

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

**JACKIE D. SCIPIO A/K/A JACQUELINE D.
SCIPIO,**

Complainant,

v.

WAL-MART STORES EAST, L.P.,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10114171

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 31, 2009, by Migdalia Pares, 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 22 2009**

Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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

Case No. **10114171**

SUMMARY

Complainant established that Respondent's employee subjected her to hostile treatment in a place of public accommodation because of race and color and that Respondent condoned the employee's unlawful conduct when its managers failed to take appropriate corrective action once they knew of the unauthorized conduct, including failing to meaningfully coach the offender. The Complainant is entitled to compensatory damages for mental anguish.

PROCEEDINGS IN THE CASE

On October 11, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent with unlawful discriminatory practices relating to public accommodation 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.

After due notice, the case came on for hearing before Margaret Jackson, and Administrative Law Judge (“ALJ”) of the Division.

ALJ Jackson held a hearing on March 5, 2008. Complainant and Respondent appeared at the hearing. Complainant was represented by Leslie H. Cohen, Esq. Respondent was represented by Steven K. Weis, Esq. and Joel L. Finger, Esq.

On April 3, 2008, ALJ Jackson issued a Recommended Order dismissing the complaint on the grounds that Complainant failed to cooperate with the Division on the presentation of her complaint. ALJ Jackson’s Recommended Order is hereby marked and received as ALJ’s Exhibit 4.

On July 28, 2008, Commissioner Galen D. Kirkland, by Adjudication Counsel, Peter G. Buchenholz, Esq., on his own motion and in the interests of justice, pursuant to Rule 20 (a) of the Rules of Practice of the Division of Human Rights, reopened the record for the purpose of returning the case to the Administrative Law Judge. Buchenholz directed that both parties be allowed the opportunity to present necessary evidence and witnesses. Adjudication Counsel’s letter dated, July 28, 2008, is hereby marked and received as ALJ’s Exhibit 5.

On November 26, 2008, pursuant to the Rules of Practice, the case was assigned to ALJ Michael Groben, who held public hearing sessions on December 3 and 4, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Leslie H. Cohen, Esq. Respondent was represented by Joel L. Finger, Esq. and Joseph E. Field, Esq.

During the public hearing session held on December 3, 2008, Complainant stated on the record that her name is Jacqueline Devoy Scipio. (Tr. 24) The Complainant's name in the caption is hereby amended to Jackie D. Scipio a/k/a Jacqueline D. Scipio.

Permission to file post-hearing submissions was granted. Respondent and Complainant filed timely post hearing submissions.

On March 6, 2009, pursuant to the Rules of Practice, the Division reassigned the case to ALJ Migdalia Parés.

FINDINGS OF FACT

1. On October 11, 2006, Complainant filed a verified complaint with the Division charging that Respondent denied her the accommodations, advantages or privileges of a place of public accommodation because of her race and color. (ALJ's Exh. 1)
2. Respondent denied the charges. (ALJ's Exh. 2)
3. Complainant is an African-American female. (ALJ's Exh. 1)
4. Respondent is a chain of retail department stores. In July 2005, Respondent opened its Cicero store located in Cicero, New York. (ALJ's Exh. 2; Tr. 270)
5. During the relevant time, Jason Leisenring was Respondent's manager for the Cicero store and Denise Biggs was the co-manager. Both are Caucasian. (Tr.268, 416)
6. During the relevant time Anthony DeSantis was employed as a door greeter, ("DG") at Respondent's Cicero store. DeSantis is Caucasian. (Tr. 481)

The Events of September 24, 2006

7. On September 24, 2006, Complainant walked into Respondent's retail store using a cane and carrying a back pack. (Tr. 25, 44-45, 50, 241, 487).

8. Complainant was in the company of Logan Collunio, a thirteen year old Caucasian who resided with her. The purpose of the visit to Respondent's Cicero store was to shop for shoes and clothes for Collunio. (Tr. 25, 44-45, 50, 241, 487)

9. Upon entering Respondent's Cicero premises, DG DeSantis, told Complainant that she was not allowed to enter the store with a backpack. (Tr. 33, 44-45, 50-51, 150, 158, 163)

10. Complainant objected to DeSantis' comment on the grounds that he was not giving the same directive to Caucasian customers. (Tr. 44-45, 50-51, 150, 158, 163)

11. Complainant ignored DeSantis' directive and entered Respondent retail with the backpack. (Tr. 61, 156)

12. After she concluded her shopping, Complainant paid for the merchandise at the front cash register nearest to the exit door. The cashier placed the merchandise in two small bags, with the receipt in one of the two bags. (Tr. 62-70, 154, 244, 264-65)

13. As Complainant and Collunio walked towards the exit, DeSantis once again approached Complainant before she reached the alarm gate at the exit door. (Complainant's Exhibits 1-12; Tr.70-76, 102, 105, 198, 233-34, 491)

14. DeSantis proceeded to block Complainant by placing his body, with arms outstretched on either side, and he shoved and pushed Complainant with his body and shoulders, and demanded she produce a receipt for the merchandise in the two bags. Complainant told DeSantis to stop shoving and pushing her because she had recently undergone back surgery, was still recuperating, and had wires in her back, but DeSantis continued to block Complainant's egress. (Complainant's Exhibits 1-12; Tr.70-76, 102, 105, 198, 233-34, 491)

15. Respondent's video surveillance film, provided as a Respondent's exhibit, confirms DeSantis' physical aggression toward Complainant. (Respondent's Exh. 1; Complainant's Exhibits 1-12))

16. After a short period of time, DeSantis permitted Complainant to go through the detector with the bags. (Tr.70-76, 102, 105, 198, 233-34, 491)

17. The detector did not ring. (Tr.70-76, 102, 105, 198, 233-34, 491)

18. Complainant began to experience "excruciating" pain in her back. (Tr. 100)

19. Collunio corroborated Complainant's testimony that DeSantis used his body and arms to block Complainant from leaving, and that DeSantis "pushed" Complainant with his body to get her back into the store. (Complainant's Exhibits 1-12; Respondent's Exh. 1;Tr. 80, 85-97, 101-03, 105, 234-237, 491, 500-11, 525-26)

20. Complainant observed that DeSantis did not physically stop Caucasian shoppers from leaving the store, nor request that they produce a receipt before leaving the store. (Tr. 70-76, 102, 105, 110, 198, 230-31, 233-34, 491)

21. After Collunio and Complainant left the store, a person identifying himself as a manager followed Complainant to her car and asked her to return to the store and file a complaint. (Tr. 238)

22. Complainant returned to the store and requested to speak to the manager. Biggs identified herself as the co-manager and Complainant explained to her how DeSantis physically pushed her. (Respondent's Exh. 7; Tr. 118-20,238, 458-59)

23. Biggs told Complainant she was not going to fire DeSantis for the conduct she described. Complainant replied that she was not asking Biggs to terminate DeSantis only that he

be prevented from engaging in similar conduct with other customers. (Respondent's Exh. 7; Tr. 118-20,238, 458-59)

24. On September 25, 2006, Complainant called Biggs and told her that DeSantis' actions had aggravated her medical condition, that she was experiencing swelling of her back and that she now required more physical therapy thereby incurring added medical costs. (Tr. 121-24, 207)

25. On September 30, 2006, Complainant contacted Leisenring regarding the status of her complaint against DeSantis. Leisenring informed Complainant that he knew nothing about her complaint and that he had not worked on the day of the incident. (Tr. 219, 400)

26. Leisenring told Complainant that DeSantis wasn't supposed to stop customers as they were exiting. Leisenring informed Complainant that he would investigate. (Tr. 219, 400)

27. Respondent had several security systems in place to prevent losses at the Cicero store due to shoplifting. (Tr. 288)

28. Respondent experiences significant losses from shoplifting and employed over 30 asset protection associates ("APA") at the Cicero store, who had the training and responsibility to seek out suspicious activity, apprehend shoplifters after they had gone past the last point of sale, contact the police department, and phone into the loss prevention office. APAs have the training and ability to hold alleged shoplifters in custody. (Respondent's Exh. 5; Tr. 287, 291)

29. DGs such as DeSantis are stationed at Respondent's customer's entrance doors to welcome customers and render necessary assistance. (Respondent's Exh. 4; Tr. 270)

30. DGs were not part of the security system and were not trained as security personnel. (Tr. 283, 286-87, 420)

31. If a DG has suspicions about a customer s/he is supposed to seek help from one of the front-end managers. (Tr. 445)

32. DGs have a specified list of dos and don'ts regarding their responsibilities. These do not authorize physical confrontations such as experienced by Complainant. (Respondent's Exh. 4)

33. According to Biggs, DGs, at their own discretion were allowed to stop customers exiting from the store to request receipts. (Respondent's Exh. 4; Tr. 282, 286-87, 420, 442)

34. Leisenring explained that after he reviewed the annual economic loss report he held a meeting in August 2006 during which he instructed DGs to prohibit customers from entering the store with backpacks. (Respondent's Exh. 4; Tr. 301, 310, 424, 428, 484-84)

35. During the public hearing DeSantis admitted that he was supposed to contact security as soon as possible when observing a customer leaving the store with an unmarked or unpaid item. (Tr. 425, 525-27, 530)

36. DeSantis conceded that he did not call security personnel when Complainant was leaving the store. DeSantis conceded he had no basis to stop Complainant as he had no reasonable suspicion that Complainant "was stealing anything." (Tr. 425, 525-27, 530)

37. Leisenring reviewed Respondent's surveillance film. (Respondent's Exhibits 3, 8-14)

38. After reviewing the surveillance film, Leisenring concluded that DeSantis violated Respondent's policies when he stopped Complainant. (Respondent's Exhibits 3, 8-14)

39. Leisenring provided an investigative report he prepared as store manager in which he indicated that he gave DeSantis a "written coaching" for poor customer service. (Respondent's Exhibits 3, 8-14)

40. But Leisenring was unable to produce that written coaching report and ultimately admitted he may have only verbally coached DeSantis. (Respondent's Exhibits 3, 8-14 ; Tr. 219, 528-29)

41. DeSantis testified that Respondent did not discipline him in any manner. (Tr. 528-29)

42. I find that Leisenring failed to take corrective action with regard to DeSantis' acknowledged improper conduct. (Respondent's Exh. 3, 8-14,)

43. Respondent provided an edited copy of its surveillance film. The film had been edited to focus on the DeSantis confrontation with Complainant and did not provide any view of DeSantis' conduct with other customers entering or leaving the store. The film does not refute Complainant's and Collunio's observations that Complainant was treated differently than other customers not in her protected class. (Respondent's Exh. 1; Tr. 136-145, 152)

44. As a result of this experience Complainant experienced public humiliation and felt Respondent's DG DeSantis treated her as if she were a criminal. Complainant felt DeSantis harassed her because of her race. She was upset and remained upset right up to the hearing. (Tr. 197, 207)

45. Collunio and his mother, Georgia DePrimo, who also lived with Complainant, corroborated that Complainant was crying and upset when she arrived home after this incident. (Tr. 197, 207, 256-57)

46. On August 24, 2006, Complainant had major back surgery. As a result of the surgery Complainant had wires inserted in her back. During the relevant time Complainant was physically disabled and needed a cane to walk. During the confrontation, Complainant told DeSantis to stop pushing her because of her back condition, a warning he ignored. (Tr. 26, 488)

47. Complainant testified that the physical contact with DeSantis aggravated her back pain and physical condition, and prolonged the need for physical therapy, but failed to produce any medical or financial documentation of actual expenditures in association with the aggravation to her back condition. (Tr. 120-21, 199-200, 207, 241)

OPINION AND DECISION

Human Rights Law §296.2 (a) states in pertinent part: “It shall be an unlawful discriminatory practice for any person, being the owner . . . [or] proprietor . . . of any place of public accommodation, because of the race . . . color, directly or indirectly, to deny to such person any of the accommodations, advantages, facilities or privileges thereof . . . or that the patronage or custom . . . of any person . . . is unwelcome . . .” N.Y. Exec. Law, Art. 15 (“Human Rights Law”) §296.2(a).

Complainant charged Respondent with violating the Human Rights Law §296.2 (a) when its door greeter DeSantis interfered with her entry to and egress from the store and physically pushed and shoved her with his body.

As an African American woman, Complainant is a member of a protected class. Respondent admitted that DeSantis violated its policies for door greeters in his treatment of Complainant. The Complainant also established that Respondent’s managers failed to take appropriate corrective action once they knew of DeSantis’ unauthorized conduct, including failing to meaningfully coach the offender. Complainant showed that the surveillance film and still photos corroborated her testimony that DeSantis did physically interfere with her exit and pushed her.

In order for the conduct of an employee to be imputed to an owner of a place of public accommodation, that owner or operator of a public accommodation must be shown to have

condoned, encouraged, or approved such conduct. *Totem Taxi, Inc. v. New York State Human Rights Appeal Board*, 65 N.Y.2d 300, 491, N.Y.S.2d 293 (1985). An owner or operator's inaction, when it constitutes knowing, after-the-fact forgiveness or acceptance of unlawful discriminatory actions, may be considered condonation. *State Div. of Human Rights (Greene) v. St. Elizabeth's Hospital*. 66 N.Y.2d 684, 496 N.Y.S.2d 411 (1985).

Complainant established that Respondent's argument that it did not condone DeSantis' actions and that it disciplined him in the form of a "written coaching" for "poor customer" skills is unworthy of belief. Respondent could not produce the alleged "written coaching" referred to by Leisenring. And when Leisenring was specifically asked for a copy of the written coaching he claimed that the discipline may have been merely verbal, despite the written report. The record is clear Respondent took no meaningful action to correct the very conduct it itself determined violated its policies. This lack of meaningful corrective action constitutes condonation of DeSantis' unlawful conduct. Under these circumstances I find that Respondent is responsible for DeSantis' discriminatory conduct.

Complainant is entitled to recover compensatory damages for mental anguish caused by Respondent's discriminatory conduct. When 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" embodied in 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 No. 196, etc. v. N.Y. 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*, 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. *N.Y. State Dep't of Correctional Servs. v. N.Y. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

The record does support that Complainant was publicly humiliated and embarrassed by DeSantis' conduct. Complainant went home upset and crying. DeSantis' actions against Complainant, who had recently undergone major back surgery, caused her physical discomfort, pain and fear for her back which was still in the healing process. Complainant experienced "excruciating pain" when DeSantis pushed her. While Complainant did not present sufficient credible medical evidence to support her contention that DeSantis' actions exacerbated her pre-existing medical condition or additional expense, her testimony and that of her witnesses established she suffered increased pain, discomfort and mental anguish.

Complainant is entitled to recover compensatory damages caused by Respondent's unlawful conduct. Complainant credibly testified that Respondent's discriminatory conduct caused her to cry, feel publicly humiliated and feel physical pain in her back. In consideration of the degree of her suffering and Respondent's conduct, an award of \$7,000.00 for emotional pain and suffering will effectuate the goals and objectives of the Human Rights Law and is consistent with prior awards of the Commissioner. *See Keimel v. Manchester Newspapers d/b/a Free Press*, DHR Case No. 10102907 (May 1, 2007); *Swails v. Classic Fashion Resources, Inc., d/b/a Pittsford Pendleton Shop*, DHR Case No. 10115313 (February 6, 2008).

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 Respondent, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in a place of public accommodation.

IT IS FURTHER ORDERED that Respondent shall take the following actions 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, Respondent shall pay to Complainant, Jackie D. Scipio a/k/a Jacqueline D. Scipio, the sum of \$7,000.00, without any withholdings or deductions as compensatory damages for the mental anguish and public humiliation she suffered as a result of Respondent's unlawful discrimination against her. Interest shall accrue on the award at the rate of nine (9%) percent per annum from the date of the Commissioner's Order until payment is actually made by Respondent.

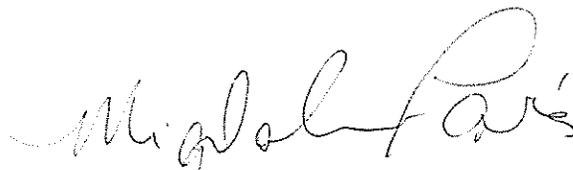
2. The aforesaid payment shall be made by Respondent in the form of a certified check made payable to the order of Complainant, Jacqueline D. Scipio, and delivered by certified mail, return receipt requested, to her attorney, Leslie Cohen, Esq., Cohen Law Offices, 115 Stillwater Drive, East Syracuse, New York 13057. Respondent shall furnish written proof to the N.Y.S. Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Fl., Bronx, New York 10458, of its compliance with the directives contained in this Order;

3. Respondent shall establish in its place of public accommodation both anti-discrimination training and procedures. Respondents shall provide proof of the aforementioned to the Division upon written demand; and

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

DATED: March 31, 2009

Bronx, New York

A handwritten signature in cursive script, reading "Migdalia Parés".

Migdalia Parés
Administrative Law Judge