

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**KRISTEN A. APLEGARTH,**

Complainant,

v.

**NICK COPPOLA, CAPPUCINO'S ARCADIA HP  
D/B/A CAPPUCINO BY COPPOLA, TREASURE  
CHEST RESTAURANT AND BISTRO, INC.,**

Respondents.

**NOTICE AND  
FINAL ORDER**

Case No. 10121719

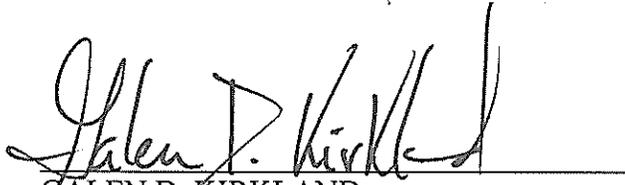
**PLEASE TAKE NOTICE** that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on August 21, 2009, by Thomas J. Marlow, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was 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: **SEP 18 2009**  
Bronx, New York

  
GALEN D. KIRKLAND  
COMMISSIONER

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CAPPUCINO BY COPPOLA, TREASURE  
CHEST RESTAURANT AND BISTRO, INC.,  
NICK COPPOLA,**

Respondents.

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

Case No. 10121719

**SUMMARY**

Complainant alleged that Respondents discriminated against her because of her pregnancy. Because the evidence does not support the allegation, the complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On November 23, 2007, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent, Cappucino's Arcadia HP d/b/a Cappucino By Coppola, 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 Respondent, Cappucino's Arcadia HP d/b/a Cappucino By Coppola, 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 Thomas J. Marlow, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on May 27 and 28, 2009.

Complainant and Respondent appeared at the hearing. Complainant was represented by Jerold S. Slate, Esq. Respondent was represented by Susan M. Corcoran, Esq., of Jackson Lewis LLP.

At the public hearing session held on May 27, 2009, on the record, the complaint was amended to reflect the names of Respondents as follows: Cappucino’s Arcadia HP, d/b/a Cappucino By Coppola, Treasure Chest Restaurant and Bistro, Inc., Nick Coppola, Respondents.

Treasure Chest Restaurant and Bistro, Inc., and Nick Coppola were also represented by Susan M. Corcoran, Esq., of Jackson Lewis LLP.

Complainant and Respondents filed proposed findings of fact and conclusions of law after the conclusion of the public hearing.

### **FINDINGS OF FACT**

1. Around May of 2006, Nick Coppola (“Coppola”), one of the owners of Treasure Chest Restaurant and Bistro, Inc., which does business as a restaurant known as Cappucino By Coppola (“Cappucino”), hired Complainant as a waitress at Cappucino.

(ALJ’s Exhibit 1; Complainant’s Exhibits 2, 3, 4; Tr. 21-22, 28-29, 62, 70, 507, 573-74, 578-79)

2. During her tenure as a waitress at Cappucino, Complainant was habitually late for her shift. (Tr. 334-35, 381, 409-10, 434, 470, 509-10, 543, 563) Complainant was late more often than other wait-staff personnel. (Tr. 381, 563)

3. At times, Complainant came to work in dirty clothes. (Tr. 389-90, 392-93, 411, 470)

4. Other wait-staff personnel complained about working with Complainant for various reasons, including having to do Complainant's setup work when she did not show up on time, having to do Complainant's end-of-the-day work when she left early, having to listen to her personal problems, and having to experience Complainant getting upset at work and crying. (Tr. 348-49, 390-91, 412, 455-56, 467-73, 488, 509-10, 515, 517-18, 549, 564) Complainant created a "negative atmosphere" for the wait-staff. (Tr. 509-10)

5. Debbie Niessen ("Niessen") was the manager of the wait-staff at Cappucino for 15 years before retiring in July of 2007. (Tr. 71, 75, 333, 404-06, 408, 510) On a few occasions during Complainant's tenure as a waitress for Cappucino, Niessen discussed Complainant's lateness with Coppola and suggested to Coppola that he should consider terminating Complainant's employment. (Tr. 511) On several occasions, Niessen informed Complainant that Complainant would not be assigned to work parties because Complainant was not dependable. (Tr. 409-10)

6. In June of 2007, Complainant learned that she was pregnant. When Complainant learned that she was pregnant, Complainant informed Niessen and Niessen informed Coppola. (Tr. 48, 83-85, 90)

7. Complainant received five checks dated in June of 2007 for hours she had worked. The average number of hours Complainant worked per week for these checks was 20.9 hours. Complainant received four checks dated in July of 2007 regarding hours she had worked. The average number of hours Complainant worked per week for these checks was 23.0625 hours. Complainant received five checks dated in August of 2007 regarding hours she had worked. The average number of hours Complainant worked per week for these checks was 21.05 hours. Complainant received four checks dated in September of 2007 regarding hours she had worked.

The average number of hours Complainant worked per week for these checks was 21.375 hours. (Complainant's Exhibits 4, 7; Tr. 145-47)

8. Business is usually slow for Cappucino during the summer and early fall. (Tr. 507-08) Many of the wait-staff complained about not being assigned enough hours of work. (Tr. 478, 499-500)

9. On October 28, 2007, Complainant was cursing in the kitchen of Cappucino. Coppola and customers were in the dining room when Coppola heard Complainant cursing. (Tr. 509, 516)

10. On October 29, 2007, Coppola terminated Complainant's employment. Coppola took into consideration Complainant's lateness and the negative atmosphere she created with the wait-staff in deciding to terminate her employment, but Complainant's cursing in the kitchen that could be heard in the dining room when customers were present was "the final straw."

(ALJ's Exhibit 1; Complainant's Exhibit 2, 3; Tr. 64-65, 509-10)

11. Complainant contended that, because of her pregnancy, her work hours were cut, she wasn't assigned to work parties, and her employment was terminated.

(ALJ's Exhibit 1; Complainant's Exhibits 2, 3; Tr. 64-66, 91-93)

### **OPINION AND DECISION**

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions, or privileges of employment because of that individual's sex. Human Rights Law § 296.1(a)

Complainant raised an issue of unlawful discrimination, alleging that Respondents unlawfully discriminated against her in the terms, conditions, and privileges of employment when Respondents reduced Complainant's hours of work, stopped assigning Complainant to

parties, and, thereafter, terminated her employment because of Complainant's pregnancy.

Complainant has the burden to establish by a preponderance of the evidence that such discrimination based on her pregnancy has occurred. *See Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2003). To meet this burden, Complainant must initially show that her reduction in hours, her loss of party assignments, or the termination of her employment occurred under circumstances that give rise to an inference of discrimination. *Id.* Complainant has failed to meet this burden.

The credible evidence establishes that business is usually slow for Cappucino during the summer and early fall and that many of the wait-staff complained about not being assigned enough hours of work. Also, Complainant's average number of hours worked per week for the pay checks received in July, August, and September of 2007 were slightly higher than the average number of hours Complainant worked per week for the pay checks received in June. The credible evidence further establishes that, on several occasions, Niessen informed Complainant that Complainant would not be assigned to work parties because Complainant was not dependable. Niessen also suggested to Coppola, on more than one occasion, that he should consider terminating Complainant's employment because of her lack of dependability. Finally, Complainant's employment was not terminated until about four months after she announced that she was pregnant. The credible evidence establishes that the termination of employment occurred only after "the final straw"- Complainant's cursing in the kitchen that could be heard in the dining room when customers were present.

After considering all of the evidence presented and evaluating the credibility and demeanor of the witnesses, I find that the credible evidence does not support a finding that Respondent engaged in unlawful discrimination. Conclusory allegations, unsupported by

credible evidence, are insufficient to establish unlawful discrimination.

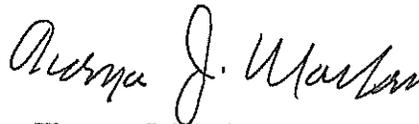
*See Gagliardi v. Trapp*, 221 A.D.2d 315, 633 N.Y.S.2d 387 (2d Dept. 1995).

**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 the complaint be, and the same hereby is, dismissed.

DATED: August 21, 2009  
Bronx, New York

A handwritten signature in cursive script, reading "Thomas J. Marlow".

Thomas J. Marlow  
Administrative Law Judge