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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

ANGELO COELLO, ERIC GUERRERO, BENIGNO DE JESUS ENCARNACION, ANTHONY HENDERON, CARLOS VASQUEZ, JAMES WHETSTONE and ROBERTO RIOS,

Plaintiffs,

-against-

THE RIESE ORGANIZATION INC., A.R.O. CONSTRUCTION CORP., DENNIS RIESE, GARY TRIMARCHI and ELIO MARTINI,

Defendants.

X

Index No: **309073/2011**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to **55** read on this **motion to reargue**

	PAPERS NUMBER
No On Calendar of **February 7, 2019**	
Notice of Motion-Order to Show Cause - Exhibits -_	**1, 2 3, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26 27, 28, 29, 30, 31, 32 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55**
Answering Affidavit and Exhibits--------	**13, 14**
Replying Affidavit and Exhibits	
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	**_4, 5,, 6 7, 8, 9, 10, 11, 12**
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants move pursuant to CPLR 2221 to reargue, in part, a motion for summary judgment that resulted in an order dated January 5, 2018 that dismissed plaintiffs' claims for intentional infliction of emotional distress in the underlying order and did not dismiss plaintiffs' other claims for workplace discrimination. Defendants reargue to dismiss with prejudice the pay disparity and retaliation claims brought by each plaintiff against defendants under the New York State Human Rights Law, (NYSHRL), and the New York City Human Rights Law, (NYCHRL), and to dismiss with prejudice all claims against the individual

defendant, Dennis Riese, (Riese). Except for Riese, the claims of defendants for hostile workplace and discrimination, other than that pertaining to differential pay, are not being re-argued. Defendants also seek to reargue their assertion that plaintiff's expert report is inadmissible.

The motion to reargue is granted and oral argument was heard on this motion on February 7, 2018. The underlying motion for summary judgment reargued in this motion is decided as follows.

DENNIS RIESE

Riese testified that he was not involved in the day-to-day management of the company, and as a result he argues he cannot be held individually liable for any violation of any anti-discrimination law. However, Riese is the principal stockholder in the company and is the CEO.[1] "A supervisory official personally participates in challenged conduct not only by direct participation, but by (1) failing to take corrective action; (2) creation of a policy or custom fostering the conduct; (3) grossly negligent supervision, or deliberate indifference to the rights of others. *Hayut v. State of Univ. of New York,* 352 F.3d 733, 753 (2d Cir.2003)." (*Rolon v. Ward*, 345 F. App'x 608, 611 [2d Cir. 2009]).

There is extensive testimony by the plaintiffs that Black and Hispanic employees were subjected to racial and ethnic slurs, such as "monkey," "idiot," "stupid," "knucklehead," "fuck," "fucking useless," "sand nigger," "fucking Hispanic," "pig," "fucking fat guy," "spic, little girls, you little bitches,"

[1] oral argument transcript, p. 4.

"motherfucker," "piece of shit," "fucking ignorant," and "these fucking Spanish," from supervisors. Each plaintiff testified that such language was not directed to white employees.[2] Riese was deposed as a consequence of plaintiffs' commencement of this action, and Riese's status as a defendant.

Riese testified at his deposition as follows: "that word (nigger) is being used constantly in our society, including by black people who seem to use it more often than white people these days. When a white person uses it in a conversation with them, they cry discrimination. That doesn't seem fair... I am not convinced that the use of the word really means discrimination anymore. I really don't."[3] Riese further testified that "construction workers who are bonding with each other and if the black men are using that word, [nigger], it is quite possible the white men will think they can too."[4] Riese further testified he "did not have time"[5] to receive any antidiscrimination training.

It is undisputed that Riese had an ownership interest in the company and there is evidence Riese had the power to remedy this situation. "Under this provision, an individual is properly subject to liability for discrimination when that individual qualifies as an "employer." N.Y. Exec. Law § 296(1). An individual qualifies as an "employer" when that individual has an ownership interest in the relevant organization or the "power to do more than carry out personnel decisions made by others." *Patrowich v. Chem. Bank,* 63 N.Y.2d 541, 483 N.Y.S.2d 659,

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[2] Underlying decision of this Court dated January 5, 2018.
[3] Riese transcript p. 202.
[4] Riese transcript p. 201.
[5] Riese transcript p. 138.

473 N.E.2d 11, 12 (1984) (per curiam)." *Townsend v. Benjamin Enterprises, Inc.*, 679 F.3d 41, 57 (2d Cir. 2012).

Accordingly, the branch of defendants' motion seeking to dismiss Riese from this action is denied.

PAY DISPARITY/MOSS EXPERT REPORT

The stated objectives in the report of plaintiff's expert, Dr. Alan Moss, (Moss), is as follows:

1. "Whether the rates paid to the minority workers, who are plaintiffs in this case, approximate usual rates paid in the marketplace.

2. Whether rates paid to the white employees of the Department constitute a similar relationship with market rates."[6]

Moss reported the methodology he employed in categorizing the labor performed by the plaintiffs and white co-employees and reported the source of the regional data base that served as a comparator prevailing wage rate. As a result of Moss' analysis, the plaintiffs earned an average of 73% of the median hourly market wage for their occupations while plaintiff's white co-workers earned an average of 126% of the median hourly market wage for their occupations.

Defendants argue that the Moss report is flawed and inadmissible as it "merely concludes that carpenters at A.R.O. earn more than plumbers, and that there was a pay disparity between plaintiffs and other employees at A.R.O."[7] Job titles of the plaintiffs and white co-employees were different, plaintiffs are

[6] Moss report p. 3.
[7] Reply memorandum of law p. 8.

plumbers, laborers, a driver and a supervisor and the white employees are largely carpenters, supervisors and a locksmith. Defendants also argue that the white employees had greater experience, better work quality, and more education at the time of hire.[8] Defendants also argue that the sample size is too small.

Defendants' argument that plaintiffs and their white co-employees are dissimilarly situated and are not comparators to each other misapprehends the methodology employed by Moss. The Moss report does not make a direct comparison between the wages of a plumber and a carpenter. In essence, the report makes two comparisons. First, each plaintiff and white co-employee's wages are compared to a regional median wage for the respective occupation of the employee. The shortfall or surplus of all of the plaintiffs are averaged and expressed as an average percentage and the shortfall or surplus of the white co-employees are averaged and expressed as a percentage. Using this methodology, the plaintiffs earned, on average, 73% of the median hourly market wage for **their** occupation, constituting a shortfall, while plaintiffs' white co-workers earned, on average, 126% of the median hourly market wage for **their** occupation, constituting a surplus above the median hourly regional wage.

With the methodology employed by Moss, in a relatively small company with a dearth of comparators, the methodology can detect discrepancies between the wage rates of minorities and whites who are dissimilarly situated and raise a factual issue as to whether any substantial differences in wages are a result of unlawful discrimination.

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[8] Defendants' reply memorandum of law p. 11.

In discrediting Dr. Moss' report, defendants have not addressed the pervasive shortfall in plaintiff's wages as compared to the national median for their respective occupations, nor did the defendants address the pervasive surplus in the wages of white employees. Rather, defendants'' arguments focus upon the lack of direct white comparators for plaintiffs' occupations. For example, defendants cite to *Uwoghiren v. City of New York*, 148 A.D.3d 457, 458 [1st Dept 2017]), for the proposition that "the employees Plaintiffs seek to compare themselves to are plainly not similarly situated[9] see also *Carryl v. MacKay Shields, LLC*, 93 A.D.3d 589 [1st Dept 2012]). However, the Moss report does not make such a direct comparison as between plaintiffs and white co-employees as explained above. What the Moss report provides is evidence that the plaintiffs and white employees are paid on a different scale with respect to regional medians.

While it appears that the direct comparator method is mandatory under NYSHRL, under NYCHRL "evidence of an unlawful motive in the mixed motive context need not be direct but can be circumstantial—as with proof of any other fact (*see Desert Palace, Inc. v Costa*, 539 US 90 [2003])." (*Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 40–41 [1st Dept 2011]).

> Six years after the passage of the New York City Local Civil Rights Restoration Act (Local Law No. 85 [2005] of City of NY) (Restoration Act), it is beyond dispute that the City HRL now "explicitly requires an independent liberal construction analysis *in all circumstances*," an analysis that "must be targeted to understanding and fulfilling what the statute characterizes as the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart state or federal civil rights laws" (*Williams v New York*

[9] Defendants' reply memorandum of law, p. 7.

> *City Hous. Auth.*, 61 AD3d 62, 66 [2009], *lv denied* 13 NY3d 702 [2009] [emphasis added])
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> Finally, the existence of discrimination—a profound evil that New York City, as a matter of fundamental public policy, seeks to eliminate[9]—demands that the courts' treatment of such claims maximize the ability to ferret out such discrimination, not create room for discriminators to avoid having to answer for their actions before a jury of their peers.[10]
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> *(Bennett v. Health Mgmt. Sys., Inc.*, 92 A.D.3d 29, 34, 38 [1st Dept 2011]).

Accordingly, the branch of defendants' motion that seeks dismissal of plaintiffs' claims for discriminatory pay disparity under the NYSHRL is granted. The motion is denied to the extent that it seeks dismissal of plaintiffs' claims for discriminatory pay disparity under the NYCHRL and is denied to the extent that defendants seek a ruling that the plaintiffs' expert report is inadmissible with respect to plaintiffs' claims under the NYCHRL.

RETALIATION CLAIMS

> [T]o prevail on a retaliation claim under the NYCHRL, the plaintiff must show that she took an action opposing her employer's discrimination, *see Albunio,* 16 N.Y.3d at 479, 922 N.Y.S.2d 244, 947 N.E.2d 135, and that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action, *see Williams,* 872 N.Y.S.2d at 33–34.
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> *(Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 112 [2d Cir. 2013]).

With respect to adverse action, Coello avers that during a meeting of minority workers with Martini, "Martini responded to our complaints by getting up

and walking towards us aggressively, raising his voice and screaming profanities at us and telling us that if we did not like our jobs we should find new ones."[10] Coello testified that after this lawsuit was commenced the white employees were "going crazy," making comments about "this fucking guy, fucking piece of shit, and cursing."[11]

Defendants contend that plaintiffs never complained about discrimination. However, defendant, Angelo Coello, (Coello),[12] testified that "I always complain that we been treated different. Yes, I did."[13] Coello avers that he informed management of the racial discrimination against black and Hispanic employees in four ways: communication with Martini, grievance meetings between Martini and black and Hispanic employees, general staff meetings with Martini and two attempted grievance meetings with Trimarchi in which he did not appear, but his secretary appeared in Trimarchi's stead and took notes to convey them to Trimarchi.[14]

Coello testified that "I never raised a point about racist. But I did say to him that we were treated differently."[15] Coello averred that "I saw indications of open racism by company managers which made me sure that complaints about racism

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[10] Affidavit, Coello, p. 8.
[11] Transcript, Coello, p. 617.
[12] The only plaintiff who is a supervisor.
[13] Transcript, Coello, p. 309.
[14] Affidavit, Coello, p. 5-9.
[15] Transcript, Coello, p. 310.

would not be acted upon properly but would result in my being fired."[16] Clearly, there is an issue of fact as to whether plaintiffs' "employer engaged in conduct that was reasonably likely to deter a person from engaging in such action [opposing employers' discrimination]." *Id.* On a summary judgment motion the "court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility." *(Dauman Displays Inc. v. Masturzo*, 168 AD2d 204 [1st Dept. 1990]).

While the lack of verbalized racial specificity regarding the complaints to management is fatal to plaintiffs' retaliation claims under NYSHRL, the lack of specificity regarding racial discrimination is not fatal to the NYCHRL retaliation claims. Under the NYCHRL, the plaintiff merely needs to allude to plaintiff's disapproval of the workplace discrimination without actually using those words in order for a triable issue of fact regarding whether workplace discrimination. *(Albunio v. City of New York,* 16 N.Y.3d 472, 479 [2011]). *Fruchtman v. City of New York*, 129 A.D.3d 500, 501 [1st Dept 2015]), is inapposite to the facts of this case as the facts herein are closer to *Albunio,* 16 N.Y.3d at 479.

> In assessing retaliation claims that involve neither ultimate actions nor materially adverse changes in terms and conditions of employment, it is important that the assessment be made with a keen sense of workplace realities, of the fact that the "chilling effect" of particular conduct is context-dependent, and of the fact that a jury is generally best suited to evaluate the impact of retaliatory conduct in light of

[16] Affidavit, Coello, p. 5.

> those realities. Accordingly, the language of the City HRL does not permit any type of challenged conduct to be categorically rejected as nonactionable. On the contrary, no challenged conduct may be deemed nonretaliatory before a determination that a jury could not reasonably conclude from the evidence that such conduct was, in the words of the statute, "reasonably likely to deter a person from engaging in protected activity."
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> *(Williams v. New York City Hous. Auth.,* 61 A.D.3d 62, 71 [1st Dept 2009]).

Accordingly, the branch of defendants' motion seeking the dismissal of the retaliation claims under the NYSHRL is granted. Defendants' motion is denied to the extent that the motion seeks to dismiss plaintiffs' retaliation claims under the NYCHRL.

CONCLUSION

Defendants' motion to reargue is granted and upon reargument, the branches of defendants' underlying summary judgment motion seeking dismissal of this action as against Dennis Riese, dismissal of plaintiffs' claims of discriminatory pay disparity under the NYCHRL, retaliation under the NYCHRL, and a ruling that the plaintiffs' expert report is inadmissible with respect to plaintiffs' claims under the NYCHRL, is denied.

The branches of defendants' underlying summary judgment motion that seeks dismissal of plaintiffs' claims for discriminatory pay disparity under the

NYSHRL and retaliation under the NYSHRL is granted.

The foregoing constitutes the decision and order of the Court.

Dated: 5/21/2019

KENNETH L. THOMPSON JR. J.S.C.