

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CINDY C. ROCK,

Complainant,

v.

**SANTOSHI CORPORATION D/B/A HOLIDAY INN
PLATTSBURGH,**

Respondent.

**NOTICE AND
FINAL ORDER**

Case Nos. 10111877 and
10113306

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 February 27, 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: **JUL 03 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**SANTOSHI CORPORATION D/B/A
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Respondent.

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

Case No. 10111877, 10113306

SUMMARY

Complainant alleges that Respondent subjected her to a sexually hostile work environment (Case No. 10111877) and that Respondent retaliated against her because she filed a complaint against Respondent (Case No. 10113306). Complainant failed to satisfy her legal burdens and the complaints are dismissed.

PROCEEDINGS IN THE CASE

On May 12, 2006, and August 3, 2006, Complainant filed verified complaints 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 complaints and that probable cause existed to believe that Respondent had engaged in unlawful discriminatory practices. The Division thereupon referred the cases to public hearing.

After due notice, the cases came on for hearing before Christine M. Kellett, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on April 14-15, 2008. The cases were subsequently transferred to Spencer D. Phillips, ALJ, for preparation of the Recommended Findings of Fact, Opinion and Decision, and Order.

Complainant and Respondent appeared at the hearing. Complainant was represented by Emy Lee Pombrio, Esq. Respondent was represented by Robert A. Lippman, Esq. Counsel for both parties elected not to submit post-hearing briefs.

FINDINGS OF FACT

1. Respondent operates the “Holiday Inn – Plattsburgh,” a franchise from Intercontinental Hotels Group. Respondent employs approximately forty employees. (Tr. 55, 195, 437)
2. In or about May 2004, Respondent hired Complainant, a female, as a director of sales and marketing, with primary responsibility for managing Respondent’s banquet services. (ALJ Exh. 1; Tr. 10-11, 102)
3. Sevasingh Sheni is a mid-level manager for Respondent. At all times relevant to this complaint, Sheni was not Complainant’s supervisor. (Tr. 12, 196, 380, 385-86)
4. Rita Patel is the general manager and a co-owner of Respondent. Patel directly supervised her husband, Sheni, and Complainant. (Tr. 30, 195-97, 382-83, 443)
5. Dhiren Amin is a co-owner of Respondent and Patel’s direct supervisor. He meets individually with all of Respondent’s employees approximately three or four times per year to discuss workplace issues and problems. (Tr. 196, 226, 441)

6. At all times relevant to this matter, Respondent displayed a sexual harassment policy on a wall near the timecard machine. The policy listed telephone numbers for Patel, Amin, and the Division. (Respondent's Exh. 1, 2, 3; Tr. 227-30)

7. In the summer of 2005, Sheni rubbed his hand on Complainant's inner thigh while explaining a computer program to Complainant. Complainant told Sheni to stop. Sheni stopped immediately. Complainant did not report Sheni's conduct to Patel or Amin. (Tr. 15-17, 153-55)

8. Beginning in early 2006, and continuing until her termination, Complainant made repeated errors in the handling of her duties as the banquet services director. Complainant failed to ensure that enough food was ordered and prepared for guests, failed to specify which guests ordered which meals, failed to identify how many guests would be attending banquets, failed to schedule enough employees to handle banquet demands, and scheduled employees to work at times when such employees were attending classes at school. (Respondent's Exh. 6, 7, 8, 12, 13, 14, 17, 21, 22, 23; Tr. 267-70, 278-81, 315, 388-89, 473-74, 541, 545-46, 551-52)

9. Complainant repeatedly engaged in rude behavior toward employees she supervised. Those employees complained to Patel. Patel warned Complainant, both verbally and in writing, that her behavior was unacceptable and must be improved. (Respondent's Exh. 5, 11, 16, 17, 19; Tr. 198, 237-38, 472-73, 537-38)

10. Complainant's behavior caused two employees to threaten resignation if Complainant continued to treat them in a rude manner. (Tr. 423-24, 460)

11. Respondent provided a cell phone to Complainant for business use. Complainant frequently neglected her duties to spend time making personal phone calls on the cell phone. Respondent chose not to renew the cell phone contract at the end of the contract term. (Tr. 77-78, 157-58, 161-69, 238, 289-91, 295, 535, 570)

12. Complainant repeatedly engaged in rude behavior toward her supervisor, Patel, by raising her voice, by acting bothered when asked to report on the completion of her work duties or to participate in employee training activities, and by responding sarcastically to an inquiry about her personal use of the cell phone provided to Complainant by Respondent. (Tr. 239-41, 297-99, 474-75, 496, 539)

13. After January 2006, Complainant repeatedly failed to give desk clerks the information necessary to appropriately bill guests for banquet services. (Tr. 288-89)

14. On January 31, 2006, Sheni and Complainant traveled by car to a business meeting in Clifton Park. During the drive, Sheni touched Complainant's face and arm. Complainant told Sheni to stop and take a nap. Sheni immediately stopped and took a nap for the remainder of the drive. Complainant and Sheni continued to interact throughout the business trip and Sheni did not touch Complainant again during the trip. Complainant did not report Sheni's conduct to Patel or Amin. (Tr. 14-16, 18, 25-27, 29, 32, 43, 137-40, 145-47, 153-55, 399-413)

15. On February 11, 2006, Sheni was collecting quarters from a narrow utility room in the hotel. While exiting the room, Sheni brushed against Complainant while she was collecting ice from an ice machine. Complainant told Sheni "If you wanted to get by me, all you had to do was say 'Excuse me.'" (Tr. 31-33, 35-41, 416-19)

16. Approximately one week later, Complainant told Patel about Sheni's conduct at the computer, on the business trip and in the utility room. (Tr. 33-35, 209)

17. After Complainant reported Sheni's conduct to Patel in mid-February, 2006, Complainant never again experienced improper conduct from Sheni. (Tr. 69-70, 87-89, 92, 336-37, 574-75)

18. On February 25, 2006, while overseeing a banquet, Complainant left work without notice, forcing Respondent's front-desk clerk to leave his post to manage the banquet services until a replacement employee arrived. (Respondent's Exh. 5; Tr. 244-48, 500-01)

19. Around March 2006, Complainant's grandson was diagnosed with autism. Shortly thereafter, Complainant began receiving medical treatment and medication for depression and anxiety. (Complainant's Exh. 5, 6; Tr. 105-06, 109-113)

20. On or about March 6, 2006, Patel gave Complainant a written reprimand for exhibiting an "improper work attitude and rude behavior with manager in front of others." (Complainant's Exh. 3; Tr. 64-66, 236)

21. On March 7, 2006, Complainant filed a criminal charge against Sheni. The charge related to Sheni's conduct toward Complainant near the computer, on the business trip and in the utility room. The charge was subsequently dismissed. (Complainant's Exh. 2; Tr. 58-63)

22. On May 12, 2006, Complainant filed an unlawful discrimination complaint with the Division. (ALJ Exh. 1; Tr. 97, 295)

23. Between June and August 2006, Complainant made repeated errors calculating hours worked by her subordinates and did not apologize for her errors when confronted by Patel. (Respondent's Exh. 9; Tr. 272-72)

24. On June 16, 2006, a corporate customer sent a written complaint to Complainant, stating it was extremely dissatisfied with the banquet services it received. The customer complained about a food shortage, that guests had to go into the kitchen to get plates, and that the bar shut down for ten minutes because the cash register at the bar ran out of money. The customer stated that there was "no way" it would ever recommend Respondent's banquet services to other businesses, that "not one single person in our party could find anything good to

say about our Holiday Inn experience,” and closed the letter by stating “I can’t imagine you’ll ever see [our organization] again.” (Respondent’s Exh. 6; Tr. 248-55)

25. In July 2006, one of Respondent’s employees, Camille Faccio, submitted a written complaint to Respondent stating that she did not want to continue working under Complainant because Complainant: made her cry, made her feel like she did not know how to do her job, and threatened to slap Faccio. (Respondent’s Exh. 11; Tr. 285-88)

26. Throughout Complainant’s employment, Patel gave Complainant multiple cash loans for personal expenses, including housing and furnishings. Complainant agreed to pay back the loans, but had not yet fully paid back these loans at the time of her termination. (Complainant’s Exh. 4; Tr. 77-86, 476-77)

27. On July 26, 2006, Complainant gave Patel a letter demanding \$20,528.24 for alleged improper payroll withholdings. Complainant threatened to commence legal action against Respondent if the full amount was not included in her next paycheck. Respondent’s attorneys promptly responded to Complainant in writing, acknowledged that Complainant’s rate of pay needed to increase by \$13.98 per week according to a recent change in state law, and informed Complainant that the funds due would be applied against personal loans Complainant received from Patel but had not yet repaid. (Complainant’s Exh. 7, 8)

28. On July 27, 2006, one of Respondent’s employees, Adam Crosley, submitted a written complaint to Respondent stating that Complainant’s rude and inappropriate behavior was affecting the work of her subordinates, and that Complainant’s failure to effectively manage Respondent’s banquet services was angering customers and would likely cause Respondent to lose business. (Respondent’s Exh. 8; Tr. 285-88)

29. On July 29, 2006, Complainant cancelled a customer's reservation for banquet services even though the customer did not request a cancellation. When the customer showed up for the banquet, the chairs and tables were not set up, and Respondent had to assign employees to stop their duties to quickly set up for the banquet. (Respondent's Exh. 12; Tr. 480-83, 572-74)

30. Also on July 29, 2006, another guest organization arrived at Respondent's hotel for a banquet for which Respondent was unaware and unprepared. Complainant had not created a contract for the banquet services and had not indicated the banquet reservation on Respondent's banquet calendar. (Respondent's Exh. 13; Tr. 573)

31. On July 22, 2006, Complainant failed to order the appropriate number of hors d'oeuvres for a wedding banquet. (Respondent's Exh. 7; Tr. 256-65)

32. On or about August 3, 2006, Complainant filed a complaint alleging unlawful retaliation. (ALJ Exh. 1)

33. On September 1, 2006, Complainant refused to fill in for one of her subordinates who left work early. (Respondent's Exh. 15; Tr. 484-88)

34. On September 2, 2006, Complainant took the tip from a table that one of her subordinates was cleaning, did not help clean off the table, and left the room with the tip. (Respondent's Exh. 16; Tr. 488-91)

35. On September 19, 2006, Complainant provided coffee services to a group of guests but failed to charge the guests for the coffee. Complainant's actions caused Respondent to lose money for the beverage services provided to those guests. (Respondent's Exh. 17; Tr. 496)

36. On September 22, 2006, Complainant inappropriately raised her voice in speaking with another employee in or near the hotel lobby. Complainant's outburst caused another employee to complain to Respondent about Complainant's misconduct. (Respondent's Exh. 19, Tr. 496)

37. On September 25, 2006, Complainant left work to cash a check and remained away from work for an unreasonable amount of time. Complainant's long absence prompted another employee to complain to Respondent about Complainant's misconduct. (Respondent's Exh. 19, 20; Tr. 496)

38. On September 29, 2006, Respondent terminated Complainant's employment. Patel made the decision to terminate, and Amin approved Patel's decision. (Tr. 119, 126, 292-94, 461, 565)

OPINION AND DECISION

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" or to retaliate against an individual who has opposed any practices forbidden by the law. Human Rights Law §§ 296.1(a), 296.7.

Sexual Harassment – Hostile Work Environment

In order to establish a prima facie case of sexual harassment based on a hostile work environment, a complainant must show that 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 and to create an abusive work environment. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004), quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

Isolated instances of harassment ordinarily do not rise to the level of actionable discrimination. *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992).

Rather, Complainant must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were “sufficiently continuous and concerted” to have altered the conditions of her working environment. *Father Belle Community Center v. New York State Division of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 (4th Dept 1996); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997), (quoting, *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577 (2d Cir. 1989)). Whether such conduct reaches the level of actionable sexual harassment is determined by the totality of the circumstances under a reasonable person standard. *Father Belle*, 221 A.D.2d 44, 50-51.

Complainant has failed to demonstrate any facts suggesting the existence of a sexually hostile work environment. Sheni touched Complainant’s leg only one time, and he immediately stopped when Complainant objected. Six months later, Sheni touched Complainant’s arm and face, but immediately stopped when Complainant objected. When Sheni brushed by Complainant while exiting a narrow utility room, Complainant did not object but merely stated that Sheni might say “Excuse me” before passing by. The proof also shows that Complainant failed to report Sheni’s conduct to Patel until mid-February, 2006. After she reported the conduct, Sheni never again engaged in bothersome conduct toward Complainant.

In view of the totality of the circumstances, Sheni’s isolated and sporadic conduct was neither sufficiently severe nor pervasive to constitute unlawful sexual harassment. Therefore, Complainant’s sexual harassment claim is dismissed.

Unlawful Retaliation

To establish a prima facie retaliation claim, Complainant must demonstrate that: 1) she engaged in a protected activity; 2) Respondent was aware of such protected activity; 3) she suffered an adverse employment action; and 4) a causal connection existed 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).

Complainant demonstrated a prima facie case of retaliation. Complainant engaged in protected activity by verbally complaining to Patel about Sheni's conduct and by filing a complaint of unlawful discrimination with the Division. Respondent does not dispute that it was aware of Complainant's protected activities. Complainant suffered an adverse employment action when Respondent terminated her employment for poor work performance. Complainant established a causal connection by demonstrating that her work performance began to decline near the time that she complained to Patel about Sheni's conduct.

However, Complainant failed to present any evidence rebutting Respondent's articulated, non-discriminatory reason for terminating her employment. The proof establishes that Respondent terminated Complainant's employment because she had, since January 2006, demonstrated a continuing inability to effectively perform the duties of her position or to engage in appropriate workplace behavior with her subordinates and supervisors. Indeed, Complainant's own workplace misconduct threatened the economic viability of Respondent's business. Employees warned they would quit if they had to continue working under Complainant. Customers complained that they would never again use Respondent's banquet services nor recommend such services to their friends.

The proof also demonstrates that Respondent did not terminate Complainant's cell phone contract, but chose not to renew that contract because Complainant frequently used the phone for personal use, thereby neglecting her workplace duties. Finally, Complainant presented no evidence to demonstrate that Respondent prevented her from attending management meetings or accessing manager-level information after she engaged in the protected activities. Therefore,

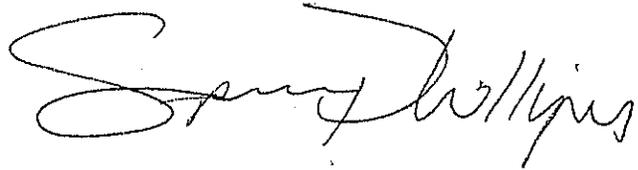
Complainant's retaliation complaint is dismissed because she has failed to present any evidence showing that Respondent's legitimate, non-discriminatory reasons for terminating her employment were pretext for unlawful retaliation.

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 complaints be, and the same hereby are, dismissed.

DATED: February 27, 2009
Rochester, New York

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

Spencer D. Phillips
Administrative Law Judge