

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

WENDELL CEDENO ORENGO,

Complainant,

v.

O & M PANCAKES, INC.,

Respondent.

NOTICE AND  
FINAL ORDER

Case No. 10114188

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, 2009, by Spencer D. Phillips, 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.

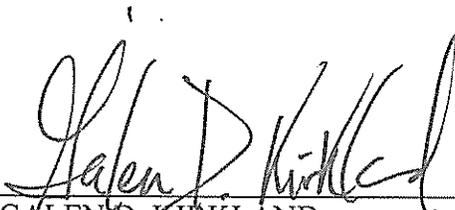
**PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER").** In accordance with the Division's Rules of Practice, a copy of this Order has been 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: **MAY 01 2009**  
Bronx, New York

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

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF  
HUMAN RIGHTS**

on the Complaint of

**WENDELL CEDENO ORENGO,**

Complainant,

v.

**O & M PANCAKES, INC.,**

Respondent.

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

Case No. **10114188**

**SUMMARY**

Complainant alleges that Respondent subjected him to unlawful discrimination because of his race and national origin. Complainant also alleges that Respondent retaliated against him because he complained about such discrimination. Complainant failed to satisfy his legal burdens and his complaint is dismissed.

**PROCEEDINGS IN THE CASE**

On October 6, 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 Spencer D. Phillips, an Administrative Law Judge (“ALJ”) of the Division. A public hearing sessions was held on February 18, 2009.

Complainant and Respondent appeared at the hearing. The Division was represented by Erin Sobkowski, Esq. Respondent was represented by Maureen Karvouniaris, *pro se*.

Permission to file post-hearing briefs was granted and timely briefs were submitted by both parties.

### FINDINGS OF FACT

1. Respondent operates an International House of Pancakes (“IHOP”) franchise, located in Amherst, New York. Michael Zeis is a manager for Respondent. (ALJ Exh. 1; Tr. 13, 75, 82)
2. On August 23, 2006, Zeis interviewed Complainant and hired him to wash dishes for Respondent. (ALJ Exh. 1; Respondent’s Exh. 7; Tr. 48, 53-54)
3. Complainant worked for Respondent for approximately two weeks, during which time he worked a total of six shifts. (Tr. 19-21, 52)
4. Complainant was born in Puerto Rico and is Hispanic. (ALJ Exh. 1; Tr. 19)
5. Upon hire, Complainant provided to Zeis a New York State Department of Motor Vehicles Interim Identification card, a social security card, and a Federal I-9 form. (ALJ Exh. 1; Respondent’s Exh. 2, 3, 4; Tr. 21-22, 35-36, 40)
6. I do not credit Complainant’s testimony that Zeis asked Complainant to provide a green card and a birth certificate from New York State. (ALJ Exh. 1; Tr. 21-24, 51)
7. Complainant complained to Zeis about his pay rate. Zeis told Complainant that Respondent starts all inexperienced dishwashers at the minimum wage of \$6.75, and that

Complainant started at the minimum wage because he had no previous experience washing dishes in a restaurant. (Respondent's Exh. 8; Tr. 54-55)

8. I do not credit Complainant's testimony that he signed an employment contract to work at a pay rate of \$7.50 per hour. (ALJ Exh. 1; Tr. 24, 34, 40-41)

9. Complainant complained to Zeis about not receiving tips. Zeis told Complainant that busboys and waiters receive tips, but employees who wash dishes to not receive tips. Zeis told Complainant that he did not receive tips because he did not perform busboy or waiter duties. (Respondent's Exh. 8; Tr. 30-31, 57-59)

10. I do not credit Complainant's testimony that every person employed by Respondent, except himself, received portions of customer tips. (ALJ Exh. 1; Tr. 24-26)

11. I do not credit Complainant's testimony that Zeis threw Complainant's lunch in the garbage, told Complainant to leave, and stated that Complainant was Puerto Rican and no good. (ALJ Exh. 1; Tr. 25-30, 59-60)

12. In late August 2006, Complainant arrived late to work on two separate occasions. Zeis verbally warned Complainant about his lateness. Zeis did not give Complainant any written warnings for these incidents. (Tr. 51-52, 62, 82)

13. On September 1, 2006, Complainant arrived late to work a third time. Zeis gave Complainant a written warning stating that he must arrive timely for work or face termination. Complainant signed the warning. (Respondent's Exh. 5; Tr. 51-52)

14. On September 3, 2006, Complainant arrived late for work a fourth time. Zeis gave Complainant another written warning threatening termination if he was again late for work. Complainant signed the warning. (Respondent's Exh. 6; Tr. 51-52)

15. Shortly after signing his second written warning, Complainant quit his job by leaving the restaurant in the middle of his shift without notifying Zeis or anyone else employed by Respondent. (Tr. 59-60)

### OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to “discriminate against an individual in compensation or in terms, conditions or privileges of employment” on the basis of race or national origin. Human Rights Law §296.1(a). It is also a violation of the Human Rights Law to retaliate against any person who “has opposed any practices forbidden under this article.” Human Rights Law §296.7.

#### Race and National Origin Discrimination

Complainant claims that Respondent subjected him to unlawful race and national origin discrimination by: 1) asking him for a green card and New York State birth certificate; 2) paying him a lower hourly wage than allegedly agreed upon at the time of hire; 3) failing to give him a portion of customer tips; and 4) throwing his lunch in the garbage and telling him he was Puerto Rican and no good.

To establish a prima facie case of race discrimination, Complainant must demonstrate that he belongs to a protected class, that he was qualified for his position, that he suffered an adverse employment action and that the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *Forrest v. Jewish Guild for the Blind*, 3 N.Y. 3d 295, 786 N.Y.S.2d 382 (2004).

Complainant is Hispanic and was born in Puerto Rico. Therefore, Complainant is protected from unlawful race and national origin discrimination. Complainant demonstrated that

he was qualified for his position by performing his dishwashing duties in a satisfactory manner. However, Complainant cannot satisfy his prima facie burden of unlawful discrimination because he did not suffer any adverse employment actions.

The proof demonstrates that Zeis did not ask Complainant to provide a green card or a New York State birth certificate, and that he hired Complainant without receiving either of these documents. Complainant was paid the minimum wage for his dishwashing services, as were all other similarly situated employees, and he failed to prove that Respondent agreed to pay him at a higher rate. Complainant did not receive tips because he did not perform any tip-paying busboy or waiters duties. Finally, Complainant failed to offer any witnesses or other proof to support his allegation that Zeis, in the presence of customers and employees, threw his lunch in the garbage and told him that he was Puerto Rican and no good. Therefore, Complainant has failed to demonstrate a prima facie case of race or national origin discrimination and those claims are dismissed.

#### Retaliation

To establish a prima facie case of unlawful retaliation, Complainant must demonstrate that: 1) he engaged in protected activity; 2) Respondent was aware of such protected activity; 3) he suffered an adverse employment action; and 4) a causal connection exists between the protected activity and the adverse employment action. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

As discussed above, Complainant failed to demonstrate that he suffered any adverse employment action in the workplace. Furthermore, the proof demonstrates that Complainant did not engage in any protected activity while employed by Respondent. While Complainant did complain to Zeis that he expected to be paid a higher wage and receive tips, such complaints of

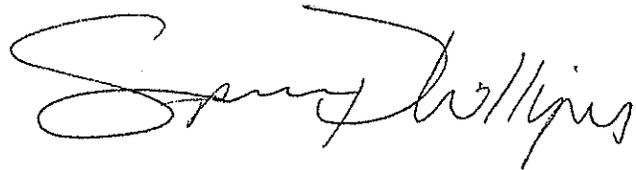
disappointed economic expectations do not constitute opposition to practices forbidden by the Human Rights Law and do not support a claim of unlawful retaliation. Human Rights Law §296.7. Therefore, Complainant has also failed to demonstrate a prima facie case of unlawful retaliation and that claim is dismissed.

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

DATED: March 24, 2009  
Rochester, New York

A handwritten signature in black ink, appearing to read "Spencer D. Phillips". The signature is fluid and cursive, with a large initial "S" and "P".

Spencer D. Phillips  
Administrative Law Judge