

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

RAFAEL PEREZ and LEOPOLDO RIVERA,  
Complainants,

v.

SUV PRODUCTION, INC.,  
Respondent.

NOTICE AND  
FINAL ORDER

Case Nos. 10120215, 10120193

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 October 22, 2008, 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:**

- The correct reasonable intermediate date from which the pre-judgment interest on Perez's back pay award accrues is October 1, 2007.
- The correct reasonable intermediate date from which the pre-judgment interest on Rivera's back pay award accrues is November 1, 2007.

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: **DEC 19 2008**  
Bronx, New York

  
\_\_\_\_\_  
GALEN D. KIRKLAND  
COMMISSIONER

TO:

Complainant

Rafael Perez  
1274 Lafayette Avenue, Apt. 4E  
Bronx, NY 10474

Complainant

Leopoldo Rivera  
61-12 Broadway  
Woodside, NY 11377

Respondent

SUV Production Inc.  
Attn: Mr. Hank Chan  
327 West 36th Street  
New York, NY 10018

Hon. Andrew Cuomo, Attorney General  
Attn: Civil Rights Bureau  
120 Broadway  
New York, New York 10271

State Division of Human Rights

Sara Toll East  
Chief, Litigation and Appeals

Caroline J. Downey  
General Counsel

Peter G. Buchenholz  
Adjudication Counsel

Matthew Menes  
Adjudication Counsel

Sharon J. Field  
Associate Attorney

Toni Ann Hollifield  
Senior Attorney

Christine Marbach Kellett  
Chief Administrative Law Judge

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF  
HUMAN RIGHTS**

on the Complaint of

**RAFAEL PEREZ and LEOPOLDO RIVERA,**  
Complainants,

v.

**SUV PRODUCTION INC.,**  
Respondent.

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

Case Nos. **10120215, 10120193**

**SUMMARY**

Complainants, former employees of Respondent, alleged that they were treated differentially and exposed to a hostile work environment on account of race and national origin. Complainants have proven their respective cases and each is hereby awarded damages.

**PROCEEDINGS IN THE CASE**

On September 14, 2007 and September 17, 2007, respectively, Complainants each filed verified complaints with the New York State Division of Human Rights ("Division"), charging Respondent 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 complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative

Law Judge (“ALJ”) of the Division. A public hearing session was held on August 25, 2008.

Complainant appeared at the hearing. Hank Chan, owner of Respondent, appeared ‘pro se’. The Division was represented by Toni Ann Hollifield, Esq.

Permission to file post-hearing briefs was granted. Neither side chose to file post-hearing submissions.

### **FINDINGS OF FACT**

1. Complainants, former employees of Respondent, alleged that they were treated differentially and exposed to a hostile work environment on account of race and national origin. (ALJ Exhs. 2, 5)

#### **The Parties**

2. Respondent is a business exclusively employing both Hispanic and Chinese workers. Since 2005, Hank Chan has been Respondent’s owner. Chan stated that he was no longer represented by an attorney at the time of the public hearing, and that he wished to represent himself. (Complainant’s Exh. 6; Respondent’s Exh. 1, 2, 3, 4, 5, 6, 7; Tr. 5, 41, 47, 122, 132)

3. Complainant Perez is an Hispanic of Mexican national origin. In October, 1998, Perez began working for Respondent. Perez was earning \$10.75 per hour for a 55 hour work week at the time his employment was terminated. (Tr. 38, 44, 46)

4. Complainant Rivera is also an Hispanic of El Salvadoran national origin. In 1995, Ramirez began working for Respondent. Rivera was earning \$9 per hour for a 52 hour work week at the time his employment was terminated. (Tr. 72, 78, 100, 103)

#### **Differential and Hostile Treatment**

5. Both Complainants, and the other of Respondent’s Hispanic workers, performed the

most difficult work such as deliveries and unloading. (Tr. 48-50, 78, 105, 117)

6. The superior of both Complainants, alluding to Perez' Mexican heritage and the fact that the Hispanics did the most difficult work, referred to Perez as "Mexicow" (*sic*); he also said that Hispanics were like burros and pack mules. This individual also called the Hispanic workers "motherfucker" and "stupid". Respondent's Chinese workers were never spoken to in this way. (Tr. 49, 51, 80, 104)

7. Respondent's Hispanic workers were disciplined for mistakes on the job while its Chinese workers were not. (Tr. 51, 79-80)

8. Respondent's Hispanic workers were sent home when there was no work while its Chinese workers would remain. Additionally, the Hispanic workers were the first ones to be laid off or fired. (Tr. 49, 74, 75, 76, 106, 119)

9. Perez was occasionally forced to stay beyond his quitting time. Perez was not paid overtime for having done so. (Tr. 64-65)

10. I do not credit the testimony of Chan that Complainants, as well as Respondent's other Hispanics workers, were not cursed at nor treated differentially relative to the Chinese workers. (Tr. 134, 135, 136, 137, 138, 139, 142, 153, 160)

*The Complainants' Employment is Terminated*

11. Perez, after having his employment terminated in August, 2007, was out of work for three months before finding another job paying him a higher salary. (Complainant's Exh. 3; Tr. 43-45, 79)

12. Rivera, whose employment was terminated the following month, was out of work for three months and currently makes \$8.50 per hour for a 40 hour work week. Rivera received \$1,800 in unemployment insurance benefits. (Complainant's Exh. 5; Tr. 73, 81)

Mental Anguish

13. Perez felt “very bad” while working for Respondent due to the treatment he received; for approximately three months Perez also was depressed, had trouble sleeping, and suffered from a diminished appetite. (Tr. 51, 57, 58)

14. Rivera had trouble sleeping for approximately two weeks after his employment was terminated. (Tr. 86-87)

**OPINION AND DECISION**

The Human Rights Law makes it an unlawful discriminatory practice for an employer, “because of the race...color [or] national origin...of any individual...to discriminate against such individual in compensation or in terms, conditions or privileges of employment.” Human Rights Law § 296.1(a).

In discrimination cases a complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must articulate, via admissible evidence, that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

In order to establish a prima facie case of employment discrimination based on protected

class membership, a complaint must show: 1) membership in a protected class; 2) that he was qualified for the position; 3) an adverse employment action; and 4) that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Knighon v. Delphi Automotive Systems*, 2004 U.S. Dist. LEXIS 27893.

In order to establish a prima facie case of hostile work environment, a complainant must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004), quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993). Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." *Harris*, at 23. Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment--one that a reasonable person would find to be so. *See id.* at 21.

The record shows that Complainants made out prima facie cases as to both theories.

As to protected class membership, Complainants established that they were members of protected classes, qualified for the positions which they held given their extended tenure in the employ of Respondent, suffered adverse employment actions upon their separation from Respondent's employ, and that the separations occurred under circumstances giving rise to an



inference of discrimination in light of the differential treatment they received.

As to unlawful discrimination based on a hostile work environment, Complainants established that their superior regularly addressed them with vulgar epithets, and used demeaning terms which compared each to beasts of burden. This abusive, hostile and insulting treatment negatively impacted the psychological well-being of both men.

Chan, in attempting to articulate a legitimate, nondiscriminatory reason for Respondent's employment actions, merely made self-serving denials of the allegations. As such, this does not constitute the required legal articulation of a legitimate, nondiscriminatory reason for the employment actions undertaken against Perez and Rivera.

Therefore, the complaints have been proven.

#### Damages

The Human Rights Law provides various remedies to restore victims of unlawful discrimination to the economic position that they would have held had their employers not subjected them to unlawful conduct. *See* Human Rights Law § 297.4.c (i)-(iv); *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 210 (1982). Awards of back pay compensate a complainant for any loss of earnings and benefits sustained from the date of the adverse employment action until the date of the verdict. *Iannnone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403 (S.D.N.Y. 1996). Besides back pay, "an award of...damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish." *Cosmos Forms, Ltd. v. New York State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dep't. 1989). That award may be based solely on a complainant's testimony. *Id.* Finally, an award of pre-determination interest of nine percent per annum, accruing from a reasonable intermediate date, complements the back pay award and is appropriate. *Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d

21, 744 N.Y.S.2d 349 (2002).

The record shows that Perez had out of work damages in the amount of \$7,098; Rivera's out of work damages are \$5,616, less \$1,800 in unemployment insurance benefits, equaling damages in the amount of \$3,816. *Ante* at ¶¶ 3, 4, 11, 12. Both men also suffered emotional distress damages. As a result, each is awarded \$5,000 as an amount which is reasonably related to Respondent's discriminatory conduct, and consistent with case law in this regard. *Quality Care, Inc. v. Rosa*, 194 A.D.2d 610, 599 N.Y.S.2d 65 (2d Dep't 1993)(award could not exceed \$5,000 in absence of, among other things, any medical treatment); *Club Swamp Annex v. White*, 167 A.D.2d 400, 561 N.Y.S.2d 609 (2d Dep't. 1990)(\$5,0000 award based solely on victim's testimony); *Port Washington Police Dist. v. State Div. of Human Rights*, 221 A.D.2d 639, 634 N.Y.S.2d 195 (award of \$5,000 after "brief" discussion by complainant as to her mental anguish).

### **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 Respondent, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and

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

1. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay Complainant Rafael Perez, as an award of back pay in the amount of \$7,098. Respondent shall also pay Complainant Leopoldo Rivera, as an award of back pay in the amount of \$3,816. Respondent shall pay prejudgment interest on said awards at the rate of nine (9) per

cent per annum from reasonable intermediate dates, namely, April 1, 2003 for Complainant Rafael Perez, and January 1, 2001 for Complainant Leopoldo Rivera, in accordance with C.P.L.R. § 5004;

2. Within sixty (60) days of the date of the Commissioner's Order, Respondent Contracting shall pay Complainant Rafael Perez, as an award of compensatory damages for mental pain and suffering in the amount of \$5,000. Respondent shall also pay Complainant Leopoldo Rivera, as an award of compensatory damages for mental pain and suffering in the amount of \$5,000. Respondent shall pay interest on said awards at the rate of nine (9) percent per annum from the date of the Commissioner's Order, in accordance with C.P.L.R. § 5002;

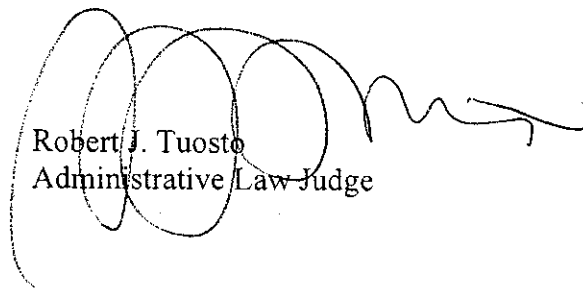
3. Respondent shall pay post-judgment interest in accordance with C.P.L.R. § 5002;

4. The aforesaid payments shall be made by Respondent in the form of certified checks made payable to the order of each Complainant and delivered by certified mail, return receipt requested, to the N.Y.S. Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4<sup>th</sup> Fl., Bronx, N.Y. 10458. Respondent Contracting shall furnish written proof to the N.Y.S. Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4<sup>th</sup> Fl., Bronx, New York 10458, of its compliance with the directives contained in this Order;

5. Respondent shall establish in its workplace both anti-discrimination training and procedures. Respondent shall provide proof of the aforementioned to the Division upon written demand.

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

DATED: October 22, 2008  
Bronx, New York



Robert J. Tuosto  
Administrative Law Judge