

**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 OF FINAL
ORDER AFTER HEARING**

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 May 18, 2007, 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 KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"), AS AMENDED AS FOLLOWS:

- Interest on the damages award for mental anguish and humiliation is to accrue at a rate of nine percent per annum from the date of this Final Order until the date payment is made.

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 11th day of June, 2007.



KUMIKI GIBSON
COMMISSIONER

TO:

Complainant

Germelia Joseph
119 Meridian Road
Levittown, NY 11756

Respondent

HDMJ Restaurant, Inc.
Attn: George Atanasopoulos, Owner
443 Jericho Turnpike
New Hyde Park, NY 11040

Respondent

Yesterday's Diner
Attn: George Atanasopoulos, Owner
443 Jericho Turnpike
New Hyde Park, New York 11040

Respondent

Yesterday's Diner
c/o HDMJ Restaurant, Inc.
Attn: George Atanasopoulos, Owner
443 Jericho Turnpike
New Hyde Park, New York 11040

Respondent

Yesterday's Diner
c/o HDMJ Restaurant, Inc.
Attn: George Atanasopoulos, Owner
443 Jericho Turnpike
New Hyde Park, New York 11040

Hon. Andrew Cuomo, Attorney General
Attn: Civil Rights Bureau
120 Broadway
New York, New York 10271

State Division of Human Rights

Joshua Zinner, Deputy Commissioner for Enforcement
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Acting General Counsel

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

Case No. 10110548

SUMMARY

Complainant alleged Respondent discriminated against her on the basis of her sex, race, national origin and disability and retaliated against her for having complained about discrimination. Specifically, she asserts that Respondent sexually harassed her, made derogatory comments about her race and ethnicity, physically harmed her in a manner that exacerbated her knee injury and, ultimately, fired her after she complained about the treatment she received. Respondent failed to answer the complaint. As a result, Complainant has proven her claim and shall be awarded damages owing to Respondent's discriminatory treatment of her.

PROCEEDINGS IN THE CASE

On March 27, 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 an unlawful discriminatory practice. 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. A public hearing was held on April 12, 2007.

Complainant appeared at the hearing. The Division was represented by Carolyn J. Downey, Esq., acting General Counsel of the Division, by Albert J. Kostelny, Esq. Respondent failed to appear, although it was given proper notice of the hearing. A notice of hearing was sent to all parties on March 3, 2007. (ALJ Exhibit I) Thereafter, a letter advising the parties of the date, time and place of the hearing was sent to all parties on March 22, 2007. (ALJ Exhibit IV) Respondent's default was entered pursuant to 9 NYCRR §465.11(e). The hearing proceeded on the evidence in support of the complaint in Respondent's absence.

Permission to file post-hearing briefs was granted. No post hearing briefs were received.

FINDINGS OF FACT

1. Complainant was employed by the Respondent as a waitress from March 2004 until January 23, 2006. She is a black female of Haitian national origin. Complainant's performance as a waitress has been described as "professional," "wonderful" and "exemplary" by her co-workers and customers. (Complainant's Exhibits 2, 3 & 4; Tr. 9-10)

2. Respondent operates Yesterday's Restaurant, in New Hyde Park, New York. Three brothers, George Atanasopoulos, Gus Atanasopoulos and Peter Atanasopoulos are Respondent's owners. (Tr. 11)

3. The owners are white, Greek males. While Complainant was employed by Respondent, she was subjected to numerous verbal insults on an ongoing and continuous basis. The brothers often cursed at Complainant and called her "mavlos," which is a derogatory Greek term for black people, "black bitch" and "Haitian bitch." Claire DeSimone, a co-worker of Complainant, witnessed this behavior and heard these comments. (Complainant's Exhibit 1; ALJ Exhibit II; Tr. 12) The brothers, especially George Atanasopoulos, often made fun of Complainant's accent. (Tr. 12-13, 15)

4. The owners also repeatedly expressed their desires for Complainant to perform oral sex on them. George Atanasopoulos was "always talking nasty" and telling Complainant to "suck my dick." Gus Atanasopoulos, who wore sweat pants without underwear, exposed his penis and told Complainant to give him a "blow job" on several occasions. (Tr. 14, 42) Peter Atanasopoulos carried a knife around the restaurant and said that if any waitress refused his demands for oral sex, he would "cut [her] throat." (Tr. 16)

5. Jose, a busboy for Respondent, once told Complainant, in Spanish, to "suck his dick." Complainant complained about Jose's behavior to Gus Atanasopoulos, who told Complainant to "smack him." When Complainant said she did feel she should do that, Gus Atanasopoulos sent Complainant home. She was not allowed to work from December 12, 2005 through December 23, 2005, during which time she was not paid. (Tr. 16-17)

6. On January 22, 2006, Complainant was on duty working for Respondent. Luis, a cook, noticed that Complainant was not getting any tables to serve. Complainant asked Peter Atanasopoulos why she was not getting any tables to serve. (Tr. 23) In response, Peter Atanasopoulos became angry. He pulled her down a flight of stairs, aggravating her injured knee, which had been damaged during a car accident in February of 2005. He cursed at

Complainant called her names and told her that the white waitresses “were supposed to make more money than foreign blacks.” (ALJ Exhibit II; Tr. 24-25)

7. As a result of this incident, Complainant’s knee became swollen and sore. The injury left her unable to work for five months. She applied for Worker’s Compensation, which she has not yet received. (Tr. 27-29, 33)

8. After that incident, Complainant complained to Gus Atanasopoulos, who told Complainant that Peter Atanasopoulos had no right to bring her downstairs, which was a storage area, not a dining room. (Tr. 25)

9. The following day, after George Atanasopoulos found out about Complainant’s disagreement with Peter Atanasopoulos, George Atanasopoulos fired Complainant. (Tr. 26)

10. Complainant did not work again until the end of June, five months after her employment with Respondent was terminated. (Tr. 27)

11. While she was employed by Respondent, Complainant was paid \$100.00 per week plus tips. She typically worked a six day week. She worked four weekdays, and earned \$50.00 in tips per day. On weekends, she earned about \$150.00 in tips. Between salary and tips, Complainant earned \$450.00 per week; \$1950.00 per month (\$450.00 multiplied by 4 1/3). (Tr. 43)

12. Complainant became “upset” and “scared” because of the way she was treated by Respondent. Her feelings persist to this day. She fears that other employers might treat her the same way. (Tr. 31-32) Her social life has changed. She sought counseling from Dr. Benjamin Hirsch, Ph.D., but did not have the financial resources to continue her treatment. (Complainant’s Exhibit 5; Tr. 34-35, 40)

OPINION AND DECISION

In order to prevail on a charge of sex 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 (3rd 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 (4th Dept. 1996), *lv. to app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant has made such a showing. She was harassed repeatedly during her term of employment with Respondent because of her race, sex and national origin. She was ridiculed because of her accent. Respondent's owners teased and tormented Complainant, and the heat in their kitchen emanated not just from the fires of the stoves, but also from racial epithets, sexual hostility and implicit threats. Complainant endured this treatment for 22 months, until her employment was terminated after she complained because she was not getting any tables to serve.

With respect to her claim 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).

Complainant complained directly to the owners about discriminatory behavior three times. After all three complaints, she immediately suffered consequences. First, when she complained about Jose, she was told to "smack him" and was, thereafter, effectively laid off for 12 days. Then, when she complained to Peter Atanasopoulos about not being assigned tables, he assaulted her and caused damage to her injured knee. Finally, when she complained about Peter Atanasopoulos' treatment of her, her employment was terminated. She has effectively established a claim of retaliatory discrimination, which Respondent has chosen not to answer. Since Respondent has offered no legitimate, non-discriminatory reasons for its actions, there remains no explanation for her termination other than retaliation. In the absence of any other explanation, Complainant's termination can be considered retaliatory. *See, Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

As a result of Respondent's discriminatory treatment, Complainant suffered lost wages. She is entitled to an award of back wages to compensate her for that loss, even though she was unable to work during her five months of unemployment. It was Respondent's discriminatory treatment of her that caused her to re-injure her knee. *See, e.g., Schlant v. Victor Belata Belting Co., Inc.*, 2000 U.S. Dist LEXIS 169770, at *4 (W.D.N.Y. November 9, 2000), (Which stated that, under HRL, a complainant "is only entitled to be compensated for injuries suffered as a direct result of the discrimination," although the plaintiff in that case was not entitled to back wages.). As a result of the rough and discriminatory treatment she received from Peter Atanasopoulos, Complainant was injured and unable to work for five months. Respondent must compensate her for those five months.

Complainant earned \$1950.00 per month. During the five months she was out of work due to Respondent's discriminatory actions, she would have earned \$9,750.00 if she had continued to work for Respondent. In addition, Complainant lost 12 days of work because Respondent sent her home after she complained about being harassed by a busboy. During her 12 days, which is equal to two six day work weeks, Complainant would have earned \$900.00. She is therefore entitled to \$10,650.00 in back pay.

Complainant is entitled to pre-determination interest on the back wage award at a rate of 9% per annum, from January 2003. "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), citing, *Lawyers' Fund for Client Protection of State of N.Y. v. Bank Leumi Trust Co. of N.Y.*, 94 N.Y.2d 398, 407, 706 N.Y.S.2d 66 (2000); see also, *Shannon v. Fireman's Fund Insurance Company*, 136 F.Supp.2d 225 (SDNY 2001), (New York Statutory interest rate of 9% per annum, NYCPLR §5004). Under New York law, prejudgment interest is calculated on a simple interest basis. See, *Epstein v. Kalvin-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).

Complainant suffered humiliation and mental anguish as a result of Respondent's unlawful discrimination. Complainant testified that as a result the harassment, she felt scared and upset; her social life changed. To alleviate the stress, she sought the assistance of a psychologist, but was unable to pay him. I therefore find that an award of \$50,000.00 for emotional distress, pain and suffering, humiliation and mental anguish, will effectuate the

purpose of the Human Rights Law. *Kowalewski v. New York State Div. of Human Rights*, 26 A.D.3d 888, 809 N.Y.S.2d 347 (4th Dept. 2006); *Bayport-Blue Point School District v. State Division of Human Rights*, 131 A.D.2d 849, 517 N.Y.S.2d 209 (1987).

ORDER

Based on the foregoing, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that Respondent and its agents, representatives, employees, successors and assigns shall cease and desist from discriminating in employment in violation of the Human Rights Law; and it is further

ORDERED, Respondent shall take the following affirmative actions to effectuate the purposes of the Human Rights Law:

1. Within 60 days of the date the Commissioner's Final Order, Respondent shall pay to Complainant \$10,650.00, as back pay Complainant lost because of Respondent's unlawful discrimination, plus pre-determination interest on the back wage award at a rate of 9% per year, calculated from April 15, 2003, a reasonable intermediate date.
2. Within 60 days of the receipt of the Final Order of the Commissioner, respondent shall also pay to the Complainant \$50,000.00 as compensatory damages for mental anguish and humiliation suffered by complainant as a result of respondent's unlawful discrimination. Interest on the compensatory damages award shall start to accrue within 60 days of receipt of the Final Order of the Commissioner, until said payment is made.
3. The payments shall be made by respondent in the form of certified checks made payable to the order of Complainant and delivered by certified mail, return receipt requested, General

Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Respondent shall furnish written proof of its compliance with the directives herein contained to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York, 10458.

5. Respondent shall cooperate with representatives of the Division during any investigation into the compliance with the directives of this Order.

DATED: May 18, 2007
Bronx, New York

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

Thomas S. Protano
Administrative Law Judge