

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

KRISTEN AMBROSINI,

Complainant,

v.

HAUPPAUGE PALACE DINER, CHRIS GONIAS,

Respondents.

NOTICE AND  
FINAL ORDER

Case No. 10114406

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 December 31, 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.

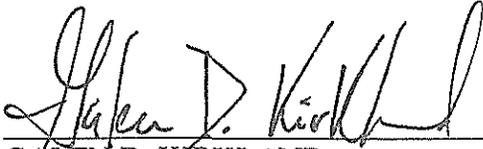
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”).** In accordance with the Division's Rules of Practice, a copy of this Order has been 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: **FEB 18 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

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RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER

Case No. 10114406

SUMMARY

Complainant alleged that the owner of her former place of employment exposed her to a sexually hostile work environment which necessitated her constructive discharge. Complainant has proven her case and damages are hereby awarded.

PROCEEDINGS IN THE CASE

On October 19, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 ("Human Rights Law").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held on November 17, 2008.

Complainant and Respondents appeared at the hearing. Complainant was represented by Richard V. Rappaport, Esq., of the law office of Richard V. Rappaport & Associates, Garden City, N.Y. Respondents were represented by William D. Wexler, Esq., Babylon, N.Y.

Permission to file post-hearing briefs was granted. Counsel for Complainant filed post-trial Findings of Fact and Conclusions of Law.

### FINDINGS OF FACT

1. Complainant alleged that her former employer exposed her to a sexually hostile work environment which necessitated her constructive discharge. (ALJ Exh. 1)
2. Respondents denied unlawful discrimination. (ALJ Exh. 3)
3. In 2003 Complainant first worked for several months at Respondent Hauppauge Palace Diner ("Diner") as a hostess/cashier. Complainant also worked at the Diner as a server/waitress for several months in 2004. Respondent Chris Gonias ("Gonias") is the Diner's owner. Several of Gonias' family members also work at the Diner. The Diner had no formal complaint procedure for employees. (Tr. 20-21, 25, 29, 38, 40, 87, 89, 90-91, 93, 135, 153, 166, 168-71, 216-17)
4. In March, 2005 Complainant returned to work at the Diner as a server/waitress. Complainant's work shift was 5:00 p.m. to 6:00 a.m. This work shift was different than the shift Complainant worked the first two times she was employed at the Diner insofar as she was on the floor in the middle of the night. Gonias' wife, who worked at the Diner until nine or ten o'clock at night, had already left by then. Gonias' son, Michael, was the only family relative who worked the same shift as Complainant, although he rarely stayed for the entire shift. (Tr. 21, 60-61, 138, 144, 164, 190, 196)

5. During the course of Complainant's employment in 2005 Gonias asked her approximately twice a week to accompany him to the basement of the Diner where a couch was located. Gonias used the Greek term "malaca" (*phonetic*) towards Complainant when he wanted her to go to the basement with him; she understood this term to mean the equivalent of the word "bastard". Gonias also pulled Complainant's hair "all the time", stuck his tongue out at Complainant and suggestively licked his lips on several occasions. Additionally, Gonias tapped Complainant's buttocks "a few times", and regularly pinched Complainant's midsection. In December, 2005 Gonias made a gesture to Complainant with his fingers on his mouth that she perceived to be a request by him to perform oral sex upon her. (Tr. 27-32, 51-54, 56-60, 62, 118, 158)

6. I do not credit Gonias' self-serving denials as to these incidents. (Tr. 156-57, 159, 163, 180, 183-84, 193-94)

7. Complainant's response to the aforementioned would be to tell Gonias that he was "a dirty old man". Complainant also told Gonias that he was not to touch her, that he was a married man, and that she was young enough to be his daughter and he was old enough to be her father. Complainant called Gonias a "pig" when he made the aforementioned gesture with his fingers on his mouth. (Tr. 52, 57)

8. During the course of her employment in 2005 Complainant tried to avoid Gonias as much as she could. Complainant continued her employment at the Diner because she needed the job to pay her bills. (Tr. 77)

9. On December 27, 2005 Gonias grabbed Complainant's right breast and nipple. Complainant became upset and experienced pain as a result of this incident; she described herself afterwards as "hysterical", "in shock" and "a mess". Complainant made her manager aware of

the situation and then permanently left the Diner. In the Diner's parking lot Complainant told Michael Gonias what happened. Gonias conceded that his son told him that Complainant left early that night because she had related to him (Michael Gonias) that Gonias had touched her chest. (Tr. 27, 33-34, 36-37, 41-50, 63-64, 69, 70, 94, 96-97, 112-13, 117, 197)

10. I do not credit Gonias' testimony that the reason Complainant made this allegation against him was because she wanted to leave work early, and because she wanted to extort money from him by receiving damages for filing her Division case. (Tr. 197-200, 209)

11. Complainant feared for her safety and subsequently filed a criminal complaint against Gonias. As a result, Gonias was arrested and Complainant received a criminal court order of protection against him which is effective until March 12, 2009. (ALJ Exh. 5; Tr. 65, 69-70, 160, 182, 202)

12. Complainant attended counseling for this and other problems she was experiencing at the time. Complainant related that she felt "violated" by what had happened, and that this incident affected her attitude towards men. Complainant expended approximately \$150 dollars of her own money for counseling. (Tr. 67-68, 71-72, 130-31, 141)

13. Complainant did not have an interest in working for the ensuing three to four months because she felt "humiliated". Complainant then worked at several diners for comparable pay, *i.e.*, approximately \$400-500 dollars per week, and was unemployed for seven to eight months. Complainant received unemployment insurance payments in the amount of approximately \$13,000. (Tr. 78-83, 142)

14. I find that Complainant's lost wages are an average of \$450 dollars per week for one year (\$23,400) less the amount she receive in unemployment insurance payments, for a total of

\$10,400. Added to this figure is the aforementioned \$150 dollars specifically expended for counseling meant to deal with this matter. Thus, Complainant's total damages are \$10,550.

### OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer, "because of the age...sex...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 hostile work environment, a complainant must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive work environment. *Forrest*, 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 of 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 of 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.

A constructive discharge occurs when an employer engages in discriminatory conduct which compels an employee to quit his or her employment. *Imperial Diner v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 436 N.Y.S.2d 231 (1980).

The record shows that, prior to her last day of employment, Complainant endured a litany of demeaning, ridiculing and insulting behavior by Gonias. Complainant tried to avoid Gonias whenever possible as she had to remain employed for financial reasons and was unable to make a formal complaint against him. Complainant called Gonias a "pig" and "dirty old man" in order to admonish him for his inappropriate conduct; unfortunately, such admonishments failed to deter him. Finally, Gonias compelled Complainant to quit her job on December 27 after he physically assaulted her. During the public hearing Gonias' denials were both self-serving and patently incredible. Therefore, I find that Complainant has proven her case.

#### 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. *Iannone 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 Complainant’s lost wages amount to \$10,550. *Ante*, at ¶14. Additionally, Complainant suffered emotional distress damages subsequent to quitting her job. As a result, she is awarded \$25,000 as an amount which is reasonably related to the discriminatory conduct she experienced, and consistent with case law in this regard. *New York State Div. of Human Rights v. Adams Security, Inc.*, 38 A.D.3d 1194, 832 N.Y.S.2d 360 (4th Dep’t 2007)(award of \$25,000 for mental anguish and humiliation upheld by Appellate Division in case involving females that were sexually harassed by employer).

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

IT IS FURTHER ORDERED that Respondents 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, Respondents shall pay Complainant, Kristen Ambrosini, an award of lost wages in the amount of \$10,550. Respondents shall pay prejudgment interest on said award at the rate of nine (9) per cent per annum from a reasonable intermediate date, namely, May 1, 2006, in accordance with C.P.L.R. § 5004;

2. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay Complainant, Kristen Ambrosini, as an award of compensatory damages for mental pain and suffering the amount of \$25,000. Respondents shall pay interest on said award 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. Respondents shall pay post-judgment interest in accordance with C.P.L.R. § 5002;

4. The aforesaid payments shall be made by Respondents in the form of a certified check made payable to the order of Complainant, Kristen Ambrosini, and delivered by certified mail, return receipt requested, to her attorney, Richard V. Rappaport, Esq., Richard V. Rappaport & Associates, 300 Garden City Plaza, Suite 218, Garden City, N.Y. 11530. Respondents 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;

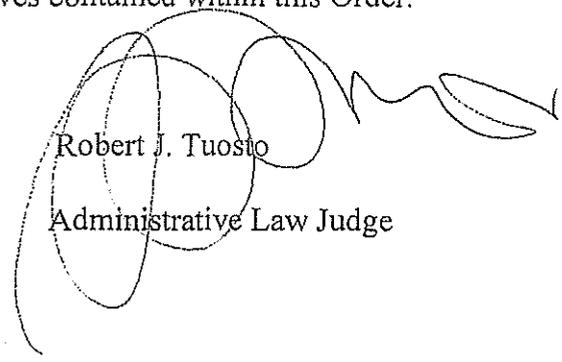
5. Within sixty days of the date of the Final Order of the Commissioner, Respondents shall prominently post a copy of the Division's poster (available at the Division's website at [www.dhr.state.ny.us](http://www.dhr.state.ny.us) under the homepage heading, "NYS Division of Human Rights Is...") in the Diner where employees are likely to view it. Respondents shall also establish in its

workplace both anti-discrimination training and procedures. Respondents shall provide proof of the aforementioned to the Division upon written demand.

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

DATED: December 31, 2008

Bronx, New York



Robert J. Tuosto  
Administrative Law Judge