

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**JENNIFER ESPOSITO,**

Complainant,

v.

**HARTLEY'S CATERING, INC. D/B/A  
SCHLESINGER DELI DEPO, CLAUDIO  
CALDERON AS AIDER AND ABETTOR,**

Respondents.

**NOTICE AND  
FINAL ORDER**

Case No. 10116158

**PLEASE TAKE NOTICE** that the attached is a true copy of the Alternative Proposed Order, issued on January 25, 2008, by Peter G. Buchenholz, Adjudication Counsel, after a hearing held before Thomas S. Protano, 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 Alternative Proposed Order, and all Objections received have been reviewed.

**PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE  
PROPOSED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE  
KUMIKI GIBSON, 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**, this 21st day of February, 2008.



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KUMIKI GIBSON  
COMMISSIONER

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

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**HARTLEY'S CATERING, INC. D/B/A  
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**ALTERNATIVE  
PROPOSED ORDER**

Case No. **10116158**

Respondents discriminated against Complainant based on her sex by subjecting her to a hostile work environment. Accordingly, Complainant is entitled to damages for the mental anguish she suffered in the amount of \$300,000. The record, however, does not support the charge that Respondents retaliated against her by terminating her employment after she complained, and that charge is dismissed.

**PROCEEDINGS IN THE CASE**

On February 16, 2007, 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 referred the case to public hearing.

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on October 29 and 30, 2007.

Complainant and Respondent Hartley’s Catering, Inc. appeared at the hearing. Complainant was represented by Adam L. Rodd, Esq. Respondent was represented by Alan L. Joseph, Esq. The alleged aider and abettor, Claudio Calderon, did not appear and is in default. During the hearing, the caption was amended to reflect “Deli Depot” as the proper spelling of Respondent’s name.

Counsel for Complainant and for Respondent Hartley’s Catering, Inc. (“Hartley’s”) filed timely post-hearing submissions.

On December 12, 2007, ALJ Protano issued a recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”). Objections to the Recommended Order were filed with the Commissioner’s Order Preparation Unit by both Complainant’s counsel and Respondent Hartley’s counsel.

The caption and complaint are hereby amended to reflect the proper spelling for Respondent Hartley’s Catering, Inc. (Commissioner’s Exhibit 1; Tr. 268).

**FINDINGS OF FACT**

1. During the relevant period, Respondent Hartley’s was a delicatessen and pizzeria located in Windsor, New York, owned by Kara and Rich Hartley, husband and wife. (Tr. 8-9, 155, 241)

2. Hartley’s hired Complainant as a clerk in November of 2005. She was eventually promoted to delicatessen manager. (Tr. 8-9, 12)

3. Hartley's did not maintain a sexual harassment policy or an employee manual. (Tr. 15, 266, 270, 291)

4. Complainant alleged that during her tenure there, she was harassed and subjected to a hostile work environment. (ALJ's Exhibit 3)

5. In October or November of 2006, Jaime Sotelo, a Hartley's employee, took a photograph of Complainant's buttocks as she was bending over placing lids on containers. (Tr. 16-17, 85, 158) Complainant felt embarrassed and humiliated by Sotelo's actions and asked him to delete the photograph. Sotelo simply laughed. Complainant then complained to Rich Hartley, who, instead of taking any disciplinary action against Sotelo, laughed and proceeded to insult Complainant by stating that her buttocks were too large to fit in a photograph. This too embarrassed and humiliated Complainant. (Tr. 18-19, 159)

6. Respondent Claudio Calderon was a Hartley's employee. (Tr. 16, 19, 244) Calderon drank alcohol while on the job. It is undisputed that several Hartley's employees, including Sotelo, Marie Fitzgerald, Chris Burke, Dan Lemer, and an employee identified only as "Margarit," complained to the Hartleys because Calderon screamed, yelled, made derogatory comments, and threatened them when he was drunk. (Tr. 22-26, 143, 161-63, 166, 223-24, 298, 300-01) On one occasion, Rich Hartley told Calderon to "take it easy," after Calderon yelled at Sotelo and called him stupid. (Tr. 225) After an incident with Burke, Hartley told Calderon, "you shouldn't push him around – you know, you shouldn't raise your voice with him. He's a little sensitive." (Tr. 300) When Lemer complained about Calderon's drinking, Hartley spoke to him about it, but when told that he was not out of control, Hartley "left it at that." (Tr. 300-01) There is no evidence that the Hartleys ever disciplined Calderon for his drinking on the job or his behavior toward Hartley's employees.

7. Toward the end of 2006, Complainant complained to Kara Hartley that Calderon threatened her job when he told her "I am going to get you fired, bitch." (Tr. 65-66) Kara Hartley's response was to direct Complainant to "tell [Calderon] to go F himself." (Tr. 66)

8. In October or November of 2006, Complainant began lending Calderon money at Calderon's request. (Tr. 27-28, 71, 89, 91) Eventually, Complainant, tired of lending Calderon money, refused his request. (Tr. 28) Calderon then threatened her saying, "you better have that money for me, bitch." (Tr. 28) The following day, Calderon bent her thumb back and ordered her to give him money. (Tr. 29) Calderon hurt Complainant, and she started crying. Complainant gave him \$50 because she was afraid of and intimidated by Calderon, who bragged about his connections to organized crime. (Tr. 29-30)

9. It is undisputed that in November of 2006, unprovoked and uninvited, Calderon twice assaulted Complainant by grabbing her breasts. On the first occasion, Complainant was restocking cigarettes at the delicatessen counter when he came up behind her. She was shocked, and she kneed him in the groin area in response. She then started crying. Calderon merely laughed. (Tr. 30) Complainant felt humiliated, degraded, belittled, and violated by his actions. Complainant stopped speaking to Calderon. (Tr. 31)

10. Shortly thereafter, Calderon approached Complainant, put his arm around her and said, "Sweetheart, what is the matter? Why don't you talk to me?" Complainant told him that she did not like that he grabbed her breasts. He then leaned over and stuck his tongue in her ear. (Tr. 31)

11. Later that day, Calderon came up from behind Complainant and again grabbed both of her breasts and moved them back and forth. Complainant smacked him, screamed at him, and then started crying. (Tr. 33-34) She felt intimidated. (Tr. 34)

12. Thereafter, Calderon was speaking with a customer when he called Complainant over to him and said, "Sweetheart will you give me a blow job?" (Tr. 37-38)

13. At the end of December 2006, Complainant approached Kara Hartley and reported Calderon's actions. She asked Kara Hartley not to tell Rich Hartley because of how he had reacted to Sotelo's behavior. (Tr. 35-37, 67) Kara Hartley admitted that Complainant complained to her both about Calderon's borrowing money and about his assaults. (Tr. 244-46) Kara Hartley explained that, "in the deli, it was a family environment and people – you know, we were all friendly with one another. Sometimes, you know, people would joke around." (Tr. 247) She admitted that Complainant told her, "I know we play around a lot, but this was different," referring to Calderon's assault. (Tr. 245) In response, Kara Hartley said, "so what do you want me to do about it?" (Tr. 246) Hartley said it sounded like a personal issue, and she did not see how it involved her. She said if Complainant felt something else needed to be done about it, she should see Rich Hartley. (Tr. 246)

14. Even though Kara Hartley testified that Rich Hartley was responsible for disciplining employees, she did not inform Rich Hartley until January 18, 2007, when he asked her if Complainant had ever complained about Calderon touching her. (Tr. 171-72, 250, 267, 277)

15. Kara Hartley admitted that she never investigated Complainant's allegations and that she never disciplined or reprimanded Calderon for his actions toward Complainant, including the assaults. (Tr. 256-57)

16. Two Hartley's employees witnessed Complainant take items from the store without paying for them. (Tr. 193, 203, 218, 273-74) They each reported it to the Hartleys in December of 2006 and January of 2007. (Tr. 204-05, 219-20)

17. On January 16, 2007, Rich Hartley called Complainant into his office and informed her that items were missing from the delicatessen and asked if she had taken them. (Tr. 39, 68, 274) Complainant admitted that she took items, but claimed that she later paid for them. Hartley informed her that she was breaking the store policy by not paying for items right away and that, as a manager, she should lead by example. (Tr. 274-75)

18. Thereafter, Complainant gave Hartley two weeks notice of her resignation, which Hartley accepted. (Tr. 42-44, 46, 275)

19. On January 18, 2007, Rich Hartley decided instead to terminate Complainant's employment immediately. (Tr. 46, 276, 284) After Rich Hartley advised Complainant of his decision, Complainant complained to Rich Hartley about Calderon's behavior. (Tr. 68, 276-77)

20. Hartley called Calderon into the office and "made [Complainant] confront [Calderon]." Complainant begged Hartley not to make her do so, but he insisted that she tell Calderon what she had told him. (Tr. 73-74, 277-78) Calderon "got very upset, didn't say but two words and left the office." (Tr. 278) Rich Hartley admitted that he never disciplined Calderon for the assaults. (Tr. 302)

21. Complainant credibly testified that as a result of the abusive treatment, she felt depressed and worthless. She did not want to get out of bed. She twice wanted to take her own life and twice had to go to the hospital. She experienced trouble being at home alone. (Tr. 47-48)

22. On January 18, 2007, Complainant filed a police report against Calderon for assaulting her. (Respondent's Exhibit 3; Tr. 76, 99-101) After filing the report, Complainant was referred to crime victim counseling. (Tr. 109)

23. On January 31, 2007, Complainant commenced treatment with Susan Giannico, a licensed clinical social worker, with 23 years of experience as a clinical social worker. (Tr. 109, 111, 125)

24. Complainant initially met with Giannico every week. The subject of the therapy was the threats and assaults by Calderon, and how Complainant was subsequently treated by the Hartleys. (Tr. 115) Giannico described Complainant's condition as severe. Complainant was emotionally distraught. Giannico diagnosed Complainant as suffering from major depressive disorder and post-traumatic stress disorder. (Tr. 116) The manifestations of Complainant's major depressive disorder included sad mood, lack of energy, fatigue, and lack of motivation to function. (Tr. 116) Complainant was not getting out of bed, was not showering or taking care of herself. She lost any feelings of joy in her life. (Tr. 117) She experienced anxiety, uncontrollable crying and insomnia. (Tr. 123) Complainant also experienced suicidal ideations as a result of Calderon's and the Hartleys' conduct. (Tr. 120-21)

25. Complainant credibly testified that she did not experience these feelings before she was assaulted by Calderon. (Tr. 53) She testified, "I just have a hurt inside of me that won't go away." (Tr. 54)

26. Giannico confirmed that on March 13, 2007, Complainant was admitted to the emergency room as a result of suicidal ideations. She was subsequently prescribed anti-depressant medication and medication to help her sleep. (Tr. 120) This event resulted from her receipt of legal papers relating to Calderon's assault, which reignited the trauma she experienced. (Tr. 120-21)

27. On March 26, Complainant was again admitted to the emergency room as a result of another episode of suicidal ideation. This admission was prompted by the district attorney

informing her that Calderon was offered a plea agreement in the criminal case against him.

(Tr. 121, 131)

28. Giannico met with Complainant for a total of 22 sessions, with a treatment plan that anticipated continuing treatment beyond the date of the hearing in this matter. (Tr. 121, 123-24) Giannico anticipated that treatment would continue for one to one-and-a-half years. (Tr. 124) Complainant initially responded well to treatment, and Giannico started to see her less than every week. As the Division hearing proceedings approached in time, however, Complainant's symptoms recurred, and she again required and resumed her weekly treatment. (Tr. 121-23)

29. When asked why Complainant continued to received therapy at the time of the hearing, Complainant stated, "Because I still see the laughing face of [Calderon] the first time he grabbed my breast." (Tr. 52)

### **OPINION AND DECISION**

Complainant's claim that Respondents discriminated against her by subjecting her to a hostile work environment is sustained. The record, however, does not support the retaliation charge, and that claim is dismissed.

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. *See* Human Rights Law § 296.1(a). Sexual harassment constitutes unlawful discrimination. "A hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 (4th Dept. 1996) (internal quotations omitted) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)); *see also McIntyre v. Manhattan Ford*,

*Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 802, 669 N.Y.S.2d 122 (N.Y. Sup. Ct. 1997), *appeal dismissed*, 256 A.D.2d 269 (1st Dept. 1998), *appeal dismissed*, 93 N.Y.2d 919 (1999), *leave to appeal denied*, 94 N.Y.2d 753 (1999). “Whether a workplace may be viewed as hostile or abusive – from both a reasonable person’s standpoint as well as from the victim’s subjective perspective – can be determined only by considering the totality of the circumstances.” *Father Belle*, 221 A.D.2d at 51. “In determining whether a plaintiff was subjected to a hostile work environment a court may consider the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating or a mere offensive utterance and whether it unreasonably interfered with the plaintiff’s work performance.” *McIntyre*, 175 Misc.2d at 803.

In this case, Respondents subjected Complainant to a hostile work environment. Rich and Kara Hartley’s conduct, attitude, and behavior with respect to their management of Hartley’s Catering, Inc., fostered an environment that allowed for and encouraged sexually abusive behavior, which was both severe and pervasive. Specifically, the Hartleys knew of Sotelo’s inappropriate behavior and of the harassing and abusive environment created by Calderon, and did nothing to address the misconduct. In fact, and in addition, Hartley’s did not have an employee manual or a complaint process whereby an employee who believed she was being discriminated against could seek redress. And, when Complainant did complain, her complaints were met with a cavalier indifference. In short, during the period in which Complainant worked for Hartley’s, she was subjected to an atmosphere of hostility, intolerance, and abuse, including two sexual assaults, engaged in by two co-workers, which was left unchecked, unaddressed, and even encouraged by the actions and inactions of the Hartleys.

Both Hartleys admitted that they did not investigate Complainant’s allegations of abuse by Calderon and that they took no disciplinary measures. “An employer’s calculated inaction in

response to discriminatory conduct may, as readily as affirmative conduct, indicate condonation.” *State Div. of Human Rights v. St. Elizabeth’s Hosp.*, 66 N.Y.2d 684, 687, 496 N.Y.S.2d 411, 412 (1985). The Hartleys demonstrated an attitude of disregard for the well-being of their employees and even encouraged the actions of the wrongdoers. This attitude included such behavior as directing Complainant to tell Calderon to “go F himself” after he threatened her; making an offensive comment in response to Complainant’s complaint of harassment; and treating abuse taking place by employees on the job site during work hours as if it was a personal matter, as opposed to the business and responsibility of the owners. It also included Rich Hartley forcing Complainant to confront Calderon, who had sexually harassed her, instead of intervening and taking appropriate investigatory and remedial measures himself.

Kara Hartley attempted to explain away the misbehavior by asserting, “in the deli, it was a family environment and people – you know, we were all friendly with one another. Sometimes, you know, people would joke around.” She acknowledged, however, that when Complainant came to her, Complainant told her, “I know we play around a lot, but this was different,” referring to Calderon’s assault. Hartley’s indifference and inaction is inexplicable and unacceptable. As the court in *McIntyre* recognized:

[h]uman beings of all ages appear to have a need and propensity to engage in pranks, practical jokes, taunting and teasing and stunts under the guise of humor. When it is good-natured and harmless it may relieve the tensions imposed by the pressures of daily life. However, ‘humor is a fragile thing.’ When it is actually what Freud labeled ‘masked aggression,’ directed at an individual because of gender, race or age, it is prohibited under the sense of fairness, decency and justice which prevails today. Behavior which transcends or was shrugged off as mere annoyance, to be suffered in silence by the recipient, is now condemned and banned by our Federal, State and local laws.

*Id.* at 796.

Considering the totality of the circumstances, it is apparent that Respondents subjected Complainant to a hostile work environment, in violation of the Human Rights Law.

As a result of Respondents' discriminatory actions, Complainant is entitled to an award for the mental anguish she suffered. *See* Human Rights Law § 297.4(c); *Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989).

The evidence establishes that Respondents' conduct made Complainant feel depressed, worthless, and suicidal. She was humiliated and embarrassed at work and frequently made to cry. Complainant was emotionally distraught. As a result of Calderon's assaults and the Hartleys' response, Complainant suffered major depressive disorder and post-traumatic stress disorder. The manifestations of Complainant's major depressive disorder included sad mood, lack of energy, fatigue, and lack of motivation to function. Complainant was not getting out of bed, was not showering or taking care of herself. She lost any feelings of joy in her life. She experienced anxiety, uncontrollable crying and insomnia. And, as previously noted, Respondents' unlawful conduct caused Complainant to suffer suicidal ideations, and to be admitted to the hospital as a result. It also led to Complainant's need for ongoing and long-term therapy, anti-depressant medication, and medication to help her sleep.

Complainant testified credibly that she did not experience these feelings before she was assaulted by Calderon. She testified, "I just have a hurt inside of me that won't go away." And, when asked why Complainant continued to receive therapy at the time of the hearing, Complainant stated, "Because I still see the laughing face of [Calderon] the first time he grabbed my breast." (Tr. 52)

In determining the amount of damages to be awarded, the following factors should be taken into consideration: the relationship of the award to the respondent's wrongdoing; whether

the award is supported by the evidence; the duration, consequence and magnitude of complainant's mental anguish, including physical manifestations or psychiatric treatment; and consideration of comparable awards for similar injuries. *See New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216 (1991); *Father Belle*, at 57; *Bronx County Medical Group, P.C. v. Lassen*, 233 A.D.2d 234, 235 (1<sup>st</sup> Dept. 1996).

The abuse and harassment that created the hostile work environment to which Respondents subjected Complainant – which included two physical assaults and public humiliation – resulted in her suffering mental anguish of a severe magnitude, which included suicidal ideations. Accordingly, an award of \$300,000 is appropriate in this case. *See Town of Hempstead v. State Div. of Human Rights*, 233 A.D.2d 451, 649 N.Y.S.2d 942 (2d Dept. 1996), *appeal dismissed*, 89 N.Y.2d 1029 (1997), *lv. denied*, 90 N.Y.2d 807 (1997); *New York City Transit Auth. v. State Div. of Human Rights*, 181 A.D.2d 891, 581 N.Y.S.2d 426 (2d Dept. 1992), *lv. denied*, 80 N.Y.2d 762 (1992).

Complainant also alleged that she was retaliated against for complaining when she was terminated from her employment, in violation of Human Rights Law § 296.7. The credible evidence demonstrates that Complainant initially resigned her position when confronted about stealing, and, thus, her separation from Hartley's could not be retaliatory. Furthermore, Rich Hartley, who made the decision to terminate Complainant's employment before her resignation date, was unaware at the time he made that decision that Complainant had complained about being abused. He hastened her separation because two co-employees, who had witnessed Complainant removing items from the store without paying for them, advised him of this, and he apparently believed them. In light of the foregoing, the retaliation claim must be dismissed.

## 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 Complainant's claim based on sex discrimination is sustained; and

**ORDERED**, that Complainant's claim based on retaliation is dismissed; and

**ORDERED**, that Respondents, their agents, representatives, employees, successors and assigns shall cease and desist from all discriminatory practices relating to sex in employment; and

**ORDERED**, that Respondents shall take the following actions to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this order:

1. Within sixty days of the date of the Commissioner's Final Order, Respondent Hartley's shall establish policies regarding the prevention of unlawful discrimination. These policies shall include an official anti-discrimination and sexual harassment policy and a formalized reporting mechanism for employees who believe they have been discriminated against. The policies shall also contain the development and implementation of a training program relating to the prevention of unlawful discrimination in accordance with the Human Rights Law. Training and a copy of the policies shall be provided to all employees, and the policies shall be posted prominently where they may be viewed by employees in the workplace.

2. Within sixty days of the Commissioner's Final Order, Respondents shall pay to Complainant \$300,000 as compensatory damages due to her emotional distress. Payment shall be made in the form of a certified check made payable to Complainant, Jennifer Esposito, and delivered to her attorney, Adam L. Rodd, Esq., at Drake Loed Heller Kennedy Gogerty Gaba & Rodd, PLLC, 555 Hudson Valley Avenue, Ste. 100, New Windsor, New York 12553, by

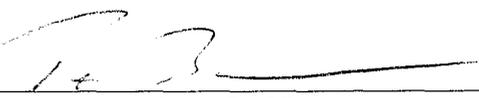
certified mail, return receipt requested. Interest on the award shall accrue from the date of the Commissioner's Final Order until the date payment is made at a rate of nine percent per annum.

3. Respondents shall simultaneously furnish written proof of their compliance with all of the directives contained within this Order to Caroline Downey, General Counsel of the Division at her office address at One Fordham Plaza, 4<sup>th</sup> Floor, Bronx, New York 10458.

4. Respondents shall cooperate with the Division during any investigation into their compliance with the directives contained in this Order.

DATED: **JAN 25 2008**  
Bronx, New York

NYS STATE DIVISION OF HUMAN RIGHTS



PETER G. BUCHENHOLZ  
Adjudication Counsel