STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 5058-98
DCR DOCKET NO. EB-60WB40094
DECIDED: FEBRUARY 26, 2002

CHARLOTTE WILEY,	
Complainant,	**ADMINISTRATIVE ACTION**
v.	**FINDINGS, DETERMINATION AND**
VICTORIA'S CAFÉ, and CONRAD JACOBSON and MICHAEL SCHOENFELD, t/a VICTORIA'S CAFÉ	**ORDER**
Respondents.	

APPEARANCES:

D'Andre Workman, Deputy Attorney General, on behalf of the complainant (John J. Farmer, Jr., Attorney General of New Jersey, attorney)

Michael S. Goodman, Esq., and Leah Krause Bourne, Esq., (M. Goodman & Associates) for the respondent

BY THE DIRECTOR:

I. INTRODUCTION

This matter is before the Director[1] of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by the complainant, Charlotte Wiley (Complainant), alleging that the respondents, Victoria's Café, and Conrad Jacobson (Respondents) subjected her to sexual and racial harassment in her employment in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. During an administrative hearing of the matter, it was revealed that Respondents sold the assets of Victoria's Café in September 1999 to Michael

[1]"Director" refers to Acting Director Jeffrey Burstein.

Schoenfeld and 336 Queen Anne Road Associates, LLC. Accordingly, the Honorable Mumtaz Bari-Brown, Administrative Law Judge (ALJ) granted Complainant's motion to amend the complaint to include Michael Schoenfeld, t/a Victoria's Café [2] (Schoenfeld), as a party respondent on the issue of successor liability.

The ALJ subsequently completed the administrative hearing and issued an initial decision (ID) on September 21, 2001, concluding that Respondents' actions violated the LAD. The ALJ awarded Complainant lost wages with interest, out-of-pocket expenses, and damages for humiliation and emotional pain and suffering. The ALJ also assessed a statutory penalty against Respondents Victoria Café and Jacobson. The ALJ dismissed the complaint against Michael Schoenfeld and 336 Queen Anne Road Associates, LLC, upon finding that they were not liable to Complainant under the theory of successor liability.

Having independently reviewed the ALJ's decision and the record submitted by the Office of Administrative Law (OAL), including the transcripts of the proceedings and the exhibits, exceptions and replies submitted by the parties, the Director finds good cause to adopt the ALJ's initial decision with modifications detailed herein.

II. PROCEDURAL HISTORY

This matter arose on October 10, 1995, when Complainant filed a verified complaint charging Respondents Victoria's Café and Conrad Jacobson with unlawful discrimination on the basis of sex and race in violation of N.J.S.A. 10:5-4 and 10:5-12. Specifically, Complainant alleges that Respondents subjected her to hostile work environment harassment because of her sex and race and that this unlawful discrimination caused her constructive discharge. Respondents filed an answer denying the allegations of discrimination. The Division investigated the allegations and issued a finding of probable cause on May 14, 1997.

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[2] The caption should have included 336 Queen Anne Road Associates, LLC, along with Schoenfeld, as owners of the restaurant who were trading as "Victoria's Café."

On May 19, 1998, the Division transmitted the case to the OAL for a hearing. The hearing was held on November 22 and 23, 1999. As noted above, Respondent Jacobson revealed during the hearings that he sold the assets of Victoria's Café to Michael Schoenfeld and 336 Queen Anne Road Associates, LLC in September 1999. Accordingly, Complainant moved to amend the complaint to join Schoenfeld as a respondent under the theory of successor liability. The amended complaint was filed on February 8, 2000. Schoenfeld filed an answer to the amended complaint denying successor liability. According, the ALJ held an additional day of hearing on March 9, 2000 limited to the issue of successor liability.

In her initial decision issued September 21, 2001, the ALJ determined that Respondents Conrad Jacobson and Victoria Café subjected Complainant to unlawful discrimination in violation of the LAD. However, the ALJ dismissed the charges against Schoenfeld, finding insufficient grounds to impose successor liability. On October 3, 2001, Complainant filed exceptions to the initial decision with respect to the issue of successor liability. Respondent Jacobson filed exceptions to the initial decision on October 11, 2001, and also submitted amended exceptions on October 19, 2001. On November 1, 2001, Schoenfeld filed a response to Complainant's exceptions on the issue of successor liability.

The Director sought and was granted three extensions of time for issuing his findings, determination and order in this matter, moving the deadline for issuing his final order to February 28, 2001.

III. <u>THE ALJ'S FINDINGS AND DETERMINATION</u>

The ALJ was persuaded by the preponderance of the evidence that the incidents occurred as Complainant described. Specifically, the ALJ found as follows: Complainant was employed in Respondent's restaurant from October 1, 1995 to October 8, 1995. After three days on the job, Respondent Jacobson promoted Complainant and a male employee to supervisory positions and met with both employees to give them keys to the restaurant. Respondent Jacobson placed a key

to the restaurant in the hand of the male employee but put another key in Complainant's front shirt pocket, intentionally touching her breast. The ALJ found that the evidence also supported Complainant's testimony that on another occasion Jacobson touched her buttocks and made suggestive comments while passing her in the kitchen. Additionally, the ALJ accepted Complainant's testimony that, in a third incident, Jacobson stroked her face while they were sitting on a bench during a work break. Finally, the ALJ found that Jacobson frequently made demeaning racial comments and jokes. Based upon these factual findings, the ALJ concluded that Complainant established a claim for hostile work environment and racial harassment by demonstrating that the complained-of conduct: (1) would not have occurred but for her gender and race, and; (2) was severe and pervasive enough to make a (3) reasonable African-American woman believe that (4) the conditions of employment were altered and the work environment was hostile or abusive. The ALJ further held that a reasonable African-American woman would have found these circumstances to be intolerable and would have resigned. The ALJ therefore concluded that Complainant established that Respondents subjected her to constructive discharge.

The ALJ then determined that the evidence did not support Complainant's claim that Schoenfeld expressly or impliedly assumed the debts and liabilities of Jacobson and Victoria's Café, Inc. Applying the traditional continuation test, the ALJ found that Schoenfeld did not purchase the restaurant with the intent of evading Complainant's claims and did not learn of the pending litigation until after the purchase. The ALJ found no evidence of merger or consolidation of the seller and buyer or continuation of the predecessor's business. Finally, the ALJ determined that the fact that Jacobson remained on the premises for 30 days during the transition did not constitute continuity of management, as Jacobson had no management duties during that period. Accordingly, the ALJ dismissed the successor liability claim.

IV. <u>THE PARTIES' EXCEPTIONS</u>

Complainant takes exception to the ALJ's finding that Michael Schoenfeld and 336 Queen Anne Associates are not liable under the theory of successor liability and seeks reversal of this finding. Specifically, Complainant contends that the ALJ incorrectly determined that Schoenfeld was not liable for Jacobson's sexual and racial harassment because the ALJ applied the "traditional continuation test" in evaluating the nature of the business transaction between Respondents and Schoenfeld rather than the "substantial continuity test" generally utilized in determining successor liability in complaints by former employees. Complainant argues that the traditional rule on corporate successor liability, referred to as the traditional continuation test, was developed in connection with contractual disputes between corporations in a business context and is inapplicable to this complaint. Instead, Complainant asserts that the substantial continuity test, which was designed to protect victims of illegal employment practices, should be applied here. Complainant further explains that if the substantial continuity test is not applied in actions by former employees, the aggrieved parties would, in most cases, have no recourse against employers who sell their businesses. Furthermore, Complainant argues that application of the substantial continuity test in this matter establishes grounds for imposing successor liability on Schoenfeld and his corporation. In particular, Complainant argues that Schoenfeld should be held liable for Complainant's damages because Schoenfeld has the ability to provide the monetary relief sought and may also recoup funds from Jacobson through the indemnification clause of the contract of sale. Complainant further asserts that it is reasonable to hold Schoenfeld responsible for his predecessor's liabilities because Schoenfeld failed to use due diligence to learn of the complaint against Respondents before purchasing the business and because Schoenfeld has essentially continued the operation of Respondents' business.

Schoenfeld filed a response to Complainant's exceptions urging adoption of the ALJ's findings regarding successor liability. Schoenfeld maintains that the ALJ correctly found that he and 336 Queen Anne Associates were not liable under the traditional continuation test. He further

argues that the sale of Victoria's Café was neither a continuation of the business nor a merger or consolidation, and that the sale did not contemplate the assumption of the debts and liabilities of Jacobson or Victoria's Café. Schoenfeld asserts that he was unaware of the pending discrimination complaint at the time of the sale and that Jacobson made material and significant misrepresentations by failing to notify Schoenfeld of the litigation. Schoenfeld asserts that imposing successor liability on him or his company under these circumstances would impose an oppressive burden on an entity that had no knowledge and no independent means of acquiring knowledge of the claims, and would have a chilling effect on the sale and purchase of small businesses generally. Finally, Schoenfeld also asserts that, even applying the substantial continuity test, the company is not liable in this instance. Schoenfeld argues that he had no notice of Complainant's claims and that the general indemnification clause in the contract protecting 336 Queen Anne Associates was merely a standard contract clause and cannot be regarded as notice of pending claims.

Jacobson takes exception to the ALJ's findings of fact and conclusions of law. First, Jacobson contends that Complainant's version of the alleged breast-touching incident was unworthy of belief and inconsistent with the hearing testimony of three witnesses that there was no other employee present when he gave Complainant a key to the restaurant. Specifically, Jacobson argues that the ALJ failed to accord appropriate weight to testimony by Division investigator Rivera that he did not recall Complainant advising him that a male employee was present during the incident (Transcript of November 23, 2000 hearing, pages 67-68) and by both Mr. and Mrs. Jacobson that no one else (beside them) was present when Mr. Jacobson gave Complainant a key to the restaurant. In addition, Jacobson asserts that the ALJ improperly disregarded this testimony and relied instead on a written statement in the answer to the complaint prepared by his former attorney that he gave keys to Complainant and another employee at the same time. Jacobson contends that the ALJ should have accepted his testimony

that the unwelcome touching did not occur as alleged. Accordingly, Jacobson urges the Director to reject Complainant's testimony that he placed a key in her shirt pocket and touched her breast in front of a male co-worker.

Jacobson also argues that the affidavits adduced to support Complainant's claims are weak and should be disregarded because none of the affiants were present at the hearing and because all were terminated by Jacobson and are therefore biased. Jacobson takes further exception to the ALJ's acceptance of Complainant's testimony that he grabbed her buttocks, and maintains her allegations are unworthy of belief. He also asserts that Complainant failed to establish the prima facie elements of constructive discharge or hostile work environment. At most, Jacobson argues, Complainant's claims establish only that she perceived his comments to be rude. Finally, Jacobson takes exception to the $20,000 pain and humiliation award, arguing that it is excessive and inconsistent with the fact that Complainant was only employed for one week.

V. THE DIRECTOR'S FINDINGS AND DETERMINATION

A. Factual Findings

The Uniform Administrative Procedure Rules provide that the Director may adopt, reject or modify an ALJ's findings of fact based on specific evidence in the record and upon the agency head's determination regarding whether the record contains sufficient competent evidence to support the ALJ's findings. N.J.A.C. 1:1-18.6(b). However, when rendering findings of fact which rest on the resolution of conflicting testimony, the Director must give substantial weight to the ALJ's credibility determinations and to all findings based on these determinations, since the ALJ has had an opportunity to hear the testimony of witnesses regarding these events and to assess their demeanor. See, Clowes v. Terminix International, Inc., 109 N.J. 575, 587 (1988); Renan Realty Corp. v. Dept. of Community Affairs, 182 N.J. Super. 415, 419 (App. Div. 1981). Accordingly, an agency head may not reject or modify an ALJ's findings of fact that rest on the ALJ's assessment of the credibility of lay witness testimony absent substantial evidence in the

record demonstrating that the rejected findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent evidence in the record. N.J.A.C. 1:1-18.6(c) and (d).

Here, the ALJ assessed the credibility of the parties and their witnesses and concluded that Complainant's testimony was more credible than Jacobson's. In reaching this determination, the ALJ weighed the discrepancies in testimonies and noted the personal and financial interest of Mrs. Jacobson. The ALJ reasoned that the inconsistencies between the witnesses' testimony about whether another employee observed the key incident do not warrant rejection of Complainant's testimony as incredible (ID 15). To disregard Complainant's testimony, the ALJ held that she would have to find "that the witness was wholly unworthy of belief." Id. Instead, the ALJ found Complainant's overall demeanor to be straightforward (ID 15). Thus, the ALJ was persuaded that Complainant's testimony was credible and rejected Jacobson's contradictory testimony denying any wrongdoing.

The ALJ further considered that Jacobson's testimony that only his wife was present during the incident involving the key was inconsistent with Respondents' answer filed in response to the complaint. The answer contains Jacobson's statement that he gave a set of keys to Complainant and another employee at the same time. The ALJ noted that Jacobson's version of events set forth in the answer was prepared in closer proximity to the complained of events and was consistent with Complainant's testimony that Jacobson placed the key in her breast pocket in front of another employee.

Moreover, in his hearing testimony, Jacobson conceded that he may have touched Complainant's buttocks unintentionally while passing her in the narrow kitchen and further testified that he may have touched Complainant's cheek while sitting on the bench during a work break (ID 16). Thus, several critical elements of Complainant's testimony were corroborated by Respondents' answer and testimony. Therefore, the ALJ determined that Complainant's testimony was credible and more reliable than Jacobson's. For these reasons, the ALJ was

persuaded that Jacobson subjected Complainant to unwelcome touching of her breasts and buttocks, to sexual remarks about the male and female anatomy, and to offensive and racist remarks (ID 14-17). Having thoroughly reviewed the record, the Director concludes that the ALJ did not abuse her discretion in gleaning additional support for her credibility determination from the December 4, 1995 answer filed by Respondent Jacobson's former counsel. Accordingly, the Director adopts the ALJ's factual findings based on her acceptance of Complainant's testimony as credible.

Similarly, the Director is not persuaded by Respondents' arguments that the ALJ improperly relied upon the affidavits of several former employees relating consistent accounts of Jacobson's propensity for subjecting employees to improper conduct and demeaning sex-based and race-based statements in rendering her determination that Complainant's testimony regarding her experiences with Jacobson was credible. The Director rejects Respondents' contention that the affidavits were of no probative value because the individuals were not presented for cross-examination or because the affiants may have been impermissibly biased against Respondents. The ALJ acknowledged the disadvantage of not having the affiants present for cross-examination as well as the possibility of bias, and appropriately accorded the written statements less weight than the testimony presented at the hearing (ID 16). However, she found nothing in the record to suggest that the former employees conspired to fabricate their statements. Moreover, the ALJ also weighed the affidavits against the fact that Jacobson was given an opportunity to refute the statements and offer his version of events. Accordingly, the Director concludes that the ALJ acted properly in considering the affidavits along with the other evidence of record and her observation of the demeanor of the parties as they testified.

Having conducted a thorough and independent review of the record, the Director concludes that the ALJ's factual findings are supported by a preponderance of credible evidence and that there is no basis for rejecting these findings as arbitrary, capricious, or unreasonable. Accordingly, the Director adopts the ALJ's factual findings as his own.

B. Hostile Work Environment Harassment

The standard for determining whether acts of harassment in the workplace constitute discrimination in violation of the LAD was set forth in Lehmann, supra. According to Lehmann, there are four requirements to be met in a hostile work environment case: "the complained of conduct: (1) would not have occurred but for the employee's gender; and it was (2) severe or pervasive enough to make a (3) reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive." Id. at 604.

Although Lehmann dealt with sexual discrimination, the Court effectively formulated the basic standard for determining a hostile environment claim for any category or class protected by the LAD. See, Taylor v. Metzger, 152 N.J. 490, 498 (1998)(standard applied to hostile work environment involving race); Heitzman v. Monmouth County, 321 N.J. Super. 133, 144 (1999)(standard applied to hostile work environment involving ancestry).

In the present case, the Director and the ALJ have accepted as true Complainant's testimony that Jacobson placed a key to the restaurant in her shirt pocket and in so doing touched her breast. Respondent Jacobson responds that even if he did place the key in Complainant's breast pocket, it was not a sexual act and therefore does not constitute sexual harassment. The ALJ correctly found that harassing conduct need not be sexual in nature; rather its defining characteristic is that the harassment occurs because of the victim's sex (ID. 17). The Director and the ALJ further found that Jacobson engaged in at least two other incidents of unwelcome touching of Complainant, including a finding that Jacobson touched Complainant's buttocks while passing through the narrow kitchen and commented that her buttocks were tighter than his.

Moreover, contrary to Respondents' assertion that the complaint involves proof of only one incident of unwelcome touching, Complainant also testified that Jacobson frequently made sexually explicit comments to her about the male and female anatomy and additionally made racially offensive comments to Complainant and others. Complainant's testimony and the affidavits of former employees demonstrate that Jacobson's objectionable comments pervaded

the workplace. For example, Complainant testified that Jacobson repeatedly told her that he did not want to have more than three African-Americans working in the restaurant at any given time and that he wanted her to take the food orders of the African-American customers (Transcript of 11/22/99 hearing pages 59-60). In addition, Complainant observed that Jacobson told jokes about the Holocaust to Jewish employees and referred to an employee of Mexican descent as a "stupid Mexican" (Id. at 57-58, 70). This record, including Complainant's testimony and the sworn statements of witnesses to similar conduct by Jacobson, establishes proof of the first element of a prima facie case because Jacobson's actions and comments to Complainant were based specifically on her gender and race and the harassment that she endured would not have occurred but for her gender and race.

The remaining prongs of a hostile work environment claim are largely interdependent and require a determination of whether Respondent's conduct was severe or pervasive enough to make a reasonable person of Complainant's gender and race believe that her conditions of employment are altered and that the working environment has become hostile or abusive to her because of her gender and race. See, Lehmann, supra, at 604.

Respondents assert that Complainant was not offended during the incident with the key because she did not complain, and said "thank you" when she was promoted to shift manager. This assertion is without merit. Implicit within this argument is the notion that Complainant's claim of racial discrimination and hostile work environment is spurious because she never complained. However, this notion is contrary to law in a case such as this where the owner is the harasser. In such cases, liability for racial discrimination and hostile work environment claims do not depend upon whether the victim reports the offending behavior in order to give the employer an opportunity to remedy the harassment and provide a lawful workplace environment. Rather, in this instance, as the owner of the restaurant, Jacobson was required by the LAD to impose protective measures to prevent discrimination and harassment in the workplace. Lehmann, supra, 132 N.J. at 617. Accordingly, regardless of whether Complainant expressed her objections to his conduct, he is prohibited from engaging in active harassment of employees Id.

Furthermore, Lehmann makes it clear that the severity or pervasiveness of the complained-of conduct must be evaluated by an objective standard, namely, the reasonable person in the aggrieved party's protected class. This requirement ensures that an overly sensitive employee cannot establish liability in circumstances that would not be perceived as severe or pervasively hostile by a reasonable person of similar protected classes, and additionally ensures that an unlawful work environment will be recognized even where the complaining party is unusually resilient or unusually reticent in the face of unlawful harassment. Accordingly, in this instance, the question of whether Jacobson's conduct was sufficiently severe or pervasive to be regarded as unlawful must be measured by whether a reasonable person of Complainant's sex and race would have found her workplace hostile or abusive to her because she is an African-American woman. 132 N.J. at 612-614.

Applying this standard, the Director rejects Respondents' contention that this case is based upon a single incident, referring to the incident with the key, and that therefore Complainant has not established severe or pervasive harassment. The evidence reveals otherwise. The Director has adopted the ALJ 's findings that Jacobson engaged in several incidents of unwelcome touching and routinely made demeaning sexual and racial comments. Complainant testified that this type of behavior continued throughout her employment (Transcript of November 22, 2000 hearing, page 119). In addition, the ALJ found that Jacobson made statements condoning sexual harassment and approached other female employees with bear hugs and kisses (ID 18, Transcript hearing 11/22/99 page 43). Complainant testified that Jacobson demeaned her in front of other employees by saying that he knew the "difference between boys and girls" and pointed to her breasts and continued, "you have something sticking out in the front that men don't have." (Transcript hearing 11/22/99 page 52). The ALJ also found credible Complainant's testimony that Jacobson frequently told racial jokes and made offensive comments regarding race and other protected characteristics.

This is more than rude behavior as Respondent alleges. Respondents subjected Complainant to a pervasively demeaning and distasteful atmosphere that created a great deal of stress in her life and resulted in her having frequent episodes of stomach cramps (Transcript of November 22, 2000 hearing, page 130). Based on all of the above, the Director concludes that Respondent Jacobson's conduct was sufficiently severe and pervasive to make a reasonable person in Complainant's circumstance believe that the working environment had become hostile or abusive and adopts the ALJ's conclusion that Respondents subjected Complainant to hostile work environment sexual and racial harassment (ID 22).

C. Constructive discharge

Where acts of discrimination make working conditions so intolerable that a reasonable person subject to such conditions would resign, the employer may be liable for terminating the employment of an employee who leaves his job in response to the discriminatory conditions. Goss v. Exxon Office Systems Co., 747 F.2d 885, 888 (3rd Cir. 1984). The Appellate Division, examining a claim of constructive discharge in a discrimination case, has adopted a "reasonable person" test which focuses on the impact of an employer's action on a "reasonable employee." Muench v. Township of Haddon, 255 N.J. Super. 288 (App. Div. 1992). Under this standard, courts will find a constructive discharge where an "employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign." Id. at 302. Thus, constructive discharge is a heavily fact-driven determination.

In the present case, Complainant has satisfied this test. Jacobson subjected her to daily, pervasive harassment, including unwelcome touching and demeaning comments, that a reasonable African-American woman would find intolerable. The ALJ found that this behavior was perpetrated upon other employees in the workplace as well. As noted in the forgoing discussion regarding sexual and racial harassment, the Director finds ample support in the record

for the ALJ's finding that Jacobson subjected Complainant to intolerable working conditions because she was female and African-American and that Complainant was therefore forced to resign. Accordingly, the Director adopts the ALJ's decision that Respondentsl constructively discharged Complainant in violation of the LAD.

D. Successor Liability

The purpose of successor liability in discrimination cases is to grant remedial relief, such as back pay, reinstatement or seniority, to an employee who is unable to obtain similar relief from a business owner because of a change in ownership. Musikiwamba v. ESSI, Inc., 760 F.2d 740, 749 (7th Cir. 1985). This doctrine was designed to ensure that an aggrieved employee is made whole when the predecessor has gone out of business. Id. In determining that Schoenfeld and 336 Queen Anne Associates are not liable for the damages caused by Jacobson's conduct, the ALJ relied upon the traditional rule of corporate succession. This rule provides that when one corporation acquires all of the assets of another corporation, the transferee corporation is not liable for the debts of the predecessor company except "where (1) the purchasing corporation expressly or impliedly agrees to assume such debts and liabilities; (2) the transaction amounts to a consolidation or merger of the seller and purchaser; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently in order to escape responsibility for such debts and liabilities." Ramirez v. Amsted Industries, 86 N.J. 332, 340 (1981); Woodrick v. Burke Real Estate, 306 N.J. Super. 61, 73 (App. Div. 1997).

Courts that have considered successor liability in the labor and employment context have applied the nine-part test announced by the Sixth Circuit in EEOC v. MacMillian Bloedal Containers, Inc., 503 F.2d 1086 (5th Cir. 1974). This test considers whether: (1) the successor had notice of the claim against the predecessor prior to the purchase; (2) the predecessor is able, or was able prior to the purchase, to provide the relief sought; (3) there is continuity in the

operation of the business before and after the purchase; (4) the new employer uses the same plant; (5) the new employer uses the same or substantially the same work force; (6) the new employer uses the same or substantially same supervisory personnel; (7) the same jobs exist under substantially the same working conditions; (8) the new employer uses the same machinery, equipment and methods of production; and (9) the new employer produces the same product. Musikiwamba v. ESSI, Inc., id. at 750-751; MacMillian, supra, 503 F.2d at 1094. Complainant notes these concerns are referred to as the "substantial continuity test" and urges its application to the present case. She contends that this test, unlike the traditional continuation test, protects civil rights plaintiffs and advances the public policy against unfair and arbitrary employment practices.

In the labor context, courts have ruled there must be a balance between the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers against some protection to the employees from a sudden change in the employment relationship. MacMillian, id. at 1089 quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909 (1964). The court's rationale is that employees do not participate in the negotiations leading to a change in corporate ownership and therefore are not afforded an opportunity to protect their interests. Id. Accordingly, the United States Supreme Court has ruled "one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct." Golden State Bottling Co. v. N.L.R.B., 414 U.S. 168, 94 S.Ct. 414, 418-419, n.2 (1973) quoting Perma Vinyl Corp., 164 N.L.R.B. 968, 969 (1967), enforced sub nom. U.S. Pipe & Foundry Co. v. N.L.R.B., 398 F.2d 544 (5th Cir. 1968).

Critical to this balancing of interests is the element of notice. Notice allows the buyer to reflect his potential liability in the purchase price or to purposely secure an indemnity clause in the

sales contract. Golden State, supra. In Golden State, supra, the Court ruled that an employer may be bound by the collective bargaining agreement of the predecessor as long as it had notice of the obligation and continued the operations of the predecessor, even if the succeeding corporation purchased the assets of the old company and did not actually merge with it. Id.

These same considerations used to justify imposing successor liability to remedy unfair labor practices have been applied to remedy unfair employment practices. MacMillian, supra; Coleman v. Keebler Company, 997 F.Supp. 1094 (N.D. Indiana 1998)(the buyer could not be held liable for alleged disability discrimination where there was no evidence that it had any notice of the employee's lawsuit despite due diligence); Wilson v. Wal-Mart Stores, 158 N.J. 263 (1999)(if parties have provided for predecessor/successor liability for employment discrimination claims, trial court should give effect to such provisions).

Complainant asserts, and the Director agrees, that the traditional continuation test was designed for contractual disputes between business corporations and is inapplicable to labor and employment discrimination matters. The traditional continuation test does not consider the public interest in preventing and remedying unlawful discrimination, and its application in the context of employment discrimination disputes yields unintended results. Wheeler v. Snyder Buick, Inc., 794 F.2d 1228 (7th Cir. 1986). Accordingly, the Director modifies the initial decision to apply the legal standards associated with the "substantial continuity test" to determine whether Schoenfeld may be held liable for damages awarded to Complainant as a result of Respondents' acts of unlawful discrimination.

Applying the appropriate legal standards, the Director notes that the first two factors of the substantial continuity test, namely, whether the successor had notice of the claim against the predecessor and whether the predecessor was or is able to provide the relief sought, are "critical" because ". . . it would be grossly unfair, except in the most exceptional circumstances, to impose successor liability on an innocent purchaser when the predecessor is fully capable of providing

relief or when the successor did not have the opportunity to protect itself by an indemnification clause in the acquisition agreement or a lower purchase price." MacMillian, supra, 503 F.2d at 750. Similarly, the court in Coleman, supra, stressed the importance of notice and ruled that "a successor who exercises due diligence in its purchase and yet fails upon inquiry to uncover evidence of the plaintiff's lawsuit prior to the purchase will not be found to have notice." Id. 997 F.Supp. at 1098. For these reasons, the court in Wheeler v. Snyder Buick, Inc., 794 F.2d 1228 (7th Cir. 1986), also declined to find the successor liable because it did not receive timely actual knowledge of the predecessor's lawsuit.

In this instance, the ALJ determined that Schoenfeld did not find out about Complainant's complaint from Jacobson. The ALJ also found credible Jacobson's testimony that he did not even inform the attorney who was handling the sale on his behalf about the lawsuit. There is no basis in the record to reject the ALJ's finding. The verified complaint was filed on October 10, 1998, well before the purchase of the business nearly one year later on September 14, 1999. Schoenfeld, the managing member of 336 Queen Anne Associates, testified that he did not learn of the charges until December 1999 when he received a deposition notice from the Division (Transcript of March 9, 2000 hearing, page 58). Jacobson initially testified that he did not tell Schoenfeld of the litigation because "[i]t wasn't pertinent" (Transcript of November 23, 2000 hearing, page 146). Later, Jacobson contradicted his prior testimony and stated that he informed Schoenfeld after the sale (Transcript of March 9 hearing, at p. 63). After the hearing and the record closed, Jacobson submitted a letter recanting his prior testimony, stating that he informed Schoenfeld in early August 1999, prior to the sale (ID 31). The ALJ was fittingly not persuaded by the latter submission and, finding it unworthy of belief, she attributed it no weight (ID 31). The Director agrees with this determination and adopts the ALJ's factual and legal determination with respect to the question of notice.

The purpose of notice is to give the successor time to negotiate a change in the purchase

agreement to reflect the potential liability of a lawsuit. Musikiwamba, supra, at 751. Schoenfeld was not afforded such an opportunity. The inclusion of the indemnification clause within the contract does not diminish the necessity for express notice of an pending claim against the business. The indemnification clause affords Schoenfeld a measure of protection against the impact of a finding of successor liability. However, it does not establish that Schoenfeld had notice or an expectation of liability. On the contrary, the inclusion of the indemnification clause indicates that the parties to the contract did not intend that the successor would be liable for any obligations of the predecessor.

The second factor in the substantial continuity test is the predecessor's ability to provide some relief. Musikiwamba, supra. This factor also weighs in favor of Schoenfeld. It is uncontradicted that Jacobson received $75,000 for the sale of Victoria's Café. Although Complainant states, and Jacobson testified, that Respondents' business has ceased to exist and the business has no ability to provide relief, she has provided no evidence that Jacobson, who is individually named and individually liable, does not have the funds or other assets with which to satisfy her claims. See, N.J.S.A. 10:5-12e. Accordingly, the Director does not find sufficient grounds to conclude that Respondents are unable to provide relief.

The remaining factors in the substantial continuity test relate to whether there is continuity in operation, workforce, equipment, and product. Several of these factors weigh in Complainant's favor, including use of the same location, use of substantially the same staff, continuation of similar working conditions, use of the same equipment, and producing the same product. As noted previously, the factors in the substantial continuity test are not weighted equally. The first two factors are critical to determining successor liability. The remaining factors must be examined by balancing them with the interests of the injured employee and the state policy against discrimination. Musikiwamba, 760 F.2d at 750. Ultimately, to hold a successor liable, the burden on the successor must be de minimis, and substantially outweighed by state public policy. Id. at 746.

New Jersey has a clear public policy to eliminate discrimination in the workplace. Fucilla v. Layman, 109 N.J. 319, cert. denied sub nom., University of Medicine and Dentistry of New Jersey v. Fucilla, 109 S.Ct. 75 (1988). The LAD's primary goal is to eradicate the cancer of discrimination. Id. However, this goal is not achieved appropriately by imposing monetary liability upon an innocent successor who had no knowledge of a claim that was actively concealed by the seller and who committed no act of discrimination against Complainant. Moreover, this is not a case in which the successor is in a unique position to provide a remedy to an aggrieved employee, such as reinstatement or promotion. The burden upon Schoenfeld under these circumstances would be substantial as well as unwarranted.

Jacobson was in the best position to have prevented the present dilemma. He should have informed Schoenfeld of the pending litigation and negotiated its impact on the value of the business in the price. The Director is also mindful that there is insufficient evidence that Complainant will be unsuccessful in obtaining full relief from Jacobson individually. Having considered the public interest in assuring Complainant a remedy for the unlawful discrimination she endured and balancing these concerns against the public interest in protecting an innocent purchaser who had no knowledge of the pending claim from the imposition of financial responsibility for the unlawful acts of his predecessor, the Director finds good cause to adopt the ALJ's finding that the record does not support the imposition of successor liability on Schoenfeld for the unlawful discrimination perpetrated by Respondents. Based on all of the above, the Director affirms the ALJ's initial decision dismissing the charges against Schoenfeld.

VI. REMEDIES

The LAD authorizes the Director to make a victim of discrimination whole through a variety of remedies, which include reinstatement, reimbursement of economic losses suffered as a result of discrimination, and compensation for emotional suffering. N.J.S.A. 10:5-17; Gimello v. Agency Rent-A-Car Sys., 250 N.J. Super. 338, 367 (App. Div. 1991). In this instance, the record supports

an award of back pay, pain and humiliation, and an assessment of a statutory penalty.

A. Back pay

Generally, back pay damages in discrimination cases are measured by the amount a complainant would have earned if the respondent had not engaged in the unlawful discrimination, reduced by the complainant's actual gross pay during the damage period. Goodman v. Lond Metals Exch., Inc., 86 N.J. 19, 34 (1981). A prevailing complainant is also entitled to recover interest on a back pay award because the respondent had use of the wages to which the complainant was entitled. Decker Bd. of Ed. of City of Elizabeth, 153 N.J. Super. 470, 475 (App. Div. 1977), certif. den. 75 N.J. 612 (1978).

In this case, the ALJ properly concluded that Complainant was entitled to a back pay award for the time period she claims she would have earned income from Respondents if she had not been constructively discharged due to unlawful discrimination. The damage period runs from Complainant's last day of work at Victoria's Café through December 1996, after which time she left the State. This period amounts to 34 weeks - October 8, 1995 to December 31, 1996.

The parties dispute the amount of Complainant's lost earnings for the damage period. Complainant argues that her back pay award should be based on the amount she earned during the one week she was employed by Respondents, and that she lost anticipated earnings of $720 per week for 34 weeks. Respondents argue that Complainant's anticipated gross earnings should not include overtime worked due to the unusual conditions of preparing to open the restaurant. Accordingly, Respondents argue that any back pay award should be based on Complainant's promised salary of $320.00 per week ($8.00 per hour for 40 hours per week).

In considering this issue, the ALJ evaluated Complainant's efforts to mitigate the amount of damages she seeks. A complainant has a duty to mitigate damages, an element of which is a willingness and availability to work. Miller v. Marsh, 766 F.2d 490, 491 (11th Cir. 1985).

Numerous courts have tolled the accrual of back pay during periods that the plaintiff was not "ready, willing, and available for employment." Miller, supra (plaintiff not entitled to backpay for period that she was enrolled as a full-time law student). *See* Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 401 (3rd Cir. 1976), cert. den. 429 U.S. 1041 (1977)(excluding from backpay periods when plaintiff was unemployable because of illness); Massie Indiana Gas Co., 752 F. Supp. 261, 272 (D.S. Ind. 1990)(plaintiff breached duty to mitigate by moving out-of-state and abandoning efforts to search for work. Failure to mitigate damages is an affirmative defense and therefore the employer has the burden of proving its applicability. Goodman v. London Metals Exchange, supra, 86 N.J. at 40.

Here, the ALJ agreed with Respondents in finding that Complainant failed to fully mitigate her requested damages during the seven month period between her constructive discharge and June 1996, because she waited for the Board to call her for part-time work rather than looking for additional or full-time employment that would replace the salary she contends she would have earned (with overtime) working for Respondents (ID 27). For this reason, the ALJ was persuaded that Complainant's estimate of anticipated pay was inflated and based on an unusual amount of overtime in the days preceding the opening of the café. Accordingly, the ALJ adopted Respondents' arguments that Complainant's lost wages should be calculated using her anticipated base earnings for the 34-week damage period minus the salary she received from the Teaneck Board of Education (Board) during that time. The ALJ therefore adopted Respondents' proposed back pay figure and concluded that Complainant was entitled to back wages in the amount of $11,467.75. The Director agrees that there is insufficient evidence that Complainant reasonably anticipated working such extensive overtime each week as she had during the week preceding the opening of the restaurant and the Director does not find sufficient grounds for calculating Complainant's lost wages as $720 per week. Accordingly, the Director adopts the ALJ's method of calculation as supported by the record and consistent with the appropriate legal standards.

The Director computes interest on the back pay award in accordance with the Rules Governing the Courts of New Jersey (R. 4:42-11). Accordingly, the Director concludes that the interest period begins on April 8, 1996, six months after the institution of the verified complaint and ends on the date of this order. The back pay and interest are calculated as follows:

	Anticipated Income	Actual Income	Lost Wages
1995 October - December	$ 3,840	$ 175.00	$ 3,665.00
1996	$16,640	$8,837.25	$ 7,802.75
	TOTAL LOST WAGES		**$ 11,467.75**

INTEREST

Interest Period	Interest Rate	Interest
April 8 - December 1996	7.5% of $9,867.75 (268 days @ $2.02)	$ 543.40
1997	7.5% of $9,867.75	$ 740.08
1998	7.5% of $9,867.75	$ 740.08
1999	7.5% of $9,867.75	$ 740.08
2000	7.0% of $9,867.75	$ 690.74
2001	7.5% of $9,867.75	$ 740.08
2002	8.0% of $9,867.75 (59 days @ $2.16)	$ 127.44
	TOTAL INTEREST	**$ 4,321.90**
	TOTAL LOST WAGES AND INTEREST	**$ 15,789.65**

This amount differs slightly from the ALJ's finding because the simple interest is not calculated until six months from the date the action was filed, and includes an additional 2% interest as provided by the Rule for judgments exceeding the $10,000.00 jurisdictional limit of

the Special Civil Part R. 4:42-11.

B. Out-of-pocket Expenses

The Director adopts the ALJ's award of $918.69 to compensate Complainant for her out-of-pocket expenses incurred by traveling to and attending the hearing. This award is consistent with the LAD's provision of make-whole remedies to prevailing complainants. N.J.S.A. 10:5-17.

C. Pain and Humiliation Damages

It is well established that a victim of unlawful discrimination under the LAD is entitled to recover non-economic losses such as mental anguish or emotional distress proximately related to unlawful discrimination. Anderson v. Exxon Co., 89 N.J. 483, 502-503 (1982); Director, Div. on Civil Rights v. Slumber, Inc., 166 N.J. Super. 95 (App. Div. 1979), mod. on other grounds, 82 N.J. 412 (1980); Zahorian v. Russell Fitt Real Estate Agency, 62 N.J. 399 (1973). Such awards are within the Director's discretion because they further the LAD's objective to make the complainant whole. Andersen, supra, 89 N.J. at 502; Goodman, supra, 86 N.J. at 35.

A victim of discrimination is entitled, at a minimum, to a threshold pain and humiliation award for enduring the "indignity" which may be presumed to be the "natural and proximate" result of discrimination. Gray v. Serruto Builders, Inc., 110 N.J. Super. 297, 312-313, 317 (Ch. Div. 1970). Thus, pain and humiliation awards are not limited to instances where medical treatment has been sought or severe manifestations are exhibited by the complainant. Id. at 318; see Troxell v. New Jersey Turnpike Authority, 92 N.J.A.R.2d (CRT) 5, 21 (July 25, 1991), on remand regarding other issues, 92 N.J.A.R.2d (CRT) 89 (May 29, 1992), aff'd in Dkt. No. A-295-91T5 (App. Div. 1994), certif. denied, 142 N.J. 446 (1995)($5,000 award to complainant who was denied reinstatement by his employer because of his disability and who offered no medical evidence other than his testimony to his anger and disillusionment).

Here, the Director adopts the ALJ's finding that Complainant suffered humiliation as a

proximate result of Respondent's unlawful conduct. However, after a review of the applicable portions of the record in this case, and in consideration of the amount of damages awarded to other prevailing complainants who have come before the Director having suffered humiliation and emotional distress of a more prolonged and extreme nature, the Director concludes that a $20,000 pain and humiliation award is slightly excessive in this case. The Director has awarded $20,000 in cases where the complainant has suffered egregious emotional distress over a sustained period of time. See Peoples v. Gloria Limousine, 97 N.J.A.R.2d (CRT) 115 (1997)($20,000 awarded to complainant who was "scared to death" by her harasser's threats and physical assault, sought counseling and filed a criminal complaint). In this instance, Complainant only worked one week during which time she suffered stomach cramps and emotional distress. In fashioning an award for emotional damages, the Director may consider the presumed natural consequences of being subjected to the discrimination and harassment endured by Complainant. In addition, the Director must consider the recommendation of the ALJ, who had an opportunity to observe the demeanor of the Complainant as she testified about the harassment and discrimination she experienced and who concluded that $20,000 was an appropriate measure of her damages. Having weighed all of the forgoing considerations, including amounts awarded to prevailing parties in comparable matters and the evidence of Complainant's pain and humiliation, the Director concludes that an award of $15,000 in pain and humiliation damages is appropriate in this case.

D. Penalties

The LAD authorizes the Director to assess penalties against respondents for proven violations. N.J.S.A. 10:5-14.1a. In this instance, the ALJ imposed the maximum penalty of $2,000.00. However, following the issuance of the initial decision, the LAD was amended to provide that the Director may assess a statutory penalty of not more than $10,000 for the first offense of a party who violates the LAD.

Generally, absent language to the contrary, legislation imposing enhanced civil penalties may be applied retroactively. Administrative proceedings imposing penalties have been recognized as civil in nature and, therefore, the imposition of an administrative penalty does not infringe on any constitutional rights or vested interests of the assessed party. In the Matter of Robert Kaplan, D.O., 178 N.J. Super. 487, 495 (App. Div. 1985)(retroactive application of statute governing civil penalties for medical fraud does not violate federal and state constitutional provisions prohibiting ex post facto laws, provided amount of penalty is not inequitable). See also State, Dept. of Environmental Protection v. Arlington Warehouse, 203 N.J. Super. 9 (App. Div.1981)(remedial statute may be given retroactive effect without unconstitutionally infringing on vested rights, provided that new statutory remedy is for redress of preexisting actionable wrong rather than for actions that were not unlawful when the legislation was passed); In re D'Aconti, 316 N.J.Super. 1(App. Div. 1998).

Accordingly, the Director modifies the amount of the ALJ's assessment of a statutory penalty against Respondents Jacobson and Victoria's Café and assesses the legislatively enhanced amount of a full penalty of $10,000, in accordance with the ALJ's intent to impose the maximum penalty to reflect the gravity of the infractions committed against Complainant.

VII. ORDER

Based on all of the above, the Director finds that Respondents unlawfully discriminated against Complainant because of her race and gender in violation of the LAD. Therefore, the Director orders and directs as follows:

1. Respondents Jacobson and Victoria's Café, their agents, employees and assigns shall cease and desist from doing any act prohibited by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -49.

2. The complaint against Schoenfeld and 336 Queen Anne Associates t/a Victoria's Cafe is dismissed.

3. Within 45 days from the date of this order, Respondents shall forward to the Division a check payable to the Complainant in the amount of $31,708.34 as compensation for her back pay with interest. out-of-pocket expenses, and pain and humiliation and interest on the back pay awards.

4. Within 45 days from the date of this order, Respondent shall forward to the Division a check payable to "Treasurer, State of New Jersey" in the amount of $10,000 as statutory penalty.

5. The penalty and all payments to be made by the Respondent under this order shall be forwarded to the Division on Civil Rights, Bureau of Policy, P.O. Box 089, Trenton, New Jersey 08625.

6. Any late payments will be subject to post-judgment interest at such amount as prescribed by the Rules Governing the Courts of New Jersey, from the due date until such time as received by the Division.

DATE:__________________

/signed/
JEFFREY BURSTEIN
ACTING DIRECTOR

JB:SSG:KCB:gm