



ANDREW M. CUOMO  
GOVERNOR

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

KATLYN MAYO,

Complainant,

v.

THOMAS MICELI, MICELI'S RESTAURANT,

Respondents.

NOTICE AND  
FINAL ORDER

Case No. 10146296

Federal Charge No. 16GB101500

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 August 17, 2012, by Robert J. Tuosto, 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 AMENDMENT:**

- The recommended award for mental anguish damages is not hereby adopted. In

light of the proof of the severity of Miceli's harassing conduct, its consequences and the duration of its effects on Complainant, \$15,000 for the mental anguish she suffered is appropriate and hereby awarded. *See New York State Dept. of Corr. Servs. v New York State Div. of Human Rights*, 225 A.D.2d 856, 859 (3d Dept. 1996); *see also Eastport Assoc., Inc. v New York State Div. of Human rights*, 71 A.D.3d 890 (2d Dept. 2010) (\$15,000 award sustained where harassment caused complainant to be intimidated, demeaned, humiliated and depressed); *Mailstar, Inc., v New York State Div. of Human Rights*, 43 A.D.3d 1407 (4th Dept. 1007), lv denied, 46 A.D.3d 1477 (4th Dept 2007), lv denied, 10 N.Y.3d 716 (2008) (\$15,000 award confirmed); *New York State Div. of Human Rights v. Vollertsen*, 61 A.D.3d 1393 (4th Dept. 2009) (same). Complainant was seventeen years old at the time Miceli harassed her. It was her first job. Complainant was shocked and disgusted by his conduct. She felt degraded and was brought to tears and ultimately felt compelled to quit her position. For several weeks following the harassment, she felt depressed and she became uncomfortable with the prospect of working for a restaurant in the future. Notably, she continued to the feel upset more than a year later when recounting Miceli's harassment at the instant hearing.

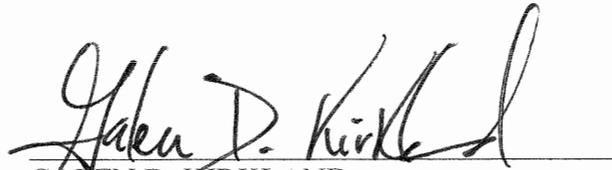
In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

**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: 9/21/2012  
Bronx, New York

  
\_\_\_\_\_  
GALEN D. KIRKLAND  
COMMISSIONER



ANDREW M. CUOMO  
GOVERNOR

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF  
HUMAN RIGHTS**

on the Complaint of

**KATLYN MAYO<sup>1</sup>,**

Complainant,

v.

**THOMAS MICELI, MICELI'S  
RESTAURANT,**

Respondents.

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

Case No. **10146296**

**SUMMARY**

Complainant, a seventeen year old female hostess employed in her first job, alleged that she was exposed to a sexually hostile work environment which necessitated her constructive discharge. Complainant has proven her case upon Respondents' default, and she is hereby awarded damages. Civil fines and penalties are also awarded to the State of New York.

---

<sup>1</sup> On February 21, 2012 the Complainant's name was changed in the caption from "Crystal Benton on behalf of her daughter, Katlyn Mayo" to "Katlyn Mayo" given that Ms. Mayo had attained the age of majority. (ALJ Exh. 2; Tr. 6-7)

## PROCEEDINGS IN THE CASE

On January 20, 2011, Complainant's mother, on her behalf, filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent Miceli's Restaurant 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 thereupon referred the case to public hearing.

On February 21, 2012 the caption was amended to add Thomas Miceli as a respondent. (ALJ Exh. 2)

After due notice, the case came on for hearing before Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. A public hearing session was held in Rochester, New York on April 4, 2012.

Complainant appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq., Senior Attorney. Respondents did not appear at the public hearing. Complainant proceeded to a hearing upon Respondents' default.

Respondent Miceli was on notice of the public hearing as those copies of the verified complaint and amendments which were posted to "Miceli's Restaurant, Att'n.: Tommy Miceli, Owner" via the U.S. Postal Service, not returned and presumed to be delivered. (ALJ Exhs. 2, 3, 4)

On August 6, 2012 ALJ Robert J. Tuosto was reassigned to this case pursuant to N.Y.C.R.R. § 465.12 (d)(2).

## FINDINGS OF FACT

1. Complainant, a seventeen year old female hostess employed in her first job, alleged that she was exposed to a sexually hostile work environment which necessitated her constructive discharge. (ALJ Exh. 3)

2. On or about January 7, 2011, Complainant, who was seventeen years old at the time, was hired as a hostess at Respondent Miceli's Restaurant. This position was Complainant's first job. (Tr. 15, 24, 29)

### Complainant's First Day at Work

3. On January 8, 2011, during Complainant's first day on the job, Respondent Tommy Miceli admonished her about her posture by saying that she should stand up straight, smile and that she should have her "tits out." (Tr. 15)

4. Complainant was shocked to hear this. (Tr. 16)

### Complainant's Second Day at Work

5. During Complainant's second day at work, Respondent Tommy Miceli approached her, pointed at her chest and, in the presence of others, said "Aren't those a nice pair of tits?"(Tr. 19-20)

6. Complainant felt disgusted when this happened. (Tr. 18)

7. Respondent Tommy Miceli repeatedly told Complainant, among other things, to "stick her tits out." (Tr. 18)

8. At the end of Complainant's second day of work she told her mother that she was starting to feel uncomfortable about Respondent Miceli's remarks. (Tr. 28)

Complainant's Third and Final Day at Work

9. During Complainant's third and final day at work, Respondent Tommy Miceli physically moved Complainant's hair and blouse out of the way so that her cleavage would be showing in anticipation of introducing her to one of his male friends who was dining in a booth. Upon attempting to shake hands with Respondent Miceli's friend, Respondent Miceli put his hand on Complainant's back and pushed down so that her chest was revealed to all of those in the booth. Respondent Miceli was laughing and joking as he was doing this. (Tr. 19-23)

10. Complainant felt disgusted, shocked and degraded when this happened. (Tr. 24)

11. Complainant called her mother and was crying over the telephone after this happened. (Tr. 28)

12. Complainant's mother described her at this time as "upset" and "very distraught." Complainant's mother further testified that Complainant was depressed for "a few weeks" afterwards. (Tr. 29-30)

13. During her testimony Complainant became upset when recounting the events which occurred on her third and final day of work. (Tr. 21, 23)

Post-Employment

14. Complainant never returned to her job after last incident. (Tr. 23)

15. Subsequently, Complainant remains "cautious" when looking for jobs, and no longer wishes to work in a restaurant again. (Tr. 25)

16. Complainant was paid one hundred dollars for the twelve hours that she worked during the three days in which she was employed. (Tr. 26)

## **OPINION AND DECISION**

### Amendments to the Complaint Made Prior to the Public Hearing

Prior to the commencement of the public hearing, Division counsel properly amended the complaint to name Thomas Miceli, individually, as a Respondent. *See* 9 NYCRR § 465.4 (c).

### Notice of Hearing

Respondents had notice of the verified complaint and its amendment. Specifically, and as noted above, Respondent Miceli was on notice of the public hearing as those copies of the verified complaint and amendments which were posted to “Miceli’s Restaurant, Att’n.: Tommy Miceli, Owner” via the U.S. Postal Service, not returned and presumed to be delivered.

Although given various opportunities to participate in the public hearing process, Respondents apparently deliberately chose not to participate in the preliminary conferences and public hearing.

### Default Hearing

Respondents failed to appear before the Division to defend against the complaints. Respondents defaulted pursuant to 9 N.Y.C.R.R. §465.11(e). The hearing proceeded on the evidence in support of the complaint pursuant to 9 N.Y.C.R.R. §465.12(b)(3).

### Liability

The Human Rights Law makes it an unlawful discriminatory practice for an employer, “because of the...sex...of any individual...to discriminate against such individual in compensation or in terms, conditions or privileges of employment.” Human Rights Law § 296.1(a).

In discrimination cases a complainant has the burden of proof and must initially establish

a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case of unlawful discrimination, a respondent must articulate, via admissible evidence, that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

1.—Hostile Work Environment

In order to establish a prima facie case of hostile work environment, a complainant must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive work environment. *Forrest*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004), quoting *Harris v. Forklift Sys., Inc.* 510 U.S. 17 (1993). Whether an environment is hostile or abusive can be determined only by looking at all of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect of the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." *Harris*, at 23. Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment—one that a reasonable person would find to be so. *See id.* at 21.

Here, Complainant established a prima facie case of a hostile work environment which

went un rebutted. The record shows that, literally from the first day of her employment, Respondent Miceli exposed Complainant to both belittling comments of a sexual nature, as well as inappropriate physical touching, which so impacted her work environment that she was forced to leave just a few days after her hire. As a result, Complainant established a hostile work environment as a matter of law.

### 2.—Constructive Discharge

A constructive discharge occurs when an employer engages in discriminatory conduct which compels an employee to quit his or her employment. *Imperial Diner v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 436 N.Y.S.2d 231 (1980); *Lambert v. Macy's East, Inc.* 84 A.D.3d 744, 922 N.Y.S.2d 210 (2d Dept. 2011) (citing, *Nelson v. HSBC Bank USA*, 41 A.D.3d 445, 447, 837 N.Y.S.2d 712).

Here, Complainant has also made such a showing. Complainant quit her job only after Respondent Miceli carried out repeated verbal and physical assaults on her person. Complainant should not have been forced to tolerate any more harassment than she endured. Therefore, Complainant was constructively discharged from her position by Respondent Miceli.

### Damages

The Human Rights Law provides various remedies to restore victims of unlawful discrimination to the economic position that they would have held had their employers not subjected them to unlawful conduct. See Human Rights Law § 297.4.c (i)-(iv); *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982). Awards of back pay compensate a complainant for any loss of earnings and benefits sustained from the date of the adverse employment action until the date of the verdict. *Iannnone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403 (S.D.N.Y. 1996).

A complainant is also entitled to recover compensatory damages for mental anguish caused by a respondent's unlawful conduct. In considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record and comparable to awards for similar injuries. *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991). Because of the "strong antidiscrimination policy" of the Human Rights Law, a complainant seeking an award for pain and suffering "need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision." *Batavia Lodge v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, "[m]ental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct." *New York City Transit Auth. v. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). The severity, frequency and duration of the conduct may be considered in fashioning an appropriate award. *New York State Dep't. of Corr. Servs. v. New York State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

There is no evidence in the record showing that Complainant has either failed to mitigate her damages or received income from any other source.

Complainant earned \$100 for 12 hours work per week. Complainant would have worked approximately 64 weeks, assuming that she worked the same 12 hours per week, in the time from the point of her constructive discharge until the date of the public hearing. Therefore, Complainant is awarded \$6,400 as a reasonable lost back pay award.

Concerning emotional damages, the record shows that, as to Respondent Miceli's conduct and its impact upon her, Complainant felt, at various times shocked, disgusted, uncomfortable,

degraded, upset, distraught, cautious and depressed for several weeks afterwards. As a result, Complainant is awarded \$5,000 as an amount which is reasonably related to the discriminatory conduct she experienced, as well as consistent with case law in this regard. *Quality Care, Inc. v. Rosa*, 194 A.D.2d 610, 599 N.Y.S.2d 65 (2d Dep't 1993)(award could not exceed \$5,000 in absence of, among other things, any medical treatment); *Club Swamp Annex v. White*, 167 A.D.2d 400, 561 N.Y.S.2d 609 (2d Dep't. 1990)(\$5,000 award to waiter based solely on his testimony); *Port Washington Police Dist. v. State Div. of Human Rights*, 221 A.D.2d 639, 634 N.Y.S.2d 195 (award of \$5,000 after "brief" discussion by complainant as to her mental anguish); *Wantagh Union Free School Dist. v. New York State Div. of Human Rights*, 122 A.D.2d 846, 505 N.Y.S.2d 713 (2d Dep't. 1986)(\$5,000 award to complainant discriminated against on the bases of age and sex not grossly excessive).

#### Civil Fines and Penalties

Human Rights Law § 297 (4)(e) requires that "any civil penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article." The additional factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence; the nature and circumstances of the violation; the degree of respondent's culpability; any relevant history of respondent's actions; respondent's financial resources; and other matters as justice may require. *See, Gostomski v. Sherwood Terr. Apts.*, SDHR Case Nos. 10107538 and 10107540, November 15, 2007, *aff'd*, *Sherwood Terrace Apartments v. N.Y. State Div. of Human Rights (Gostomski)*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009); *119-121 East 97<sup>th</sup> Street Corp, et. al., v. New York City Commission on Human Rights, et. al.*, 220 A.D.2d 79; 642 N.Y.S.2d 638 (1st Dept.1996).

Pursuant to Human Rights Law § 297.4(e), “[i]n cases of employment discrimination where the employer has fewer than fifty employees, [a] civil fine or penalty may be paid in reasonable installments, in accordance with regulations promulgated by the division. Such regulations shall require the payment of reasonable interest resulting from the delay, and in no case permit installments to be made over a period longer than three years.”

A civil fine is appropriate in this matter. Human Rights Law §297 (4)(c)(vi) directs the Division to assess civil fines and penalties, “in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious.” Statutory directives require a civil fine and penalty of greater than \$50,000.00 for cases in which a respondent’s actions were willful, wanton, and malicious.

The proof established that Respondent Miceli’s actions met the statutory threshold of being willful, wanton, and malicious. The record shows that Respondent Miceli preyed on a naïve, young woman who was working in her very first job by repeatedly objectifying her in a vulgar and derogatory way including, on her final day at work, acting more like a procurer than a restaurant owner. Throughout her abbreviated tenure Complainant was treated as if she were a plaything who was forced to comply with her superior’s momentary sexual whims. In sum, Respondent Miceli’s actions towards Complainant were both egregious and repulsive, and evinced an attitude of deliberate indifference as to their consequences. Given the above, and the Division’s goal of deterrence, a civil fine of \$75,000.00 is appropriate in this case, payable in three \$25,000 installments.

**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, and its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and

IT IS FURTHER ORDERED, that Respondents shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty (60) days of the date of the Commissioner's Order, Respondents Thomas Miceli and Miceli's Restaurant, shall pay Complainant, Katlyn Mayo, an award of lost wages in the amount of \$6,400. Respondents shall pay prejudgment interest on said award at the rate of nine (9) per cent per annum from a reasonable intermediate date, namely, August 21, 2011;

2. Within sixty (60) days of the date of the Commissioner's Order, Respondents Thomas Miceli and Miceli's Restaurant, shall pay Complainant, Katlyn Mayo, as an award of compensatory damages for mental pain and suffering the amount of \$5,000. Respondents shall pay interest on said award at the rate of nine (9) percent per annum from the date of the Commissioner's Order;

3. Within sixty (60) days of the date of the Commissioner's Order, Respondents Thomas Miceli and Miceli's Restaurant, shall pay civil fines and penalties to the State of New York in the amount of \$75,000 for having violated the Human Rights Law. On the condition that all other payments directed in the Recommended Order are timely made, the two remaining payments of \$25,000 each to be made by Respondents Thomas Miceli and Miceli's Restaurant as part of the total \$75,000 civil fine and penalty shall be made within 180 days and 270 days of

the date of this Final Order. Interest shall accrue at a rate of nine percent per annum on any amount paid after sixty days from the date of this Final Order until payment is made. *See* 9 NYCRR § 466.12(e). Payments of the civil fine and penalty shall be made in the form of certified checks, made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is fully made by Respondents Thomas Miceli and Miceli's Restaurant.

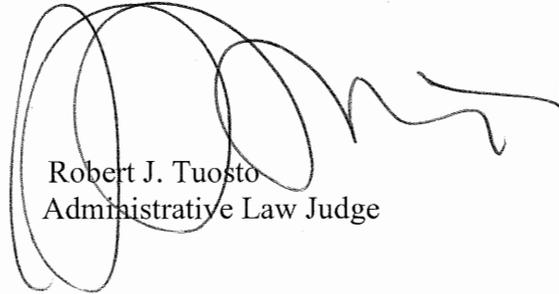
4. Respondents Thomas Miceli and Miceli's Restaurant, shall pay post-judgment interest;

5. The aforesaid payments to Complainant, Katlyn Mayo, shall be made by Respondents Thomas Miceli and Miceli's Restaurant, in the form of a certified check made payable to her order and delivered by certified mail, return receipt requested, to her address at 115 Burnham Heights, Apt. 3, Palmyra, New York 14522. Respondents shall furnish written proof to the N.Y.S. Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4<sup>th</sup> Fl., Bronx, New York 10458, of its compliance with the directives contained in this Order;

6. Within sixty days of the date of the Final Order of the Commissioner, Respondents Thomas Miceli and Miceli's Restaurant, 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 the restaurant where employees are likely to view it. Respondents shall also establish in its workplace both anti-discrimination training and procedures. Respondents shall provide proof of the aforementioned to the Division upon written demand.

7. Respondents Thomas Miceli and Miceli's Restaurant shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within this Order.

DATED: August 17, 2012  
Bronx, New York



Robert J. Tuosto  
Administrative Law Judge