

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

GERMELIA JOSEPH,

Complainant,

v.

HDMJ RESTAURANT, INC.,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10110548

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 June 6, 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").** 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: **JUL 30 2008**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

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RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER

Case No. 10110548

SUMMARY

Complainant is a black Haitian female, who suffered from a knee injury. She also alleges that she complained of discrimination. Complainant alleges that she was discriminated against and harassed because of her race, sex, national origin and disability. Respondent denied all the charges of discrimination and retaliation. For the reasons that follow, the case must be dismissed.

PROCEEDINGS IN THE CASE

On March 7, 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. A public hearing session

was held on April 12, 2007, at which Respondent did not appear and, thereafter, an Order After Hearing was issued by then-Commissioner of the Division, Kumiki Gibson, sustaining the complaint. Pursuant to § 298 of the Human Rights Law, Respondent applied for an Order to vacate Commissioner Gibson's Order. The application was granted by Order of Hon. Daniel Martin, Acting Supreme Court Justice, Nassau County, on October 26, 2007, and the case was remanded back to the Division for further proceedings.

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 16, 2008 and January 17, 2008. A final hearing session was scheduled for February 29, 2008, however, no evidence or testimony was taken on that date after it was determined that the record was complete.

Complainant and Respondent appeared at the hearing. The Division was represented by Bellew S. McManus. Respondent was represented by David S. Feather, Esq.

Permission to file post-hearing briefs was granted. Respondent filed a timely submission.

### **FINDINGS OF FACT**

1. Complainant is a black female of Haitian national origin, who had suffered a knee injury. She worked for Respondent as a waitress at Yesterday's Restaurant ("Yesterday's") from March, 2004 until January 23, 2006. (Tr. 9-10, 84)
2. Respondent operated Yesterday's in New Hyde Park, New York. Four brothers, George Athanasopolous, Peter Athanasopolous, Gus Athanasopolous and Jimmy Athanasopolous own the Respondent corporation. George Athanasopolous and Gus Athanasopolous ran Yesterday's

on a daily basis. Peter Athanasopolous worked Sundays only. Jimmy Athanasopolous never worked at Yesterday's. (Tr. 81-82)

3. Neither Respondent nor any of the Athanasopolous brothers presently have any ownership interest in Yesterday's. (Tr. 81)

4. Gus Athanasopolous interviewed and hired Complainant. He was impressed with her experience and "excited" to hire her. (Tr. 108, 111)

5. The Athanasopolous brothers found Complainant to be a good, reliable waitress. However, she had a penchant for arguing with her co-workers. (Tr. 89, 112-14)

6. Complainant was neither the first nor the last black employee Respondent has hired. (Tr. 85) The workplace at Yesterday's was very diverse. Employees have come from "Greece, South America, the West Indies, [and] Eastern Europe." (Tr. 135)

7. Complainant never complained to George Athanasopolous about Gus Athanasopolous or Peter Athanasopolous engaging in any type of racial, sexual or national origin discrimination or harassment. (Tr. 85)

8. Complainant alleged that on her first day of employment at Yesterday's, Peter Athanasopolous told her he carries a knife so that when he asks a waitress for a blow job "if they don't give it, so I cut their throat." She later claimed that this didn't happen the first time she worked at Yesterday's but, rather, it first happened "after a couple of months," and, thereafter, "he said it constantly." (Tr. 16, 62)

9. In fact, Peter Athanasopolous did not make such a statement. He did not carry a knife around and credibly denied making any threats to Complainant. (Tr. 120-21)

10. Complainant alleged that the Athanasopolous brothers often made derogatory comments about her race and national origin. She accused them of making fun of her accent.

Complainant alleged that Gus Athanasopolous exposed his penis to Complainant and told Complainant to give him a "blow job" on several occasions. (Complainant's Exhibit 1; ALJ Exhibit 2; Tr. 12-13, 14, 15, 42) The Respondent and the three brothers each denied making any derogatory comments. Gus Athanasopolous denied harassing Complainant in any manner. (ALJ's Exhibit 5; Tr. 108-11, 119-20)

11. Complainant's former co-workers Carol Seifert and Irene Totok stated that the Athanasopolous brothers treated them "like family" when they worked at Yesterday's. (Tr. 138, 144) Neither Seifert nor Totok ever saw any harassing behavior and when Totok heard the Complainant's allegations it was "a really big surprise because that is not true." (Tr. 136, 147)

12. On February 14, 2005, Complainant was involved in a serious car accident, in which she injured her knee. (Tr. 64) Complainant called Yesterday's from the accident scene and George Athanasopolous rushed to the Complainant to check on her condition. (Tr. 47)

13. After injuring her knee, Complainant was forced to undergo surgery and took time off from work. Respondent retained her while she convalesced and hired a waitress from a temp agency to cover for Complainant when she was out. Respondent did the same thing when another waitress named Lori was out for an extended period of time for surgery. (Tr. 114-15)

14. The only time in which Complainant ever complained about harassment to George Athanasopolous was in December of 2004 after a busboy named Jose told Complainant, in Spanish, to "suck his dick." (Tr. 16-17, 89)

15. Complainant was screaming within earshot of Yesterday's dining room after this incident and, as a result of her behavior, George Athanasopolous felt the need to suspend her, with pay, while he investigated the incident. When he found out what Jose had said, George

Athanasopolous immediately fired Jose. Complainant, thereafter, returned to work at Yesterday's. (Respondent's Exhibit 2; Tr. 85-89)

16. On Sunday, January 22, 2006, Complainant and another waitress were having an argument on the floor of Yesterday's, in full view of all the customers. Peter Athanasopolous broke up the argument and ordered the two waitresses back to work. Complainant alleged that Peter Athanasopolous pulled her down a flight of stairs, causing her to re-injure her knee. Peter Athanasopolous credibly denied this allegation. (Tr. 23-25, 121-23)

17. The following morning, a waitress failed to appear for work during the breakfast shift. That left Complainant and a hostess, who normally did not serve food, alone in the dining room. George Athanasopolous, who was not scheduled to come in to work until later, was called at home. George Athanasopolous instructed the hostess to help Complainant serve until he arrived at the restaurant. (Tr. 94)

18. When George Athanasopolous arrived at Yesterday's, the hostess informed him that Complainant had refused to allow the hostess to serve any customers. George Athanasopolous looked at the checks and noticed that Complainant had served 85 checks, which he felt made it impossible to provide good service to his patrons. He admonished Complainant and the hostess for not following his directives and creating what he termed a "catastrophe." (Tr. 94-96)

19. Complainant was not limping and did not appear to be injured that day. She worked her full shift and left shortly after George Athanasopolous arrived. (Tr. 97)

20. Later that day, as George Athanasopolous was preparing dinner, Complainant called. She spoke to George Athanasopolous on the phone and began "yelling and screaming out of control." George Athanasopolous stated he "couldn't take it anymore" and told Complainant not to return to work. He did not hear from Complainant again. (Tr. 97)

### OPINION AND DECISION

In order to prevail on a charge of discrimination by reason of harassment creating a hostile work environment, Complainant bears the burden of establishing that (1) she belongs to a protected group, (2) she was the subject of unwelcome harassment, (3) the harassment was based on her status as a member of a protected group, (4) the harassment affected a term, condition or privilege of employment and (5) the employer knew or should have known of the harassment and failed to take remedial action. *Pace v. Ogden Services Corporation et al.*, 257 A.D.2d 101, 103, 692 N.Y.S. 220, 223 (3<sup>rd</sup> Dept., 1999). In addition, the Complainant must show that the totality of the circumstances constitutes harassment in the mind of both the victim and a reasonable person. *Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4<sup>th</sup> Dept. 1996), *lv. to app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant has not made such a showing. Her assertions that she was harassed repeatedly have effectively been denied by Respondent and the Athanasopolous brothers. Inasmuch as Complainant changed a portion of her allegations regarding the knife she alleged that Peter Athanasopolous carried, her testimony cannot be credited over the three Athanasopolous brothers and the two waitresses who testified that they had not seen any harassing behavior of any sort at Yesterday's. In addition, the fact that Complainant called George Athanasopolous from the accident scene when she was injured in a car accident seems inconsistent with her claims of harassment.

Regarding her claim of retaliation, and discrimination based on race, sex and national origin, Complainant must first make out a prima facie case. To establish a prima facie case of

retaliation Complainant must show that (1) she engaged in activity protected by Executive Law § 296, (2) Respondent was aware that she participated in the protected activity, (3) she suffered from a disadvantageous employment action after her activity, and (4) there is a causal connection between the protected activity and the adverse action taken by Respondent. *Pace v. Ogden Services Corp.*, at 104, *citing Dortz v. City of New York*, 904 F Supp 127, 156 (S.D.N.Y., 1995). To make out a case of discrimination for race, sex, disability and national origin, Complainant must show (1) that she was a member of a protected class; (2) that she was capable of performing the duties of her job in a reasonable manner; (3); that Complainant suffered an adverse employment action, and (4) that this occurred under circumstances which would lead one to infer that she had been discriminated against. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Burlington Industries v. New York City Human Rights Commission*, 82 A.D. 2d 415, 441 N.Y.S.2d 821 (1<sup>st</sup> Dept. 1981), *aff'd*, 58 N.Y.2d 983, 447 N.E.2d 1281, 460 N.Y.S.2d 920 (1983).

Complainant does not make out a prima facie case of discrimination because of retaliation, race, sex, disability or national origin. She has not established that any of the actions taken against her can be construed to have occurred because of her race, sex, national origin, disability or in retaliation for having complained of discrimination. Respondent hired and employed other blacks and other females at Yesterday's. Their workplace was extremely diverse and comprised employees who originated from many different nations and worked together "like family." When Complainant was injured and required surgery, her job was held for her and she was treated exactly the same way another, similarly situated employee was treated. When she complained about Jose, George Athanasopolous investigated the matter and fired Jose. He suspended Complainant only because of her loud behavior, and he paid her during her

suspension. Ultimately, George Athanasopolous fired Complainant because of her loud, disruptive behavior and because of the problems she had caused in attempting to serve every customer in the Restaurant on January 23, 2006.

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

DATED: June 6, 2008  
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano", with a long horizontal line extending to the right.

Thomas S. Protano  
Administrative Law Judge