



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CATHERINE J. GARRETT,

Complainant,

v.

**KIRBY'S GRILL, INCORPORATED, A/K/A
KIRBY'S AMERICAN RESTAURANT, NICK
DEMPERIO AS AIDER AND ABETTOR,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10141470

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 29, 2012, by Michael T. Groben, 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.

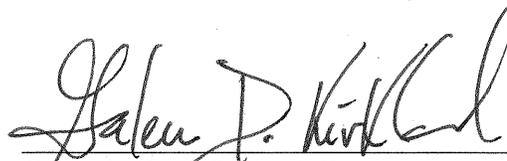
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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 18 2012
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

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**KIRBY'S GRILL, INCORPORATED, a/k/a
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DEMPERIO AS AIDER AND ABETTOR,**

Respondents.

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

Case No. **10141470**

SUMMARY

Complainant alleges that she was subjected to unlawful discriminatory treatment in employment, and was forced to resign due to sexual harassment by an employee. Respondent employer denies these allegations. Complainant has failed to establish a prima facie case, and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On June 2, 2010, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondents Kirby's American Restaurant and Nick Demperio 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.

After due notice, the case came on for hearing before Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. The public hearing was held on December 9, 2011. At the hearing, the complaint was amended to reflect the name of the corporate Respondent as Kirby's Grill, Incorporated, a/k/a Kirby's American Restaurant ("Kirby's" or "Respondent").

Complainant and Respondent Kirby's appeared at the hearing. The Division was represented by Richard J. Van Coevering, Esq., and Respondent Kirby's was represented by Cohen & Cohen LLP, by Daniel S. Cohen, Esq., of counsel. Respondent Nick Demperio did not appear, and no attorney appeared on his behalf.

Permission to file post-hearing briefs was granted, and the Division and Respondent Kirby's each filed proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Complainant was employed by Respondent Kirby's as a hostess, on the day shift, from October 26, 2009, to April 2010. (Tr. 15-16, 59, 95, 111-12)
2. Respondent is a restaurant located at Westvale Plaza, Syracuse, New York. (ALJ's Exhibit 2; Tr. 80-81)
3. Richard Zdyb owns and operates a chain of restaurants, including Respondent. (Tr. 135-37, 143-45) Zdyb is present at the restaurant at least one day per month. (Tr. 141)

4. Zfood Serv functions as the parent corporation of Respondent. It provides management services to Respondent and other affiliated restaurants. (Tr. 76, 79-80, 138-39)¹

5. Scott Brim ("Brim") is employed by Zfood Serv as its district manager supervising operations for several restaurants, including Respondent. (Tr. 47, 92, 108-10) He is present at Respondent's restaurant approximately two to three days per week. (Tr. 113-14)

6. Lori Allen ("Allen"), also known as Lori Hynes Allen, is employed by Zfood Serv in an administrative capacity at its New Hartford, New York location. Her responsibilities include serving as Respondent's sexual harassment counselor. (Tr. 76-78, 82, 89, 139)

7. John Camille ("Camille") is Respondent's general manager. (Tr. 28-29, 87, 97-98)

8. Michael DeSantis ("DeSantis") is a manager at Respondent's restaurant. He is present at the restaurant two or three days each week. (Tr. 125, 127-28, 133-34)

9. At all times relevant to the complaint, Respondent Nick Demperio ("Demperio") was employed by Respondent Kirby's as a cook. He began working on the day shift in the spring of 2010. (Tr. 17-18, 104) At the public hearing, Respondent's counsel advised that Demperio was no longer employed by Respondent. (Tr. 6-7)

10. Terry Price ("Price") is a server at Respondent's restaurant on the day shift. One night per week, Price is employed by Respondent as a supervisor. Price punches in on the time clock separately for these separate shifts and responsibilities. She does not function as a supervisor on the day shift, when Complainant worked. (Tr. 91, 94-95, 125) However, Complainant believed Price to be a supervisor. (Tr. 20, 25)

¹ The transcript contains an incorrect spelling of the name of Zfood Serv. The correct spelling is set forth in Respondent's Exhibits 1 and 5.

Respondent's Sexual Harassment Policy

11. Respondent maintains a written policy which forbids sexual harassment. The policy, which is distributed to Respondent's employees, directs that incidents of sexual harassment and retaliation shall be reported to Allen or to a general manager. (Respondent's Exhibit 1; Tr. 70-73, 78, 84-85)

12. Respondent maintains an employee handbook which contains a summary of its sexual harassment policy, stating that any employee found to have engaged in sexual harassment will be subject to disciplinary action. (Respondent's Exhibit 3 [p. 12])

13. Respondent maintains a poster regarding sexual harassment, posted on an employee bulletin board in an area of its restaurant available to employees. The poster states, in pertinent part, that employees "have a right to a harassment-free workplace," names Allen as the person to whom incidents should be reported, and lists her telephone number. (Respondent's Exhibit 6; Tr. 79-82, 83-84, 92-94, 123)

14. Respondent provides its salaried managers with sexual harassment training, and directs them to report incidents of sexual harassment to Allen. (Tr. 89-91, 124, 137-40)

15. In her testimony at the public hearing, Complainant acknowledged that she had received Respondent's employee handbook, but stated that it did not contain any information regarding sexual harassment. She also stated that no one had ever told her to whom she should report an incident of sexual harassment. (Tr. 45-46)

16. Complainant examined Respondent's employee handbook "version 10/7" at the public hearing, and stated that she was not sure whether she recognized it. When confronted with her signature on a form acknowledging receipt of the handbook "version 107" (sic), Complainant repeated that she did not recognize the handbook. (Respondent's Exhibits 3 and 4; Tr. 64-65)

I find that Complainant received the employee handbook containing the summary of the sexual harassment policy.

17. Complainant stated that she did not know whether she had ever received Respondent's sexual harassment policy. When confronted with her signature on a form acknowledging receipt of the policy, Complainant stated that she had received the policy, but had never read it.

(Respondent's Exhibits 1 and 2; Tr. 60, 62-63)

18. On or about November 1, 2009, Complainant received a one page memo stating that all complaints of sexual harassment and retaliation were to be reported to Allen, as Respondent's sexual harassment counselor. The memo also listed Allen's telephone number, and a printed acknowledgment, above Complainant's signature, that Complainant had read the memo. At the public hearing, Complainant acknowledged signing the memo, but denied that she had read it, or that she was aware that Allen was Respondent's sexual harassment counselor. (Respondent's Exhibit 5; Tr. 66)

The March 27, 2010, Incident

19. Complainant occasionally left her hostess station to speak to waitresses in the kitchen. (Tr. 18-19)

20. On or about March 27, 2010, Complainant entered the kitchen to speak to a waitress. Price was present. Demperio stated "I like to fuck girls in the ass" and "that's why I like whores." (Tr. 19-21, 22-24, 32, 59)

21. Complainant was highly offended by these remarks; she felt weak and sick, and vomited in Respondent's bathroom before returning to work. She did not complain to anyone that day. (Tr. 24-26)

22. The next day, Complainant stated to Price that she had felt very offended by Demperio's statement and that it made her sick. Price replied "Cathy, that's who he is. Ignore him." (Tr. 27-28, 33)

23. Complainant did not complain to Camille regarding Demperio's offensive statements. She did not do so because she had previously referred customer complaints (unrelated to Demperio) to Camille, and believed that he was "ineffective" in dealing with them. She also did not complain to any other of Respondent's managers regarding the March 27 incident. (Tr. 28-31, 41-45)

24. On a few occasions after the March 27 incident, Demperio referred to Complainant, in her presence, as an "old, dried up thing." Complainant did not complain to Respondent regarding these incidents. (Tr. 32-38)

The April 27, 2010, Incident

25. On the morning of April 27, 2010, Brim was present at Respondent's restaurant. Complainant complained to him in general terms regarding Demperio's "language." She did not tell Brim what Demperio had said, nor did she complain of sexual harassment. Brim acknowledged to Complainant that he had had to tell Demperio a few weeks ago to "shut up, or (he would) send him home." (Tr. 50-52, 116-18)

26. Other than the above conversation with Brim, Complainant had never previously expressed concerns to him regarding Demperio. (Tr. 110-11, 113, 115) Complainant had expressed concerns regarding Demperio's speech and behavior to her friends and co-workers, but had never complained to any of Respondent's managerial personnel. (Tr. 41-45)

27. Later that day, Demperio told Complainant, in Camille's presence, to "go fuck yourself." Camille told Demperio to shut his mouth. Complainant stated to Camille that

Demperio's statement was "illegal;" Complainant then left Respondent's restaurant. (Tr. 38-40, 40-41, 46-47, 98-99)

28. Camille then called Allen to discuss the incident, and they agreed that Demperio should be suspended. Brim was informed of the incident, and Demperio was suspended. (Tr. 87-88, 99-101, 121-22)

29. Before she received the telephone call from Camille, Allen was unaware of Complainant's concerns regarding Demperio's language and behavior. Complainant had never contacted Allen or complained to her regarding Demperio. (Tr. 45, 86-89, 91-92)

30. Complainant never complained to Zdyb or DiSantis about Demperio. (Tr. 134, 142)

31. That same day, Complainant called Brim to advise him of the incident with Demperio, and to tell him that she was resigning. Brim told Complainant that Demperio's conduct had been against the law, and asked Complainant if she wished to file a complaint of sexual harassment. Complainant replied that she did not want to, and resigned. (Tr. 46-50, 52, 101, 114, 118-21)

32. Demperio was known by both Camille and Brim to have a "big mouth," and to use foul language. However, no other employees had complained to them about Demperio. (Tr. 105-06, 124)

OPINION AND DECISION

Hostile Work Environment

Pursuant to the N.Y. Executive Law, art. 15 ("Human Rights Law"), it is 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).

Sexual harassment, in the form of a hostile work environment, has been recognized as a

form of sexual discrimination which is actionable under the Human Rights Law. *Matter of Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744, *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

In order to prevail in a case of hostile work environment sexual harassment, a complainant bears the burden of establishing that: (1) she belongs to a protected group; (2) she was the subject of unwelcome harassment; (3) the harassment was based on her status as a member of a protected group; (4) the harassment affected a term, condition or privilege of employment and (5) the employer knew or should have known of the harassment and failed to take remedial action. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999). Whether a workplace may be viewed as hostile or abusive-from both a reasonable person standpoint as well as from the victim's subjective perspective-can be determined only by considering the totality of the circumstances. *Matter of Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744, *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997). The complainant must also demonstrate that the conduct was sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive working environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986).

Complainant is a female and a member of a protected group. She was subjected to unwelcome harassment in the form of aggressive, foul-mouthed language from a co-worker, directly related to her status as a member of a protected group. Complainant was sufficiently affected by this mistreatment to become ill on one occasion, and she eventually quit her job as a consequence. However, Complainant fails to demonstrate that her employer knew or should have known of the harassment and failed to take remedial action.

"[A]n employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it." *Medical Express Ambulance Corp. v. Kirkland*, 79 A.D. 3d 886, 887, 913 N.Y.S.2d 296, 298 (2d Dept. 2010), *lv. den.*, 17 N.Y. 3d 716, 934 N.Y.S. 2d 374 (2011), quoting *Matter of State Div. of Human Rights v. St. Elizabeth's Hosp.*, 66 N.Y. 2d 684, 687, 496 N.Y.S. 2d 411, 412 (1985). "Only after an employer knows or should have known of the improper conduct can it undertake or fail to undertake action which may be construed as condoning the improper conduct." *Medical Express Ambulance Corp.* at 887-88, 913 N.Y.S.2d at 298.

Complainant did not bring her allegations to the attention of any of Respondent's managers despite her access to them, file a complaint with Respondent's designated sexual harassment counselor, or otherwise notify Respondent about her concerns. Although Complainant believed that a fellow employee, Price, was a supervisor, the record is clear that Price was not Complainant's supervisor, and the fact that, on one occasion, Demperio made offensive statements when Price was present, is not enough to charge Respondent with knowledge of sexual harassment. Respondent made elaborate efforts to inform its employees of its policy against sexual harassment, and of the protections available to them. Complainant failed to avail herself of these protections, and failed to inform Respondent of Demperio's poor treatment of her. Thus, the evidence does not support a finding that Respondent knew or should have known of any improper conduct or that it condoned such conduct by failing to take remedial action. *See Doe v. State of New York*, 89 A.D. 3d 787, 788, 933 N.Y.S. 2d 688, 690-91 (2d Dept. 2011). Complainant has failed to establish a prima facie case as against Respondent Kirby's, and the complaint must be dismissed.

Human Rights Law § 296.6 makes it an unlawful discriminatory practice "for any person

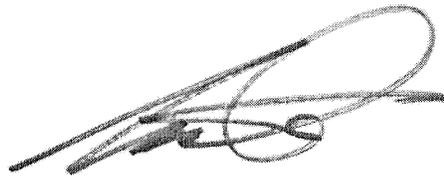
to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so." In order to find an aider and abettor liable, there must first be a finding of liability against the employer. When the case against the employer is dismissed, the case against an aider and abettor must also be dismissed. *Yerry v. Pizza Hut of Southeast Kansas*, 186 F. Supp. 2d 178 (N.D.N.Y. 2002); *Kent v. Papert Companies, Inc.*, 309 A.D.2d 234, 247, 764 N.Y.S.2d 675, 685 (1st Dept. 2003). The complaint alleges liability on the part of Respondent Demperio as an aider and abettor of discrimination by Respondent. The complaint against Respondent Demperio is also 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 hereby is, dismissed.

DATED: March 29, 2012
Bronx, New York

A handwritten signature in black ink, appearing to read "Michael T. Groben", with a large, sweeping flourish extending upwards and to the right.

Michael T. Groben
Administrative Law Judge