



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

CARMEN HERNANDEZ,

Complainant,

v.

**TEAM TACO MEXICO, CORP, DAVID ORDUNA
AS AIDER AND ABETTOR,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10137659, 10139300

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 28, 2012, by Thomas S. Protano, 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: 5/10/12
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

CARMEN HERNANDEZ,

Complainant,

v.

TEAM TACO MEXICO, CORP.,

Respondent.

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

Case No. 10139300

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

CARMEN HERNANDEZ,

Complainant,

v.

**TEAM TACO MEXICO, CORP. and DAVID
ORDUNA, as Aider and Abettor,**

Respondents.

Case No. 10137659

SUMMARY

Complainant was sexually harassed repeatedly by Respondent Orduna while she worked for Respondents. As a result, Respondents are liable to Complainant for the damages she suffered and to the State of New York for civil fines and penalties assessed. Complainant filed a

second complaint of retaliation, but has failed to prove her claim. As a result, the second claim is dismissed.

PROCEEDINGS IN THE CASE

On November 5, 2009, Complainant filed a verified complaint (case number 10137659) with the New York State Division of Human Rights (“Division”), charging Respondents with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 (“Human Rights Law”).

On February 5, 2010, Complainant filed another verified complaint (case number 10139300) with the New York State Division of Human Rights (“Division”), charging Respondent Team Taco Mexico Corp. with unlawful discriminatory practices relating to employment in violation of 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 Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. A public hearing was held on December 21, 2011.

Complainant appeared at the hearing. The Division was represented by Veanka S. McKenzie, Esq. Respondent did not appear at the public hearing. Pursuant to §465.12(b)(3) of the Division’s Rules of practice, Respondent’s default was noted and the hearing proceeded in Respondents’ absence.

FINDINGS OF FACT

1. Team Taco Mexico, Inc. is a Mexican Restaurant in Jackson Heights, New York, owned by David Orduna. (Tr. 9)
2. Complainant worked for Respondents from 1991 until 1996 and, in 1999, returned to work for Orduna and Team Taco Mexico. (Tr. 10-11)
3. Complainant was a waitress for Respondent, but she also served as a bartender and cashier. She cleaned and swept the restaurant, took deliveries, worked the cash register and served food and drinks. (Tr. 11-12)
4. In about June of 2009, Elizabeth, Complainant's co-worker, was fired. Orduna had a sexual relationship with Elizabeth. When that relationship ended, Orduna tried to forge a sexual relationship with Complainant. (Tr. 36)
5. When Orduna drank during Complainant's work day, Orduna would "bother" Complainant. (Tr. 13)
6. Orduna sent flowers to Complainant and told her she was pretty. Complainant told Orduna she did not want his flowers. (Complainant's Exhibit 1; Tr. 13-14, 20)
7. In August or September of 2009, Orduna put his hands under her blouse, grabbing her breasts. Hermenegildo Sanchez, a co-worker of Complainant, witnessed the incident. (Tr. 13-14, 16, 54-55)
8. Complainant responded by telling Orduna "not to bother" her. She then went into the bathroom and cried. (Tr. 13-14)

9. After the incident, Orduna told Complainant he wanted her to be his “lover.” Orduna told Complainant he would pay for an apartment for Complainant if she agreed. Complainant did not agree but continued to work for Orduna. (Tr. 15)

10. Orduna continued to pursue Complainant. On four occasions, Orduna appeared at Complainant’s home late at night, uninvited. Orduna would pass by in his car and call Complainant from his car, telling Complainant to come out and see him. Complainant never went out to meet him. (Tr. 19)

11. After Complainant rejected Orduna’s advances, Orduna became abusive towards Complainant. He screamed at her in front of customers and called her “stupid,” a “cripple” a “*pendeja*” and a “hood rat.” (Tr. 20-21)

12. Complainant would sometimes respond to the treatment Orduna subjected her to by crying in the restaurant bathroom. (Tr. 46)

13. Conversely, Orduna treated waitresses who gave in to his sexual advances differently. Erica and Elizabeth, who were involved sexually with Orduna, were allowed to arrive later than Complainant and let them set their own schedules. In addition, he paid them more than Complainant. Complainant was paid \$150.00 per week and the other waitresses were paid \$400.00 per week. (Tr. 22-23)

14. When Complainant complained to Orduna about the pay discrepancy, Orduna said “if you don’t like it, go fuck yourself.” (Tr. 24)

15. On November 3, 2009, Complainant decided she could no longer stand working for Respondents and she quit her job. Complainant felt she had “no other option,” because “it was so much humiliation, so much screaming.” (Tr. 24)

16. On November 5, 2009, Complainant filed her first complaint against Respondent. (ALJ Exhibit 3)

17. After Complainant filed her complaint, she did not receive a W-2 wage statement for 2009 from Respondents. She called and asked Sanchez to retrieve the W-2 from Orduna; however, Orduna refused to provide one. Previously, Complainant had received a W-2 every year when she worked for Respondent. (ALJ Exhibit 4; Tr. 28-30)

18. Eventually, after the Internal Revenue Service intervened, Orduna provided Complainant with a W-2. (Tr. 31)

19. Complainant looked for work for about four months before she found another job at a café. (Tr. 48-49)

20. With tips, Complainant earned about \$650.00 per week when she worked for Respondents. (Tr. 35)

21. In her new position, Complainant made only \$300.00 per week and received no tips. (Tr. 35)

22. After securing her new position, Complainant changed jobs twice, while working continuously and earning the same amount of money. She continued to look for work until September of 2011, when she became pregnant and stopped working. (Tr. 50)

23. As a result of Orduna's treatment, Complainant felt depressed. After being diagnosed with depression and anxiety disorder, Complainant sought therapy Effexor to control her symptoms. She was treated at the New York State Psychiatric Institute from Jun 2010 and at Clinica Psiquiatrica Hispanica from January 28, 2009 until April 13, 2009. (Complainant's Exhibits 4, 5 & 6; Tr. 41, 44)

24. Complainant was “humiliated” by Orduna’s treatment and felt “dirty,” like she “was in a hole with no way out.” Complainant was fearful of Orduna. (Tr. 45-46)

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 because of that person’s sex. Human Rights Law §§ 296.1(a).

Sexual harassment is a form of sex discrimination. Complainant alleges that Orduna harassed her because of her sex and that the harassment ultimately forced her resignation. In order to sustain a claim of sexual harassment, Complainant must demonstrate that she was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Community Ctr. v. N.Y. State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant in this case has established a claim for sexual harassment. Orduna’s behavior was offensive, abusive, hostile and unwelcomed. He grabbed Complainant in front of witnesses and repeatedly appeared, uninvited, at Complainant’s home during non-working hours. When Complainant refused Orduna’s advances, he berated her and called her names.

Complainant also claims that she was constructively discharged from her position due to Orduna’s harassment. A complainant establishes a claim for constructive discharge by showing that her employer deliberately made her working conditions so intolerable that a reasonable

person in her position would have felt compelled to resign. *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). Complainant, in this case, has made such a showing.

Complainant quit her job only after Orduna harassed and intimidated her. Complainant cannot and should not be forced to tolerate any more harassment than she endured. Complainant was constructively discharged from her position by Orduna.

While Complainant worked for Respondents, she was paid less than the waitresses who succumbed to Orduna's advances. From November 6, 2008 to November 5, 2009, Complainant received \$250.00 less per week than the other waitresses. She is entitled to the difference for a period of one year, which amounts to \$13,000.00. The Human Rights Law provides that, "[a]ny complaint filed pursuant to this section must be so filed within one year after the alleged unlawful discriminatory practice." N.Y. Exec. Law, art. 15 (Human Rights Law) § 297.5. This provision acts as a mandatory statute of limitations in these proceedings. *Queensborough Cmty. College v. State Human Rights App. Bd.*, 41 N.Y.2d 926, 394 N.Y.S.2d 625 (1977). Therefore, Complainant is only entitled to the damages she suffered during the one year period prior to the filing of her initial complaint of discrimination.

After Complainant was constructively discharged from her position, she was able to find work that paid significantly less than the wages and tips she earned while working for Respondent. She was out of work for four months, during which she lost \$2,666.67 per month (\$650.00 per week multiplied by 4 1/3) for a total of \$10,668.68. Thereafter, Complainant earned \$300.00 per week, which means she lost \$350.00 per week for 18 months, until she stopped looking for work in September 2011. She is entitled to \$1316.67 per month for a total of \$23,700.06.

Complainant is entitled to pre-determination interest on the award at a rate of nine per cent per year, from April 17, 2011, a reasonable intermediate date. “An award of interest is often appropriate from the time which a party was deprived of the use of money since without the addition of interest, the aggrieved party is not made whole.” *Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d 21, 771 N.E.2d 231, 744 N.Y.S.2d 349 (2002). Under New York law, prejudgment interest is calculated on a simple interest basis. *See, Epstein v. Kalvin-Miller Intern, Inc.*, 139 F.Supp.2d 469 (S.D.N.Y. 2001), *citing, Marfia v. T.C. Ziraat Bankasi*, 147 F.3d 83, 90 (2d Cir. 1998); *Donovan v. Diary Farmers of America, Inc.*, 53 F.Supp.2d 194, 197 (N.D.N.Y. 1999).

Complainant is also entitled to an award of compensatory damages owing to the emotional distress she suffered as a result of Orduna’s actions. The Human Rights Law authorizes the “awarding of compensatory damages to the person[s] aggrieved by” Respondent’s discriminatory actions, “as in the judgment of the [D]ivision will effectuate the purposes” of the law. This includes awards for mental anguish. Human Rights Law §297.4(c)(iii); *300 Gramatan Ave. Assoc. v. State Division of Human Rights*, 45 N.Y.2d 176, 183.

As a result of Respondents’ actions, Complainant has suffered from depression. She has felt humiliated and was forced to seek professional therapy and take medication. Accordingly, an award of \$50,000 will effectuate the remedial purposes of the Human Rights Law and is consistent with similar cases. *MTA Trading, Inc. v. Kirkland*, 84 A.D.3d 811, 922 N.Y.S.2d 488 (2d Dept. 2011); *Bemis v. New York State Div. of Human Rights*, 26 A.D.3d 609 (3d Dept. 2006).

“Mental 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). “An award of

damages for mental anguish will be upheld where...it is reasonably related to the wrongdoing, is supported by substantial evidence, and is comparable to awards for similar injuries.” *Kondracke v. Blue*, 277 A.D.2d 953, 716 N.Y.S. 2d 533 (4th Dept. 2000); *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

After she left Respondents’ employ, Complainant alleges that Orduna retaliated against her by refusing to release her W-2 wage statement. In order to establish a claim for retaliation, Complainant must show that she engaged in activity protected by Human Rights Law § 296 of which respondent was aware and that some adverse action resulted from that complaint. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999) (citing *Fair v Guiding Eyes for the Blind*, 742 F Supp 151, 154 (S.D.N.Y. 1990); *Matter of Town of Lumberland v New York State Div. of Human Rights*, 229 AD2d 631, 636 (3d Dept. 1996). Complainant is unable to establish a case of retaliation. Although Respondent made her wait for her W-2, she ultimately received it. She was able to use it to file her taxes and no tangible damages resulted from Orduna’s failure to immediately release Complainant’s W-2.

Because of Orduna’s actions, Respondents shall be liable to the State of New York for 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. *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 97th 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)

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 Respondents’ actions met the statutory thresholds of willful, wanton, and malicious. Orduna acted with deliberate indifference to Complainant’s protected rights and acted in a manner considered outrageous in a civil society. Although the record shows that Respondents operate a relatively small business, it has also been shown that Orduna has repeatedly harassed and insulted Complainant. Given the above, and the Division’s goal of deterrence, a civil fine of \$75,000.00 is appropriate in this case. *Park v. K & Management*, SDHR Case No. 10145367, March 16, 2012 (\$75,000.00 civil fine assessed against Respondent, a small company whose owner repeatedly sexually harassed the Complainant).

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 case number 10139300 is hereby dismissed, and with respect to case number 10137659, it is

ORDERED, that Respondents and their 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 affirmative action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within 60 days of the date of the Commissioner's Final Order, Respondents shall establish policies regarding the prevention of unlawful discrimination. These policies shall include an official anti-discrimination policy and a formalized reporting mechanism for employees who believe they have been discriminated against. The policies shall also contain the development and implementation of a training program relating to the prevention of unlawful discrimination in accordance with the Human Rights Law. Training and a copy of the policies shall be provided to all employees, and the policies shall be posted prominently where they may be viewed by employees in the workplace.

2. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant \$50,000 as compensatory damages due to her emotional distress. Payment shall be made in the form of a certified check made payable to Complainant and delivered to the Division c/o Caroline Downey, General Counsel, One Fordham Plaza, Bronx, New York, 10458, by certified mail, return receipt requested. Interest on the award shall accrue from the date of the

Commissioner's Final Order until the date payment is made at a rate of nine percent per year in accordance with Division practice and C.P.L.R. §5004.

3. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant \$13,000.00 as back wages for the period in which she was paid less than other waitresses. Payment shall be made in the form of a certified check made payable to Complainant and delivered to the Division c/o Caroline Downey, General Counsel, One Fordham Plaza, Bronx, New York, 10458, by certified mail, return receipt requested. Interest on the award shall accrue from May 5, 2009, a reasonable intermediate date, until the date payment is made at a rate of nine percent per year in accordance with Division practice and C.P.L.R. §5004.

4. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant \$10,668.68 as back wages for the period in which she was unemployed. Payment shall be made in the form of a certified check made payable to Complainant and delivered to the Division c/o Caroline Downey, General Counsel, One Fordham Plaza, Bronx, New York, 10458, by certified mail, return receipt requested. Interest on the award shall accrue from January 5, 2010, a reasonable intermediate date, until the date payment is made at a rate of nine percent per year in accordance with Division practice and C.P.L.R. §5004.

5. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant \$23,700.06 as back wages for the period in which she was employed but unable to find work that paid her a salary comparable to the one she received while working for Respondents. Payment shall be made in the form of a certified check made payable to Complainant and delivered to the Division c/o Caroline Downey, General Counsel, One Fordham Plaza, Bronx, New York, 10458, by certified mail, return receipt requested. Interest on the award shall accrue from December 5, 2010, a reasonable intermediate date, until the date

payment is made at a rate of nine percent per year in accordance with Division practice and C.P.L.R. §5004.

6. Within sixty days of the date of the Commissioner's Final Order, Respondents shall pay to the State of New York the sum of \$75,000.00 as a civil fine and penalty for their violations of the Human Rights Law. The payment of the civil fine and penalty shall be made in the form of a certified check, 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 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)

7. Respondents shall simultaneously furnish written proof of their compliance with all of the directives contained within this Order to Caroline Downey, General Counsel of the Division, at her office address at One Fordham Plaza, 4th Floor, Bronx, New York, 10458.

8. Respondents shall cooperate with the Division during any investigation into their compliance with the directives contained in this Order.

DATED: March 28, 2012
Bronx, New York



Thomas S. Protano
Administrative Law Judge