NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

JENNIFER D. LUTZ,

Complainant,

v.

RADISSON HOTEL ISLANDIA AND ANDY RAULYNATIF AS AIDER AND ABETTOR AND COLUMBIA SUSSEX CORP.,

Respondent.

NOTICE OF FINAL ORDER AFTER HEARING

Case No. 7940787

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on February 8, 2007, 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").

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 25th day of April, 2007.

KUMIKI GIBSON
COMMISSIONER

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STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS

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Complainant,

-against-

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Respondents.

ALTERNATIVE PROPOSED ORDER

Case No.
7940787

Complainant alleged that Respondents discriminated against her in employment when Respondent Raulynatif sexually assaulted her. Because Respondent Radison Hotel Islandia was on notice that Raulynatif posed a threat and took no remedial action, Respondent Radison Hotel Islandia is liable and the complaint is sustained. Complainant also claimed that Respondent retaliated against her, however, the evidence does not show retaliation and that claim, therefore, is dismissed. Respondent Raulynatif was never served with notice of this complaint and, therefore, the claim against him is dismissed.

PROCEEDINGS IN THE CASE

On October 16, 1996, Complainant filed a complaint with the New York State Division of Human Rights ("Division"), charging Respondents with discriminatory practices relating to employment in violation of Executive Law Article 15 of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents engaged in an unlawful discriminatory practice. The Division then referred the case to a public hearing.

After due notice to Respondent Radisson Hotel Islandia, the case came on for public hearing before Thomas S. Protano, an Administrative Law Judge ("ALJ") of the Division. A public hearing was held on June 1 and 2, 2004. It was noted at that time, Andy Raulynatif was never served with the complaint, the probable cause determination, or the notice of hearing. He did not appear at the hearing.

Complainant was represented by William D. Wexler, Esq. Respondents were represented by Meyer, Suozzi, English & Klein, P.C., by Barry J. Peek, Esq., of Counsel.

Permission to file post-hearing briefs was granted. Counsels for both parties filed timely briefs.

On November 7, 2006, ALJ Protano issued a Recommended Findings of Fact, Decision and Opinion, and Order ("Recommended Order") for the Commissioner's consideration. No Objections to the Recommended Order were filed with the Commissioner's Order Preparation Unit.

FINDINGS OF FACT

1. Complainant alleged in her complaint that she was sexually harassed by Andy Raulynatif and subsequently fired from her position in retaliation for her complaints of sexual harassment. Respondent denied the claims. (ALJ's Exhibits II, IV).

2. Complainant was hired by Respondent, a hotel, in November of 1995, as a night auditor. Her schedule in that position was 11 p.m. to 7 a.m. While on duty, she was responsible for maintaining the front desk, checking customers in and out as needed and tallying the daily receipts from the hotel operation. Except for a security guard, Complainant was the only employee on duty for most of her shift. (Tr. 31-32). During her tenure with Respondent, she

never received any disciplinary memoranda or written warnings. She had never taken any sick days. (Tr. 33, 344).

3. On March 18, 1996, at about 6:10 a.m., Raulynatif, a cook in Respondent's restaurant, entered the back room where Complainant was doing paper work. Raulynatif was picking up the keys to the kitchen, which he did daily at the beginning of his shift, before breakfast service. Security personnel had left at 6 a.m., leaving Complainant in the hotel by herself. While he was alone with Complainant, Raulynatif molested her. He began by massaging her shoulders and then rubbed her breasts, stomach and thighs. He then stopped and left, saying that massages "sometimes got out of hand." Raulynatif's actions were not welcomed by Complainant. (Complainant's Exhibit 1, 2; Tr. 34-35). Complainant did not react because she was "in shock" and "scared." She described Raulynatif as "big and scary." (Tr. 35). After her shift ended, Complainant reported the incident to Susanne Allen (now known as Susanne Lofaso), general manager, who told Complainant to provide a written statement. (Respondent's Exhibit B; Tr. 37-38, 118-20).

4. Allen began investigating the incident. She told Raulynatif's supervisor, Thomas Lofaso, to secure a statement from Raulynatif. (Respondent's Exhibit C; Tr. 121). She then forwarded that statement, along with Complainant's statement, to George Muller, of human resources. (Tr. 122). After sending the statement to Muller, Allen suspended Raulynatif. Four days later, Muller recommended that Raulynatif's employment be terminated. Allen terminated Raulynatif's employment that day. (Tr. 124-25).

5. Before he molested Complainant, Raulynatif had been the focus of some concern for Allen. She had heard "through the grapevine" that some women had complained about Raulynatif, no one had ever formally complained to her. Allen basically heard complaints

second hand. (Tr. 117-18, 146-47). Allen's sister, who was a part-time waitress for Respondent, did complain directly to Allen that Raulynatif made inappropriate comments to her, but did not make any formal complaint. (Tr. 149). Allen encouraged the individuals who told her about the employees' complaints to have them come forward and make formal complaints, but none did. (Tr. 117-18). Significantly, Allen did notify Lofaso about her sister's complaints and there is no evidence in the record that Lofaso took any action in response. (Tr. 153-155). When asked if she felt is was inappropriate for Respondent to have terminated Raulynatif, Allen responded, "It was quite the contrary, actually, based on what was happening with my sister." (Tr. 125).

6. After being molested by Raulynatif, Complainant testified that she felt shocked and embarrassed by the assault and that she felt shocked and embarrassed by it up until and through the date of the hearing. (Tr. 272). She testified credibly that she was scared that she was going to be raped. (Tr. 296-97). She sought psychological counseling. She testified that, "[she] was having recurrent nightmares, [she] couldn't sleep at night, [she] was being chased and raped and people were out to get [her] and [she had] many sleepless nights. [She] started drinking a little too much and then [she] went into therapy." (Tr. 202). She remained in therapy for four years. (Tr. 202).

7. On Sunday, April 14, 1996, Complainant's car became inoperable and had to be towed to a mechanic. The following day, Complainant learned at about 5 p.m. that her car could not be repaired in time for her to get to work by 11. She called Joann Garmacin, front office supervisor, and informed her that she could not get to work that night because her car was unavailable. Garmacin mentioned that a taxi could possibly be arranged and that Respondent might pay for it. It was not clear to Complainant that the taxi would definitely be authorized, and she could not pay for it herself. Complainant did not appear for work. (Tr. 80, 134, 291).

8. Garmacin was unable to find a replacement for Complainant that night. Garmacin then called Complainant back and informed her that car trouble was not an acceptable excuse, and she would have to find a way to get to work. (Tr. 81-82). Complainant objected to Garmacin's call. She was told by Garmacin that Complainant could be written up if she failed to arrive for work and that Respondent's management had directed her to make the call. Complainant then responded, "management sucks balls," and challenged Garmacin by saying "whoever directed you to call me should have called me directly." (Complainant's Exhibit 5; Tr. 82, 133, 321). Complainant disputed Respondent's assertion claiming she only said "management sucks." (Tr. 82). Respondent's version of the conversation, however, is credited. Since Complainant had said she wanted to speak to the person who decided her absence was inexcusable, Gagliardi called Complainant. (Tr. 322).

9. After Garmacin hung up, she talked to Maryanne Gagliardi, Allen's administrative assistant. Gagliardi had instructed Garmacin to call Complainant back to let her know she had to come to work. Garmacin informed Gagliardi what Complainant had said. Gagliardi reaffirmed her position that Complainant had to come into work that night. Complainant refused to come to work, and said she did not think Gagliardi had any right to call her at home. Gagliardi told Complainant she would be reporting the incident to Allen in the morning, which she did. The call, which Gagliardi described as "heated," took place between 7:30 and 8 p.m. Thus, Complainant still had three to three-and-a-half hours to find a way to get to work at that point. (Tr. 325-27).

10. After hearing about the incident, Allen decided Complainant's employment had to be terminated. (Tr. 134). She said she made this decision because it was reported to her that Complainant had taken an unexcused absence and had said "management suck balls." (Tr. 135).

She asserted that Complainant's job was "one of the most important positions." She said that "to have somebody in that position who felt that way and who wasn't responsible in that matter was scary." (Tr. 136). She credibly denied that Complainant's harassment claims played any role in her decision. (Tr. 135).

11. Gagliardi, could recall only one other incident in which an employee's job was terminated for making inappropriate comments. She said that in 1997 or 1998 a white employee called a black employee a nigger and was fired. (Tr. 371).

DECISION AND OPINION

Complainant charged that Respondent is liable for discrimination based upon the alleged sexual harassment committed by Raulynatif. Additionally, she charged Respondent with retaliation for having fired her for making the complaint against Raulynatif. The credible evidence supports her claim that Respondent is liable to her for a hostile work environment and this claim is sustained. Because the credible evidence does not support her retaliation claim, that claim is dismissed.

Sexual Harassment

Executive Law, Article 15 (Human Rights Law), §296.1 (a). states that "[i]t shall be an unlawful discriminatory practice ... [f]or an employer ... because of ... sex ... to discriminate against such individual in compensation or in terms, conditions or privileges of employment." Discrimination based on sex includes sexual harassment.

Complainant alleged that Respondent's harassing behavior created a hostile work environment. "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" (internal quotations omitted). *Beharry v. Guzman*, 823

N.Y.S.2d 195 (2d Dept. 2006) (*citing, 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) (*citing, Harris v. Forklift Sys, Inc.*, 510 U.S. 17 (1993))).

"Whether conduct or words are unwelcome and whether a workplace should be viewed as hostile or abusive can only be determined by considering the totality of the circumstances. 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 v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 803, 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).

"[w]hether 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 Comm. Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d at 51.

In the instant case, with respect to the alleged sexual harassment, Complainant was the victim of an unwelcome, sexually harassing act by Raulynatif. He physically molested her, touching her breasts and putting his hand in between her thighs, and thus perpetrated an act that was severe enough to create a hostile work environment.

"An employer may be held accountable for an employee's discriminatory acts where 'the employer became a party to it by encouraging, condoning or approving it.' (*Matter of Totem Taxi v. State Human Rights Appeal Bd.*, 65 N.Y.2d 300, 305). The acquiescence or failure to take appropriate action in response to an awareness of discriminatory conduct may constitute

condonation on behalf of the employer." (*citing State Div. of Human Rights v. St. Elizabeth's Hosp.*, 66 N.Y.2d 684, 687; *New York City Health and Hosps. Corp. v. New York State Div. of Human Rights*, 236 A.D.2d 310, 310-311). In the instant case, Respondent Radisson Hotel Islandia was aware of Raulynatif's propensity for engaging in behavior that constituted a hostile work environment. Beyond the several hearsay complaints Allen heard from female employees, her own sister complained to her. Allen made that complaint known to Lofaso, yet no remedial action was taken. Accordingly, Respondent Radisson Hotel Islandia is deemed to have been aware of Raulynatif's behavior and thus condoned it by failing to act in response. Thus, despite having taken prompt and appropriate remedial action in response to Complainant's complaint, Respondent was in a position to have prevented it in the first place and is, therefore, liable. Respondent Raulynatif was never served with notice of this complaint and, therefore, the claim against him is dismissed.

Complainant is entitled to compensatory damages for the mental anguish she suffered as a result of Raulynatif's harassment. Human Rights Law § 297. "[A]n award of . . . damages to a person aggrieved by an illegal discriminatory practice may include compensation for mental anguish." *Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989). Such compensation may be based solely on a complainant's testimony. *Id.* at 442; *see also Cullen v. Nassau County Civil Serv. Comm'n*, 53 N.Y.2d 492, 442 N.Y.S.2d 470 (1981). It must, however, be reasonably related to Respondent's discriminatory conduct. *Quality Care v. Rosa*, 194 A.D.2d 610, 599 N.Y.S.2d 65 (2d Dept. 1993); *School Bd. of Educ. of the Chapel of the Redeemer Lutheran Church v. N.Y.C. Commission on Human Rights*, 188 A.D.2d 653, 591 N.Y.S.2d 531 (2d Dept. 1992).

After being molested by Raulynatif, Complainant testified credibly that she felt shocked and embarrassed by the assault and that she felt shocked and embarrassed by it up until and through the date of the hearing. She testified credibly that she was scared that she was going to be raped. It is undisputed that she sought psychological counseling. She testified that, "[she] was having recurrent nightmares, [she] couldn't sleep at night, [she] was being chased and raped and people were out to get [her] and [she had] many sleepless nights. [She] started drinking a little too much and then [she] went into therapy." She remained in therapy for four years. Accordingly, in consideration of the degree and duration of Complainant's suffering and the severity of the harassing conduct, an award of $50,000 will effectuate the purposes of the Human Rights Law. *See Gleason v. Callanan Indus., Inc.*, 203 A.D.2d 750, 752, 610 N.Y.S.2d 671 (3rd Dept. 1994) (court is to consider the duration, severity, consequences and physical manifestations of the mental anguish, as well as any treatment that plaintiff underwent as a result of her anguish) (*citing New York City Tr. Auth. v State Div. of Human Rights,* 78 N.Y.2d 207, 573 N.Y.S.2d 49 (1991); *New York State Off. of Mental Retardation & Dev. Disabilities v New York State Div. of Human Rights,* 183 AD2d 943, 583 N.Y.S.2d 580 (3rd Dept. 1992)); *see also Town of Hempstead v. State Div. of Human Rights*, 233 A.D.2d 451, 649 N.Y.S.2d 942 (2d Dept. 1996) ($200,000 to $500,000 for six complainants who suffered from sexual harassment); *Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept. 1996) ($60,000 appropriate for employee subjected to a hostile work environment).

Retaliation

As for the retaliation claim, 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 adverse employment action after her activity, and (4)

that a causal connection existed between the protected activity and the adverse action taken by Respondent. *See Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999*) citing, Dortz v City of New York*, 904 F.Supp. 127, 156 (S.D.N.Y. 1995).

In her claim of retaliation, Complainant has established a prima facie case by showing that she made a complaint of discrimination to Respondent and was terminated shortly thereafter despite maintaining a good work record up to that point. Respondent answers with a legitimate, non-retaliatory reason for firing Complainant. Specifically, Respondent said Complainant's employment was terminated because of the comments she made and for refusing to appear for work. The burden now shifts to Complainant to show that the reasons put forth by Respondent are merely a pretext and that there was "'a subjective retaliatory motive for the termination' of Complainant's employment." *Milonas v. Rosa*, 217 AD2d 825, 826 (3d Dept., 1995), *lv. denied*, 87 N.Y.2d 806 (1996), *quoting Pace University v. New York City Comm. on Human Rights,* 85 N.Y.2d 125, 128 (1995). Complainant has offered no evidence beyond the timing of the incidents to prove that Respondent's reasons for terminating her were a pretext.

By refusing to even consider coming into work and then saying "management sucks balls," or even, as she asserted, "management sucks," Complainant gave Respondent a legitimate reason to terminate her employment. And, given that Respondent took prompt action in getting rid of Raulynatif and the offensive, hostile environment he created for Complainant, there is no evidence of a retaliatory motive in Respondent's actions.

Moreover, Complainant's "implacable refusal to follow a reasonable work order was considered an act of insubordination justifying immediate discharge...[and] such conduct cannot be tolerated because it potentially jeopardizes business operations." *Citibank v. N.Y. State Div. of Human Rights*, 277 A.D.2d 322, 325, 643 N.Y.S.2d 68, 70 (1st Dept. 1996). After evaluating the

incident and considering the Complainant's position of responsibility, Allen determined that Complainant's employment had to be terminated.

There is no evidence that Respondent's stated, independent, non-retaliatory reason was pretextual. *Milonas*, at 829.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law, it is

ORDERED that Complainant's complaint regarding retaliation be and herby is dismissed; and it is further

ORDERED that Complainant's claim against Andy Raulnatif be and hereby is dismissed; it is further

ORDERED that Complainant's claim against Respondent Radisson Hotel Islandia regarding sex discrimination be and hereby is sustained; and it is further

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

ORDERED that Respondent Radisson Hotel Islandia, its agents, representatives, employees, successors and assigns shall take the following affirmative action to effect the purposes of the Human Rights Law:

1. Within sixty days from the date of the Final Order, Respondent Radisson Hotel Islandia shall pay to Complainant compensatory damages for mental anguish and humiliation, without any deductions or withholding whatsoever, in the amount of $50,000.00. Interest at a rate of nine percent per annum shall be awarded from date of this order until the date payment is made.

5. The aforesaid payment shall be made by Respondent in the form of a certified check made payable to the order of Complainant and delivered to the Complainant's counsel, William D. Wexler, Esq. at his office address of 816 Deer Park Avenue, P.O. Box 2310, North Babylon, New York 11703, by registered mail, return receipt requested.

6. Respondent shall simultaneously furnish written proof of the aforesaid payments to the Acting General Counsel of the Division, Caroline Downey, Esq., at her office address of One Fordham Plaza, 4th Floor, Bronx, New York 10458, and shall cooperate with the representatives of the Division during any investigation into their compliance with the directives contained in this Order.

DATED: JAN 0 8 2007
Bronx, New York

STATE DIVISION OF HUMAN RIGHTS

Peter G. Buchenholz
Adjudication Counsel