr. 209-13) Heriveaux observed Complainant's demeanor on the day he had a telephone conversation with M. Sparacino when told that he was no longer needed because he complained to the Division. (Tr. 218-19)

62. Heriveaux described Complainant prior to his problems at work as a happy person, smiling, talking with everybody and always ready to go to work when called. At that time, Complainant liked his job, was not a sick person, and was not taking medications. (Tr. 224)

Heriveaux observed Complainant's demeanor after the termination to be, "very, very, very sad and depressed." (Tr. 221) Heriveaux observed Complainant's demeanor and described it as follows:

He was saddened knowing that he couldn't provide the help in the home ... would stay in bed and lay down. He would cry. He wouldn't sleep at night. He wouldn't eat and it was very stressful for me too. I had a hard two years with him, went through this depression and I was scared for him because he was thinking of killing himself. I took him to the hospital and they keep him for a week. They give him medication...because he is a person who have his pride ... and seeing that someone spit on you and have your pride, you know, it was—it's a terrible thing. And I was scared for him because every time I go to work and come in the house, I don't know what I see because he talking about throwing himself through the window, cut his wrist ... And that was never [Complainant]. (Tr. 221- 23)

63. Heriveaux observed Complainant being depressed, concerned and afraid of not getting another job. (Tr. 224) Heriveaux confirmed Complainant's hospitalizations for inpatient and outpatient psychiatric treatment for the symptoms of depression, including his taking various medications for sleep problems and depression. (Tr. 221, 225, 228) Heriveaux observed that Complainant lost a lot of weight. (Tr. 228).

OPINION AND DECISION

Hostile Work Environment Claim

The evidence submitted at hearing demonstrated that Respondent discriminated against Complainant because of his national origin by subjecting him to a hostile work environment.

The Human Rights Law makes it an unlawful discriminatory practice for an employee to discriminate against an individual because of his race and national origin. N.Y. Exec. Law, Art. 15 §296.1 (a), ("Human Rights Law"). It is an unlawful discriminatory practice to discriminate against an individual because of race or national origin in the terms, conditions or privileges of

employment . . . including where, as here, an employee is the victim of ethnic insults and harassment." *Broad Elm Auto Ctrs., Inc. v. New York State Div. of Human Rights*, 159 A.D. 2d 978, 552 N.Y.S. 2d 763 (4th Dept. 1990).

"A hostile work environment exists when, as judged by the reasonable person, it is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the [complainant's] employment." *McIntyre v Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc. 2d 795, 802; 669 N.Y.S. 2d 122 (N.Y. County 1997). Whether a workplace may be viewed as hostile or abusive, from both a reasonable person's standpoint as well as from the victim's subjective perspective, can be determined only by considering the totality of the circumstances. *Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A. D. 2d 44, 50, 642 N.Y.S. 2d 739 (4th Dept. 1996), *appeal denied*, 647 N.Y.S. 2d 652 (4th Dept. 1996), *lv. denied*, 80 N.Y. 2d 809, 655 N.Y.S. 2d 889 (1997); *see also Harris v. Forklift Sys.* 510 U.S. 17 (1993) and *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

"[A] continuing violation may be found where there is proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory policy or practice" *Clark v State of New York*, 302 A.D. 2d 942, 754 N.Y.S. 2d 814 (4th Dept. 2003). Here, Complainant complained about acts which occurred between the year 2000 and August 2002 which demonstrated discriminatory conduct.

Respondent subjected Complainant to a hostile work environment over the course of two years because of his national origin. Bravo pulled a knife on Complainant in the winter of 2000 while using the threatening words, "I am going to kill you, you Haitian punk," continued to

repeatedly use the offensive term "Haitian punk" whenever he saw Complainant, on July 18, 2002, spat in Complainant's face while calling him "Haitian punk," and continued to call Complainant using slurs until his termination. Bravo's actions were abusive, threatening, severe and pervasive enough to constitute a hostile work environment and a continuing violation.

Condonation of Hostile Work Environment

The offensive behavior was perpetrated by Complainant's direct supervisor. It was also condoned by Respondent's owners who failed to take remedial action despite having knowledge of the conduct.

Condonation, which may sufficiently implicate an employer in the discriminatory acts of its employee to constitute a basis for employer liability under the Human Rights Law, contemplates a knowing, after-the-fact forgiveness or acceptance of an offense. An employer's calculated inaction in response to discriminatory conduct may, as readily as affirmatively conduct, indicate condonation. Condonation may be disproved by a showing that the employer reasonably investigated a complaint of discriminatory conduct and took corrective action.

Father Belle Community Ctr. v. New York State Div. of Human Rights, 221 A. D. 2d at 53.

Complainant described harassing comments relating to his national origin that lasted from 2000 until his termination on August 9, 2002. Respondent had knowledge of Bravo having pulled a knife on Complainant when its only response was to ask Complainant to withdraw his criminal complaint and shake Bravo's hand. Respondent's actions were meant to protect the reputation of its company rather than stop and remediate Bravo's offensive conduct.

Respondent failed to provide any reason for ignoring Complainant's complaints regarding Bravo's threatening and harassing conduct. Respondent did not have an anti-harassment policy. Bravo's conduct of pulling a knife to threaten Complainant so as to cause him to run away to flee potential physical harm is unacceptable conduct in any work place.

Bravo's conduct of spitting on Complainant's face was a physically threatening and hostile act that was unacceptable in a work environment. Respondent placed Complainant in a physically threatening environment with a superior who repeatedly continued to insult Complainant with derogatory references to his national origin. This harassment occurred during the relevant time period of the original and amended complaints, and continued throughout Complainant's last two years of employment.

Bravo was emboldened by Respondent's failure to discipline him for his actions towards Complainant. Respondent's indifference to Complainant's repeated complaints and its failure to take any action to correct the hostile atmosphere condoned Bravo's derogatory and discriminatory conduct. *Kondracke v Blue*, 277 A. D. 2d 953, 718 N.Y.S. 2d 533 (4th Dept. 2000).

Retaliation Claim

Complainant alleged that he was retaliated against for opposing discriminatory practices when he asked Respondent to stop Bravo from engaging in harassing conduct, and when he filed a complaint with the Division.

The Human Rights Law makes it an unlawful discriminatory practice for an employer to retaliate against an employee because he opposed behavior he reasonably believed to be discriminatory. Human Rights Law § 296.7; *see also, 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 (3rd Dept. 1990).

In order to make out a prima facie case of retaliation, Complainant must demonstrate that he: 1) engaged in activity protected by the Human Rights Law; 2) Respondent was aware that he participated in the protected activity; 3) he suffered an adverse employment action based upon this activity; and 4) there is a causal connection between the protected activity and the adverse

action. Should Complainant make out a prima facie case, the burden of production shifts to Respondent to articulate a legitimate, non-discriminatory reason for its actions. Complainant has the ultimate burden of demonstrating that Respondent's explanation is a pretext for unlawful discrimination. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3rd Dept. 1999).

Complainant established a prima facie case of retaliation. Complainant engaged in protected activity when he complained to Respondent's managers about Bravo's actions, and when he filed a complaint with the Division. Bravo had knowledge that Complainant complained to Respondent about his harassing conduct, and Respondent's managers knew Complainant filed a complaint with the Division. Bravo reduced Complainant's work hours, and Respondent's managers ultimately terminated Complainant's employment. These adverse employment actions were based upon Complainant's protected activity. There was a causal connection between the protected activity and the adverse actions because the adverse actions occurred very soon after Complainant engaged in the protected activity, i.e. as soon as Respondent's owners received a copy of the Division complaint they terminated Complainant's employment. The proximity of time between the complaint and the adverse actions and M. Sparacino telling Complainant that he was not longer needed because he complained to the Division are sufficient to find a nexus for a retaliatory motive. *See Rosenblum-Wertheim v. New York State Div. of Human Rights*, 228 A.D.2d 237, 643 N.Y.S.2d 117 (1st Dept. 1996).

As to the reduction in hours, Respondent's reason was that Complainant was an "on call" employee whose work hours varied. However, the record shows that although Complainant's daily work hours could vary from 4 to 17, Respondent admitted Complainant worked a 40 hour week.

As to the termination, Respondent justified its action on the ground that Complainant failed to report to work on August 10, 11 and 12, 2002. In support of this explanation, Respondent alleged that Complainant was not available via telephone. However, M. Sparacino admitted that he spoke to Complainant via telephone, thus discrediting his testimony that Complainant was not available. The record shows that M. Sparacino did call Complainant to terminate his employment. This termination occurred as soon as Respondent received notice that Complainant had filed a complaint with the Division.

Back Pay Claim

Complainant is entitled to an award of back pay. The Human Rights Law requires that complainants mitigate their damages. *See Boodram v. Brooklyn Developmental Center*, 2 Misc. 3d 574, 773 N.Y.S. 2d 817 (Kings County 2003). A back pay award constitutes the difference in salary Complainant would have received but for the violation, and any salary he actually received from other employment. *Bell v. Div. of Human Rights*, 2007 N.Y. Slip Op 367, 827 N.Y.S. 2d 779 (3rd Dept. 2007). Therefore, based on the record, Complainant is entitled to an award of back pay in the amount of \$52,041.66 without any deductions whatsoever. Income taxes will not be deducted from the back pay award.

Complainant is entitled to a pre-determination interest award on the back pay award at a rate of nine per cent per annum, from January 1, 2003, a reasonable intermediate date, until the date of the Commissioner's Final Order. *See Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002).

Emotional Distress Claim

I find that Complainant suffered humiliation and mental anguish as a result of Respondent's unlawful discrimination. Complainant is entitled to damages for the mental anguish he suffered as a result of both the hostile work environment and subsequent retaliation. *Cosmos Forms, Ltd. v. New York State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989). Such compensation may be solely based on a Complainant's testimony. *Id.* at 442; *see also, Cullen v Nassau County Civil Serv. Comn.*, 53 N.Y. 2d 492, 442 N.Y.S. 2d 470 (1981). It must, however, be reasonably related to a respondent's discriminatory conduct, *See Quality Care v. Rosa*, 194 A.D.2d 610, 599 N.Y.S.2d 65 (2nd Dept. 1993); *School Bd. of Educ. of the Chapel of the Redeemer Lutheran Church v N.Y.C. Commission on Human Rights*, 188 A. D. 2d 653, 591 N.Y.S. 2d 531 (2nd Dept. 1992).

Complainant credibly testified that he experienced depression and anxiety caused by Bravo which was condoned by Respondent's managers. The proof established that Complainant's mental health deteriorated at the hands of an abusive supervisor.

Though a mental anguish award may be based solely on Complainant's testimony, here Complainant and his wife testified compellingly and persuasively as to the emotional distress, anxiety and psychological harm he suffered, as well as its impact on his daily life. Furthermore, Complainant's medical records from the psychiatric hospitals and psychologists who treated him documented the serious impact of the stress Complainant suffered while employed, and the subsequent effects of the retaliatory termination. The hostile work environment consisted of repeated derogatory comments made by Bravo, as well as Respondent's indifference and callous disregard to Complainant's request for assistance. The harassment lasted from the winter of 2000, when Bravo pulled a knife on Complainant, until his termination. However, the serious

psychological impact continued for another two years.

Complainant described the anxiety and depression he experienced as a result of the humiliation he received at the hands of his supervisor and condoned by Respondent's managers. Complainant described how he ran for his life when Bravo came after him with a knife, how Bravo spat at him while insulting him with the term "Haitian punk" and other repeated insults based on his national origin. Complainant compellingly and persuasively described his feeling "devastated," "suicidal," anxious, hopeless, fearful, unable to sleep, unable to eat, unable to deal with day-to-day life and so depressed that he had to seek medical treatment. Complainant was hospitalized several times to receive intensive psychiatric treatment to deal with feelings of depression. These feelings were exacerbated when his employment was terminated and continued for a period of two years.

Here, the record shows that Complainant's mental anguish lasted until 2005. The severity and consequences of Complainant's mental anguish and its duration were documented by his testimony, the medical records which confirmed the psychiatric treatment received, and by the testimony of his wife. In consideration of the fact that that Complainant suffered humiliation while at work for a period of two years, and that he suffered extensive mental anguish as a result of the retaliatory termination resulting in psychiatric treatment for a further two year period, an award of \$100,000.00 for emotional distress, pain and suffering, humiliation and mental anguish, will effectuate the purpose of the Human Rights Law. The award for mental anguish is in accord with compensatory awards in similar Human Rights Law cases. *Allender v Mercado*, 233 A. D. 2d 153; 649 N.Y.S. 2d 144; (1st Dep't 1996) (citing *Tiffany & Co. v. Smith*, 224 A.D.2d 332, 638 N.Y.S.2d 454 (1st Dep't 1996, *lv denied*, 88 N.Y.2d 806; 646 N.Y.S.2d 985 (1996); *Sogg v. American Airlines*, 193 A.D.2d 153, 603 N.Y.S.2d 21 (1st Dep't 1993), *lv. dismissed*, 83 N.Y.2d

846, 612 N.Y.S.2d 106 (1994); *lv. denied*, 83 N.Y.2d 754, 612 N.Y.S.2d 109 (1994); *Boutique Indus. v. New York State Div. of Human Rights*, 228 A. D. 2d 171, 643 N.Y.S. 2d 986, 1996 (1st Dep't 1996).

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 Complainant's complaint regarding race discrimination be and hereby is dismissed; and it is further

ORDERED, that Complainant's claim regarding national origin discrimination be and hereby is sustained; and it is further

ORDERED, that Complainant's claim regarding retaliation be and hereby is sustained; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall cease and desist from discriminating in employment based on national origin in violation of the Human Rights Law; and it is further

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

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative action to effect the purposes of the Human Rights Law:

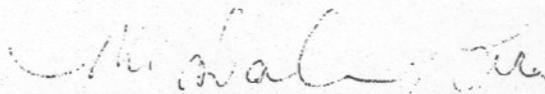
1. Within sixty (60) days from the date of the Final Order, Respondent shall pay to Complainant back wages without any deductions or withholding whatsoever, in the amount of \$52,041.66.

Interest at a rate of nine percent per annum shall be awarded from January 1, 2003, until the date payment is made.

2. Within sixty (60) days from the date of the Final Order, Respondent shall pay to Complainant compensatory damages for mental anguish and humiliation, without any deductions or withholding whatsoever, in the amount of \$100,000.00. Interest at a rate of nine percent per annum shall be awarded from the date of the Final Order until the date payment is made.
3. The aforesaid payments shall be made by Respondent in the form two certified checks made payable to the order of Complainant, Jacques B. Heriveaux, at his address of 2215 Newkirk Avenue, Apt. D-2, Brooklyn, New York 11226, and delivered by certified mail, return receipt requested.
4. Respondent shall simultaneously furnish written proof of the aforesaid payments to the Acting General Counsel of the Division, Caroline J. Downey, Esq., at her office address at One Fordham Plaza, 4th Floor, Bronx, New York 10458.
5. Within sixty (60) days from the date of the Final Order, Respondent shall create an anti-harassment policy and shall transmit a memorandum to all of its employees, agents, and officers, notifying them that it has a policy of non-discrimination and anti-harassment based on, among other reasons, a person's national origin.
6. Within sixty (60) days from the date of the Final Order, Respondent shall transmit a memorandum to all of its employees, agents, and officers, notifying them that it is unlawful to retaliate for filing a complaint, testifying, or assisting in any proceeding under the Human Rights Law.
7. Respondent shall simultaneously furnish copies of the aforesaid memoranda to the Acting General Counsel of the Division, Caroline J. Downey, Esq., at her above office address.
8. Respondent shall furnish written proof of its compliance with the directives contained in this Order.

9. Respondent shall cooperate with the representatives of the Division during any investigation into their compliance with the directives contained in this Order.

DATED: May 21, 2007
Bronx, New York



MIGDALIA PARÉS
Administrative Law Judge