

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

JOANNA JACOBS,

Complainant,

v.

SCHLESINGER ASSOCIATES,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10111273

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 March 24, 2008, by 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 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”), WITH THE FOLLOWING AMENDMENTS:**

- Within sixty days of the date of this Order, Respondent shall pay Complainant \$90 in lost wages. The record reveals that Complainant should have been working full-time hours from March 13 through April 6, the date of her resignation. (Complainant’s Exhibits 8, 11; Tr. 14, 36) At 35 hours per week, Complainant should have been scheduled for 126

hours. She actually worked 120 hours and thus is owed 6 hours in lost wages. Interest shall accrue on the lost wage amount at a rate of nine percent per annum from March 25, 2006, until the date payment is made.

- Because Respondent is found to have retaliated but not to have discriminated based on sex, the decree in the Recommended Order directing that Respondent establish anti-discrimination and anti-harassment policies is not hereby adopted.
- Within sixty days of the date of this Order, Respondent shall establish an anti-retaliation policy with a mechanism for individuals who believe they have been retaliated against to complain
- Within sixty days of the date of this Order Respondent shall promulgate policies and procedures for the prevention of retaliation in accordance with the Human Rights Law. These policies and procedures shall include a formal complaint procedure for employees who believe they have been aggrieved. A copy of the policies and procedures shall be provided to all employees.
- A copy of the policies and procedures shall be produced within sixty days of this Order to Caroline J. Downey, General Counsel of the Division at One Fordham Plaza, 4<sup>th</sup> Floor, Bronx, New York 10458.
- Respondent 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 places on Respondent's premises where employees are likely to view it.

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: **AUG 04 2008**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF  
HUMAN RIGHTS

on the Complaint of

JOANNA JACOBS,

Complainant,

v.

SCHLESINGER ASSOCIATES,

Respondent.

RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER

Case No. 10111273

SUMMARY

While Complainant worked for Respondent, a racial epithet was directed at her by a co-worker. Complainant alleges that after she complained to management, her hours were reduced and she suffered from a hostile atmosphere because she had complained about a co-worker. Complainant has met her burden and should be compensated for the retaliation she suffered after making her complaint.

PROCEEDINGS IN THE CASE

On April 17, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent 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 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 S. Protano, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on January 9 & 10, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Emery Cilli, Brinkerhoff & Abady, LPP, by O. Andrew F. Wilson, Esq. Respondent was represented by Greenwald Doherty, LLP, by Kevin M. Doherty, Esq.

Permission to file post-hearing briefs was granted. Counsel for both parties filed timely submissions. Subsequent submissions filed by the attorneys were not considered during the preparation of this Recommended Order.

#### **FINDINGS OF FACT**

1. Complainant is African American. She began working for Respondent, a market research firm, in its New York office on January 24, 2006. (ALJ Exhibit II; Tr. 9-10)
2. Complainant was hired as a qualitative assistant. Her duties were to monitor focus groups and make sure the clients and the individuals who comprised the focus groups were comfortable. (Tr. 10-11)
3. After two weeks, Complainant was given receptionist duties. Her hours increased to full-time but her per-hour pay rate remained unchanged. (Tr. 14-15)
4. Lizabeth Bloom, vice president, claimed at hearing that Complainant was only given the “opportunity” for full time hours when she was given the receptionist duties. Bloom’s testimony, however, contradicted a sworn statement she made during the investigation of this case, which stated that Complainant “was given full time hours in February of 2006.”

(Complainant's Exhibit 24; Tr. 304) Based upon this discrepancy, I credit the Complainant's claim that she was given full time hours.

5. Respondent has an anti-harassment policy, which is outlined in its employee manual. Complainant was given a copy of the manual, but received no instruction with respect to Respondent's anti-harassment or anti-discrimination policies. (Complainant's Exhibit 1; Tr. 15)

6. On February 16, 2006, Complainant, while working for Respondent, encountered Kelvin Classen, an Hispanic co-worker, who told Complainant she was lower on the "color food chain" than he was. (Tr. 20) Complainant took no action other than to tell Classen to leave her alone. (Tr. 22)

7. A few hours later while Complainant was at the reception desk, Classen walked over to Complainant and asked "what's up, nigger?" (Tr. 23, 205)

8. Complainant felt "shocked," "degraded" and "violated" by this comment and went to the supervisor, Lori Mahl to report that Classen had used a "racial term" that was offensive to her. (Tr. 25, 104)

9. Mahl told Complainant that was "the way [Classen] is," and suggested that Complainant should accept it. This exchange made Complainant feel "hopeless." (Tr. 26)

10. Despite that interchange, Mahl directed Classen to apologize to Complainant. Classen offered a verbal apology to Complainant that day, which Complainant did not consider to be sincere or genuine. (Tr. 29, 221)

11. A few days later, Complainant told Bloom about the two incidents involving Classen. (Tr. 32, 310)

12. Bloom then questioned Classen, who admitted to directing the comment at Complainant. (Tr. 316) He said, however, that he did not think it was a serious matter, because

he considered the word “nigger” to be “a catch phrase that we all use in the street.” (Tr. 287, 318)

13. After that meeting, Classen sent Complainant a written apology. (Complainant’s Exhibit 14; Tr. 215) He was neither reprimanded nor warned in writing for his comments. He had been, however, warned in writing in the past about using Respondent’s computers without authorization on numerous occasions. (Complainant’s Exhibits 15, 16 & 18; Tr. 234-35, 344)

14. Complainant did not work for Respondent from February 22, 2006 through March 5, 2006. She did not want to work with Classen and did not think she would continue working for Respondent. (Tr. 115-16)

15. During this period, Complainant was offered the opportunity to work in Respondent’s New Jersey office. Complainant initially accepted the offer, but rejected it after she realized the position paid significantly less money than her position in the New York office. (Tr. 38-40)

16. Bloom and Complainant then agreed that Complainant would return to the New York office, but her schedule would be arranged to that she would not have to work with Classen. (Tr. 39-40, 136)

17. Although Complainant didn’t work directly with Classen, she did come into contact with Classen at Respondent’s work site. (Tr. 61-62)

18. When Complainant returned after she had complained about Classen, Complainant became an outcast among her co-workers. Andrew Levine, a co-worker told Complainant that she was considered a “tattletale” by other employees. (Complainant’s Exhibit 9; Tr. 65, 407)

19. Levine further stated that if Classen “were someone who had actually did mistreat people or wasn’t very well liked here, I’m sure they would have done something else.” He then said “this is a misunderstanding.” (Complainant’s Exhibit 9; Tr. 76)

20. Levine called Classen a “clown” and acknowledged that Classen’s behavior was inappropriate and stated that he had personally warned Classen about it. (Complainant’s exhibit 9; Tr. 394, 408)

21. On another occasion, Complainant spotted a co-worker, who was identified as “Whip,” mimicking her behind her back. Complainant stated that Whip “had his hands up in the air, he was gyrating his hips, dancing behind me kind of seductively.” Complainant said she could see his reflection and turned and confronted him, but he “looked embarrassed and stopped and left the room.” (Tr. 66-67)

22. On April 6, 2006, Complainant resigned from her position with Respondent. In a letter to Respondent, Complainant described the situation under which she had been working, stating that she “didn’t want to be persecuted anymore.” She is not seeking remuneration for any lost wages for the period after she resigned. (Complainant’s Exhibit 6; Tr. 85, 157)

23. After the incidents of February 16, 2006, Complainant did not work regular full time hours, despite the fact that she specifically requested full time hours on March 15, 2006. In fact she worked a total of 152.85 hours. Based upon a 35-hour week, Complainant would have worked 238 hours between February 22, 2006 and April 6, 2006 if she had worked full time. (Complainant’s Exhibits 8 & 21)

24. Classen continued to work full time hours. Bloom indicated that because clients often asked for Classen, he received full time hours and, in order to keep Complainant and Classen separated, Complainant’s hours were scheduled around Classen. (Tr. 484-88)

25. Complainant described the experience as “painful.” She felt “hurt” and “very bad” because her peers had “turned their backs on me for something...I had every right to fight for.”

She feels Respondent “reinforced” Classen’s comments by their actions, which caused her to feel stress. (Tr. 92-94)

26. Respondent did not conduct harassment training with its staff and only made cursory mention of harassment and discrimination during a March 25, 2006 meeting at which the meeting’s facilitator told the staff that it “sucks” that he has to discuss such topics. (Tr. 162, 364)

27. Since she filed the instant complaint, Complainant has legally changed her name to Judah Devoreaux. She has not produced any documentary evidence of the change and, therefore, the caption will not be amended to reflect that change.

### OPINION AND DECISION

In order to prevail on a retaliation claim, Complainant must first establish a prima facie case. To do so, Complainant must show that (1) she engaged in activity protected by Human Rights Law § 296, (2) Respondent was aware that she participated in the protected activity, (3) she suffered from a disadvantageous employment action based upon his activity, and (4) there is a causal connection between the protected activity and the adverse action taken by Respondent. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101; 692 N.Y.S.2d 220 (3<sup>rd</sup> Dept. 1999), *citing Dortz v City of New York*, 904 F Supp 127, 156 (1995).

Complainant in the instant case has made such a showing. She complained about Classen and her hours were reduced thereafter. Respondent has offered no explanation for this that would support a conclusion that they did not violate the law, other than discredited testimony that implies her hours were never reduced, and specifically rewarded the offender by taking care of his hours first. Moreover, Complainant was also made to feel like a pariah and a “tattletale” and was the target of mimicking and ridicule, such that it interfered with her ability to work and

altered the conditions of her employment. See, *Father Belle Community Center, v. New York State Division of Human Rights*, 221 A.D. 44, 51, 642 N.Y.S. 2d 739, 745 (4<sup>th</sup> Dept. 1996). As a result, she felt persecuted and she suffered from stress. She is entitled to be compensated for the hostile and retaliatory work environment that existed. She is, therefore, entitled to be compensated for the stress she felt as a result of these actions. An award of \$10,000 is reasonably related to the emotional distress she suffered over the course of seven weeks and will effectuate the purposes of the Human Rights Law. *New York City Transit Authority v. State Division of Human Rights*, 581 N.Y.S.2d 426 (1992)

Respondent has indicated that Complainant could have worked full time hours, but it sought to accommodate Classen first. As a result of that Complainant worked 152.85 hours instead of 238 hours. Thus she lost 85.15 hours during the seven weeks after Classen's comments. Calculated at a rate of \$15.00 per hour, Complainant lost \$1277.25 in back wages and is entitled to damages for that amount. *Bell v. NYS Division of Human Rights*, 36 A.D.2d 1129 (3<sup>rd</sup> Dept., 2007). Complainant is entitled to pre-determination interest on the back wage award at a rate of 9 per cent per annum, from March 18, 2006, a reasonable intermediate date. "An award of interest is often appropriate from the time which a party was deprived of the use of money since without the addition of interest, the aggrieved party is not made whole." *Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d 21, 771 N.E.2d 231, 744 N.Y.S.2d 349 (2002). Under New York law, prejudgment interest is calculated on a simple interest basis. See, *Epstein v. Calvin-Miller Intern, Inc.*, 139 F.Supp.2d 469 (S.D.N.Y. 2001), citing, *Marfia v. T.C. Ziraat Bankasi*, 147 F.3d 83, 90 (2d. Cir. 1998); *Donovan v. Dairy Farmers of America, Inc.*, 53 F.Supp.2d 194, 197 (N.D.N.Y. 1999).

## 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 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, Schlesinger Associates, 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 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant \$10,000 as compensatory damages due to her emotional distress. Payment shall be made in the form of a certified check made payable to Complainant, Judah Devoreaux, and delivered to her attorney at Emery Celli Brinkerhoff & Abady LLP, 75 Rockefeller Plaza, 20<sup>th</sup> Floor, New York, NY, 10019, 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. Within 60 days of the Commissioner's Final Order, Respondents shall pay to

Complainant \$1,277.25 as back wages. Payment shall be made in the form of a certified check made payable to Complainant, Judah Devoreaux, and delivered to her attorney at Emery Celli Brinkerhoff & Abady LLP, 75 Rockefeller Plaza, 20<sup>th</sup> Floor, New York, NY, 10019, by certified mail, return receipt requested. Interest on the award shall accrue from March 18, 2006 until the date payment is made at a rate of nine percent per annum.

4. 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.

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

DATED: March 24, 2008  
Bronx, New York



Thomas S. Protano  
Administrative Law Judge