

Latest Developments on Sexual Harassment and Discrimination in the Public Workplace and the Effect of the #MeToo Movement

New York State Bar Association - Local and State
Government Law Section Fall Meeting
September 28, 2018

Moderator:

Lise Gelernter, Arbitrator and Faculty, University at Buffalo School of Law

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Agenda

- New York Guidance on Sexual Harassment Released
- Stop Sexual Harassment in NYC Act
- Effects of the #MeToo movement - Discussion
- Case studies



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What Happened?

- An agreement was reached on the New York State 2018-2019 budget signed by Governor Cuomo on April 12, 2018
- The Budget included Part KK of the 2018 Session Laws, Chapter 57 (S. 7507-C) which includes new guidelines and requirements which affect sexual harassment prevention policies and settlements of these cases for all employers, not just public employers

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New Proposed Guidance Issued

New York Guidance on Sexual
Harassment Released
August 23, 2018



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What Happened?

- On August 23, 2018 New York State released proposed guidance regarding the new sexual harassment legislation
- The newly created website <https://www.ny.gov/programs/combating-sexual-harassment-workplace> houses a model policy, model training, frequently asked questions and a sample complaint form
- All documents have been released in "draft" form and the state is seeking public comment on or before September 12, 2018
- The proposed documents answer some questions that were left unclear in the legislation

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Key Provisions



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"Sexual Harassment"

- "Sexual Harassment" is defined in the Frequently Asked Questions, Model Policy and Training
- Includes sexual orientation, gender identity and transgender status
- Sex stereotyping is also included in the definition of sexual harassment which includes conduct or personality traits that do not conform to other people's ideas or perceptions, including harassment because an individual is performing a job traditionally performed by the opposite sex

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What Is Not Included?

- Other forms of harassment and discrimination based upon protected classes, including, but not limited to, race, age are not covered by this legislation



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"Employee" Definition Expanded

- Executive Law (Section 296-d) has been amended to now include non-employees
 - Contractors, subcontractors, vendors, consultants or other persons providing services pursuant to a contract in the workplace or who is an employee of such contractor, subcontractor, vendor consultant or any other person providing services in the workplace

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When is The Employer Liable?

- Employer, its agents, or supervisors knew or should have known that such non-employee was subjected to sexual harassment in the employer's workplace
- AND
- The employer failed to take "immediate and appropriate corrective action"

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Significance?

- Legally non-employees can now sue employers for failing to take corrective action
- Appears that the employer has a responsibility to investigate and correct non-employee on non-employee harassment
- However, in reviewing cases involving non-employees, the extent of the employer's control and other legal responsibility the employer may have with respect to the conduct of the harasser shall be considered

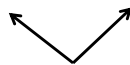


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Potential Non-Employees

- | | |
|---------------------------|---------------------------------------------|
| • Vendors | • Third party building or security services |
| • Interns | • Contractors |
| • Volunteers | • Subcontractors |
| • Independent contractors | • Welfare to Work or HIRE workers |
| • Sales representatives | |



An employee of any of these

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How to Make Non-Employees Aware of Policy

- In light of expanded definition, non-employees should be made aware of policy
- Include in bid documents (require certification from vendor)
- Post prominently where third parties frequent in employer's work place

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New Requirements for All Employers

- A written sexual harassment policy equal to or exceeding the standards of a model policy must be adopted (Labor Law Section 201-g)
- **Effective October 9, 2018**



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Model Sexual Harassment Policy Elements

Must BE WRITTEN and:

- 1) Prohibit sexual harassment consistent with guidance issued by DOL and provide examples of prohibited conduct
- 2) Include information concerning the federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment and state that there may be applicable local laws (i.e., New York City)
- 3) Include a standard complaint form
- 4) Include a procedure for the timely and confidential investigation of complaints and ensure due process for all parties

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Model Sexual Harassment Policy Elements

- 5) Inform employees of their rights of redress and all available forums for resolving complaints administratively and judicially (this would include notification about the opportunity to file a complaint with the New York State Division of Human Rights, United States Equal Employment Opportunity Commission or any City agency, including contact information)
- 6) Clearly state that sexual harassment is considered a form of employee misconduct and that sanctions will be enforced against individuals who engage in sexual harassment, as well as supervisors and managers that knowingly allow such behavior to continue

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Model Sexual Harassment Policy Elements

- 7) Contain a zero tolerance policy
- 8) Indicate how investigations will be completed
- 9) Clearly state that retaliation against individuals who complain of sexual harassment or who testify or assist in any proceeding under the law is unlawful



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Model Sexual Harassment Policy (7 pages)

Sexual Harassment Policy for All Employers in New York State



Introduction

[Employer Name] is committed to maintaining a workplace free from sexual harassment. Sexual harassment is a form of workplace discrimination. [Employer Name] has a zero tolerance policy for any form of sexual harassment, and all employees are required to work in a manner that prevents sexual harassment in the workplace. This Policy is one component of [Employer Name]'s commitment to a discrimination-free work environment.

Sexual harassment is against the law. All employees have a legal right to a workplace free from sexual harassment, and employees can enforce this right by filing a complaint internally with [Employer Name], or with a government agency (e.g. court under federal, state or local antidiscrimination laws).

Policy:

1. [Employer Name] Policy applies to all employees, regardless of employment status, whether paid or unpaid, contractors and non-employees working with [Employer Name].
2. Sexual harassment will not be tolerated. Any employee or individual covered by this policy who engages in sexual harassment or retaliation will be subject to remedial and/or disciplinary action, up to and including termination.
3. Retaliation Prohibited: No person covered by this Policy shall be subject to adverse employment action including being discharged, disciplined, discriminated against, or otherwise subject to adverse employment action because the employee reports an incident of sexual harassment (provides information, or otherwise assists in any investigation of a sexual harassment complaint). [Employer Name] has a zero tolerance policy for such retaliation against anyone who, in good faith, complains or provides information about suspected sexual harassment.

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Model Sexual Harassment Policy- Distribution

- Must be distributed annually in writing
- An acknowledgement receipt is not required but recommended
- It may be distributed electronically, but employees must be able to access the policy during work hours online and be able to print off a copy

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Model Sexual Harassment Policy

- The Department of Labor in consultation with the Division of Human Rights developed a model policy and training program
- The model policy may be found here:
https://www.ny.gov/sites/ny.gov/files/atoms/files/StatewideSexualHarassment_PreventionPolicy.pdf
- The minimum standard for a policy may be found here:
<https://www.ny.gov/sites/ny.gov/files/atoms/files/StandardsSexualHarassmentPreventionPolicies.pdf>

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Model Complaint Form Must be Used with Policy

- A model complaint form is available here:
<https://www.ny.gov/sites/ny.gov/files/atoms/files/ComplaintFormSexualHarassment.pdf>

The form is titled "Complaint Form For Reporting Sexual Harassment" and includes the following sections:

- COMPLAINANT INFORMATION:** Name, Home Address, Home Phone, Cell Phone, Job Title, Email Address, and Signature (printed name).
- SUPERVISOR INFORMATION:** Immediate Supervisor's Name, Title, Home Address, and Home Phone.
- COMPLAINT INFORMATION:** 1. How incident of Sexual Harassment took place (date), Name, Title, Home Address, and Home Phone.

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Model Complaint Form

- HOWEVER, guidance and sample policies and training make clear that verbal complaints **MUST** be investigated
- Accordingly, complaints from individuals who are unwilling to fill out a written complaint **MUST** be investigated



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Model Sexual Harassment Policy- Recommendations



- Update employee handbook to include updated sexual harassment policy
- Hand it out separately and have employees sign for it annually
- Include other forms of harassment and discrimination in your policy, rather than maintain separate policies
- Can't simply use model forms – must be customized

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New Training Requirements for All Employers

- Annual “interactive” training on sexual harassment must be provided to all employees (Labor Law Section 201-g)



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Interactive Training Required

- **"Interactive"** requires some form of employee participation, meaning the training may be: Web-based with questions asked of employees as part of the program, accommodate questions asked by employees, include a live trainer made available during the session to answer questions; and/or require feedback from employees about the training and materials presented

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Interactive Training

- Watching a video training, or a recorded online training and completing a certificate of completion will not be sufficient. . . Need some engagement with the employee during and/or after the training



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Who Must Be Trained?

- All employees, including part time, temporary, interns, volunteers, seasonal workers, HIRE workers




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Model Training

- The Department of Labor consulted with the Division of Human Rights to develop a model sexual harassment prevention training program
- Model sexual harassment training available at <https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentDRAFTModelTraining.pdf>
- Model PowerPoint at <https://www.ny.gov/sites/ny.gov/files/atoms/files/SexualHarassmentPreventionDRAFTTrainingPPT.pdf>


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When Must Training Occur?

- Annual sexual harassment training utilizing the state's model training or an equivalent must be completed by employer for existing employees **on or before January 1, 2019**
- New employees must be provided with the training **within 30 days of hire**
- The annual date for training can be set by the employer after January 1, 2019 and can be based on the calendar year, anniversary of each employee's start date or any other date the employer chooses

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Elements of Training

- Explanation of sexual harassment consistent with guidance issued by state
- Examples of conduct that would constitute sexual harassment
- Information concerning federal and state statutory provisions regarding sexual harassment
- Information regarding remedies available to victims of sexual harassment
- Information concerning employees' rights of redress and "all available forums for adjudicating complaints"
- Query – Does this include rights under a CBA?

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Elements of Training Cont'd

- Model training script is 24 pages
- Minimum standards for sexual harassment training
<https://www.ny.gov/sites/ny.gov/files/atoms/files/StandardsSexualHarassmentPreventionTraining.pdf>

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What About Investigations?

- The proposed guidance in the policy, training materials and standards contains directions for what is now required when conducting investigations



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Requirements for Investigations

- Must be conducted within 30 days
- Must be a written report conducted on each investigation. It must contain the final resolution of the complaint, along with any corrective actions taken
- Documents, emails and phone records must be obtained, preserved and maintained in connection with the investigation
- Contain a timeline of events

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Requirements for Investigations

- Investigator must interview parties and witnesses
- Both accuser and accused must be notified of the final determination of the investigation
- You must have a designated person or office to investigate complaints in your policy
- A summary of prior relevant incidents, reported or unreported must be included

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FAQ's

- Frequently asked questions (11 page document) is available at <https://www.ny.gov/combating-sexual-harassment-workplace/combating-sexual-harassment-frequently-asked-questions#for-employers>

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Non-Disclosure Agreement

- Non-disclosure agreements are prohibited in any settlement unless the complainant indicates it is his or her preference. (General Obligations Law § 5-336)
- Complainant is allowed 21 days to consider whether it is his or her preference to agree to confidentiality, which must be evidenced by a signed agreement at the end of the 21 day period
- Complainant has 7 days to revoke the agreement
- **Effective July 11, 2018**

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Non-Disclosure Agreement

- Identical provisions apply to settlements and stipulations reached in court cases (CPLR 5003-b)
- There does not appear to be an ability to waive the 21 day period, unlike under the ADEA

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Mandatory Arbitration Clauses

- Bars mandatory arbitration provisions in contracts relating to claims of sexual harassment except in limited circumstances
- **Effective July 11, 2018**

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Mandatory Arbitration Clauses

- “[n]othing contained in this section shall be construed to impair or prohibit an employer from incorporating a non-prohibited clause or other mandatory arbitration provision within such contract, that the parties agree upon”
- If there is an applicable collective bargaining agreement that is inconsistent, the collective bargaining agreement controls

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Settlements – Public Employers

- New York Public Officers Law §18 amended to add a new section 18-a, which provides for reimbursement by an employee who is adjudicated to have committed harassment to the public entity that has paid any award
- **Effective immediately**

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Settlements – Public Employers

- Public entities include, but are not limited to, counties, towns, cities, villages, political subdivisions, school districts, BOCES or any other governmental entities or entities operating a public school, college, community college or university, a public improvement or special district, public authorities, commissions, agencies or public benefit corporations and any other separate corporate instrumentality of the state

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Settlements – Public Employees

- Employee is broadly defined to include appointed employees, elected officials and anyone holding any appointment in public service whether paid or unpaid, including former employees or individuals in these categories
- Any employee who has been the subject of a final judgment of personal liability for intentional wrongdoing “related to a claim of sexual harassment” **shall reimburse** the public entity for any award paid within 90 days of the payment of the award

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Settlements – Public Employees

- If the employee does not pay, the municipality can garnish wages
- There is a similar amendment to Public Officers Law 17-a which applies to New York State employees

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Question

- Does this new amendment create ethical concerns in the representation of the municipality and accused employee?



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State Contractors

- All bidders on state competitive bidding contracts must submit a certification with every bid certifying under penalty of perjury, that the bidder has implemented a written policy addressing sexual harassment prevention in the workplace and provides annual sexual harassment training to all of its employees in compliance with Department of Labor regulations (to be enacted). Finance Law § 139-1
- Any bid not meeting this requirement will not be considered
- **Effective January 1, 2019**

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State Contractors

- For contracts not subject to competitive bidding, it is in the discretion of the state agency or department to require the certification
- Provides for bids made to "the state or any public department or agency thereof"

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Stop Sexual Harassment in NYC Act



<https://goo.gl/images/Mbw008>

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Stop Sexual Harassment in NYC Act

- A package of 11 bills – together referred to as the Stop Sexual Harassment in NYC Act
- Signed by New York City Mayor DeBlasio on May 11, 2018

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Stop Sexual Harassment in NYC Act

- The act effects a number of obligations, including one with a deadline that was effective September 6, 2018 that maintains that employers must conspicuously display an anti-sexual harassment notice in employee breakrooms and other common areas in which employees gather
- The NYC Commission on Human Rights, which enforces the act, published the poster at its website

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Stop Sexual Harassment in NYC Act



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Case Studies

- Morinello v. Villella, Waldorf Niagara, Inc., et. al. DHR Case No. 10155011 (2017)
- Mayo-Coleman v. Am. Sugars Holding, Inc., 2017 U.S. Dist. LEXIS 151958 (S.D.N.Y. 2017)
- Barnes v. City of Jamestown, DHR Case No. 7905657 (2007)

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Discussion Questions

- What are the impacts of the new requirements?
- How can we make employees comfortable complaining about sexual harassment?
- Does Human Resources suggest EAP to an employee who has been sexually assaulted?

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Discussion Questions

- What role does mediation play in sexual harassment complaints? Is it offered internally? Are there risks?



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Questions?

Thank You.

Moderator:

Lise Gelernter, Arbitrator and Faculty, University at Buffalo School of Law

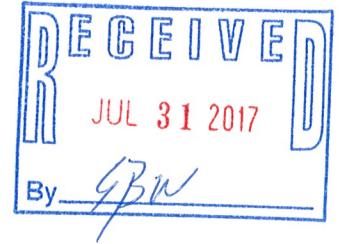
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**Division of
Human Rights**



**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

JACINTA M. MORINELLO,

Complainant,

v.

**FILIPPO VILLELLA, WALDORF NIAGARA, INC.
D/B/A VILLELLA'S ITALIAN RESTAURANT,
FILIPPO INGLIMA,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10155011

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 20, 2015, by Martin Erazo, Jr., an Administrative Law Judge ("ALJ") of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the February 20, 2015, Recommended Order and the March 29, 2016, Amended Recommended Order. Objections to both Recommended Orders have been received and considered along with the entire record.

PLEASE BE ADVISED THAT, UPON REVIEW, THE FEBRUARY 20, 2015, RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER") WITH

THE FOLLOWING AMENDMENTS:

- The procedural history of the instant matter after the issuance of the February 20, 2015, Recommended Order is as follows:

In March of 2015, both parties filed Objections to the Recommended Order. On June 12, 2015, the caption and Complaint were amended to name Filippo Villella as a respondent and the matter was reopened “to be assigned to a new ALJ in order to provide Respondent Villella a full and fair opportunity to defend against the Complaint.” June 12, 2015, Notice of Reopening at 2. Respondent Villella was afforded an opportunity to litigate all issues to be decided by the Commissioner and to present any non-duplicative and relevant evidence. Complainant was permitted, but not required, to present further evidence. *See Id.*

On November 9, 2015, a public hearing session was held. Complainant, Respondent Waldorf Niagara and Respondent Villella appeared at the hearing. Complainant was represented by Perry and Harper. Respondents Waldorf Niagara and Villella were represented by Linda Joseph, Esq. Respondent Inglima did not appear.

Complainant objected to Respondent Villella’s proposed witnesses on the grounds that the witnesses were “presumably available” to testify at previous hearing dates. The presiding ALJ overruled Complainant’s objection, noting that Complainant had asked that Respondent Villella be named as a respondent, that the Commissioner had granted Complainant’s request and that the Commissioner had granted Respondent Villella an opportunity to defend against the Complaint. (Tr. 223-24)

Respondent Villella called Complainant as a witness. At the direction of her attorney, Complainant refused to testify on the grounds that she had already testified and that Respondent Villella was being given “a second bite of the apple.” The presiding ALJ noted

that as an individual respondent, Respondent Villella had not had an opportunity to cross-examine Complainant, that Complainant had a responsibility to cooperate with the proceeding and that the Commissioner could take Complainant's refusal to testify into consideration, including drawing an adverse inference. Complainant, nonetheless, refused to testify. (Tr. 248-50)

On May 19, 2016, ALJ Luban issued an Amended Recommended Order to dismiss the Complaint. Thereafter, Complainant filed Objections to the Amended Recommended Order.

- To the extent the February 20, 2015, Recommended Order is hereby made the Final Order, the section of the analysis entitled "Waldorf's Liability" in the February 20, 2015, Recommended Order is not hereby adopted. "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08; *see also, Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). "[A]n employee is a 'supervisor' for purposes of vicarious liability . . . if he or she is empowered by the employer to take tangible employment actions against the victim . . ." *Vance v. Ball State Univ.*, 133 S.Ct. 2434, 2493 (2013). Tangible employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth* at 761.

The record here shows that when asked how Complainant was hired, Villella testified, "so we needed somebody and [Inglima] said that he would bring somebody. And I said okay, bring somebody. He didn't say who. He was – actually at that time I didn't even know [Complainant]." (Tr. 143-46) Villella effectively delegated to Inglima the authority to hire

Complainant. The Supreme Court recognized in *Vance* that “the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies.” *Id.* at 2452 (citing *Ellerth*, 524 U.S. at 762); *see also*, *Id.* at n. 8 (Tangible employment actions can be subject to approval by higher management). Accordingly, it is on this basis that Inglima is determined to be a supervisor for vicarious liability purposes.

Once it is determined that a supervisor subjected an employee to a hostile work environment, “[w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher v City of Boca Raton*, 524 US 775, 807–08 (1998); *see also*, *Winkler v. State Div. of Human Rights*, 59 A.D.3d 1055, 1056 (4th Dept. 2009).

In the instant matter, Respondents raised no affirmative defense. Accordingly, Respondent Waldorf is vicariously liable for the discriminatory actions of its supervisor.

- The findings made by the ALJ in the May 19, 2016, Amended Recommended Order that Respondent Villella was not aware of the hostile work environment are hereby adopted. Because Complainant would not make herself available to cross-examination by Villella during the reopened hearing, he did not have the opportunity to test the veracity of her claims that he was aware of the harassment. In her previous testimony, Complainant claimed that she attempted to complain to Villella on more than one occasion, but then acknowledged that she complained to Villella on only one occasion. (Tr. 99-102) Her recall of what exactly she

told him was inconsistent. What is clear is that Villella spoke over her and she was unsure what he may have heard because she was unable to fully express her thoughts. (Tr. 99, 102, 110-16, 120-22) Accordingly, findings of fact 23, 35, 36 and 38 in the February 20, 2015, Recommended Order are not hereby adopted. The weight of the credible evidence supports the determination that Villella was not aware of Inglima's conduct. Thus, the Complaint against Respondent Villella in his individual capacity is hereby dismissed. *See State Div. of Human Rights v. Miranda*, 136 A.D.3d 1240, 1241-42 (3d Dept. 2016)

- Under the section entitled "Mental Anguish Damages," the reference to Complainant's duty to mitigate her damages is not hereby adopted. Complainant has a duty to mitigate her *economic* damages "by making reasonable efforts to obtain comparable employment." *Rio Mar Rest. v. State Div. of Human Rights*, 270 A.D.2d 47, 48 (1st Dept. 2000). Courts have not held that there is a duty to mitigate mental anguish damages. The ALJ recognized that Complainant's resistance to treatment was part and parcel of her PTSD. Accordingly, she should be fully compensated for the suffering she endured. Nevertheless, considering the record and the severity, frequency and duration of the conduct, \$65,000 is an appropriate award.
- Regarding Complainant's lost wages, Complainant worked at Siro's from January 1, 2012, through July 1, 2014, a period of 130 weeks, not 78 as stated in the Recommended Order. *See* February 20, 2015, Recommended Order at p. 11. Complainant presented no evidence of her efforts to mitigate damages after July 1, 2014. Accordingly, based on her average earnings of \$300 per week, Complainant earned approximately \$39,000 at Siro's. Had Complainant remained at Waldorf through July 1, 2014, she would have earned \$63,480 based on her average salary of \$460 per week (i.e. \$460 * 138 weeks). Thus, Complainant's

total lost wage award is \$24,480 (i.e. \$63,480 - \$39,000). Complainant is also entitled to interest on lost wages at a rate of nine percent per annum from March 1, 2013, a reasonable intermediate date, until payment is actually made by Respondents. *See Argyle Realty Assoc. v. State Div. of Human Rights*, 65 A.D.3d 273, 286 (2d Dept. 2009).

- Finally, in assessing a civil fine and penalty, consideration has been given to the fact that Villella was not aware of Inglima's conduct. Nonetheless, based on the other factors considered by the ALJ, \$20,000 is an appropriate penalty.

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 26 2017**
Bronx, New York


HELEN DIANE FOSTER
COMMISSIONER

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Respondent

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State Division of Human Rights

Robert Goldstein, Director of Prosecutions
Lilliana Estrella-Castillo, Chief Administrative Law Judge
Edward Luban, Administrative Law Judge
Michael Swirsky, Litigation and Appeals
Caroline J. Downey, General Counsel
Melissa Franco, Deputy Commissioner for Enforcement
Peter G. Buchenholz, Adjudication Counsel
Matthew Menes, Adjudication Counsel



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

JACINTA M. MORINELLO,

Complainant,

v.

**FILIPPO INGLIMA, WALDORF NIAGARA,
INC. D/B/A VILLELLA'S ITALIAN
RESTAURANT,**

Respondents.

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

Case No. **10155011**

SUMMARY

Respondents sexually harassed and constructively discharged Complainant. Respondents are liable to Complainant for \$16,160 in lost wages and \$65,000 for pain and suffering. Complainant did not establish that Respondents retaliated against her. Respondents are liable to the State of New York in the amount of \$20,000 in civil fines and penalties.

PROCEEDINGS IN THE CASE

On May 11, 2012, Complainant filed a verified complaint 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 October 9, 2012, the Division's Buffalo Regional Office ("Regional Office") amended the verified complaint to add Filipino Inglima ("Inglima") as an individually named respondent. (ALJ Exh. 1, p.3)

On June 11, 2012, the Regional Office amended the verified complaint to remove federal status because Waldorf Niagara, Inc. ("Waldorf") had fewer than 15 employees. (ALJ Exh. 1, p.6)

On November 7, 2012, 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. (ALJ Exh. 3) The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Martin Erazo, Jr., an Administrative Law Judge ("ALJ") of the Division. Complainant was represented by the Law Office of Lindy Korn, PLLC, Lindy Korn, Richard Perry, William F. Harper, Esqs., of counsel. The Waldorf and Filipino Villella ("Villella") were represented by William D. Berard, III, Esq.

On April 15, 2014, Complainant made a motion to individually name Villella, the Waldorf's owner. (ALJ Exh. 4) ALJ Erazo denied the motion on two grounds. First, the motion did not articulate any reasons for the delay. The verified complaint had been prepared and submitted to the Division by Complainant's prior private counsel. (Tr. 16, ALJ Exh. 4) Second, the motion was untimely, two and half years after the last date of violation and two years after the filing of the verified complaint. (Tr. 17) *See Sally v. Keyspan Energy Corp.*, 106 A.D. 3d 894, 896 (2d Dept 2013), *Matter of State Division of Human Rights v. A.R. Heflin Painting Contr.*, 101 A.D.3d 1442, 1445 (3d Dept 2012), *Matter of Murphy v. Kirkland*, 88 A.D. 3d 267, 275, 278 (2d Dept 2011).

Public hearing sessions were held on September 22-23, 2014. Complainant and the Waldorf appeared at the hearing. Inglima failed to submit a verified answer to the complaint and, therefore, defaulted pursuant to 9 New York Code of Rules and Regulations (“N.Y.C.R.R.”) § 465.11(e). Inglima also failed to appear at the public hearing to defend against the complaint. With respect to Inglima, the hearing proceeded on the evidence in support of the complaint pursuant to 9 N.Y.C.R.R. § 465.12(b)3.

FINDINGS OF FACT

Parties

1. The Waldorf is a hotel with a restaurant. (Tr. 63, 69-70, 136)
2. The hotel has 65 rooms with a seven-table restaurant and open kitchen. (Tr. 136-37)
3. Villella is the president and owner of the Waldorf. (Tr. 64, 136)
4. Inglima managed the daily activities at the Waldorf. (Tr. 64)
5. As the Waldorf’s manager, Inglima’s duties included hiring personnel and supervising employees, helping in the dining area when the restaurant was busy, cooking when necessary, and managing the daily business affairs. (Tr. 64-65, 90)
6. Complainant is female. (ALJ Exh. 1, p.9)
7. Complainant’s date of birth is June 18, 1991. (Complainant Exh. 1)
8. During the period of 2003 to 2005, Inglima had sexually assaulted Complainant at various times when she was a child. (Respondent Exh. 1, pp.4-5)
9. The sexual assaults occurred when Complainant’s family visited Inglima’s home. (Respondent Exh. 1, pp.4-5)

10. Complainant did not report the sexual assaults that occurred when she was a child because, at the time, her entire family worked for Inglima at a restaurant he had owned and operated. (Tr. 63-64; Respondent Exh.1, p.5)

11. Complainant did not want to cause her family any trouble with their employment. (Respondent Exh.1, p.5)

12. Michaelina Morinello (“M. Morinello”) is Complainant’s sister and worked as a server for the Waldorf from June 2011 to October 30, 2011. (Tr. 62-63, 69-70)

13. Angelo Morinello (A. Morinello) is Complainant’s brother and also worked for the Waldorf in the capacities of busser, cook, and server, during June 2011 to October 2011. (Tr. 103-04; Respondent Exh.1, p.9)

14. In July 2011, Complainant needed money and sought employment at the Waldorf knowing that Inglima worked there as the manager. (Respondent Exh.1, p.5)

15. Complainant believed she would be safe because her family was there and she believed Inglima “would not touch [her] in a public place.” (Respondent Exh. 1, p.5)

16. Inglima hired Complainant as a busser on July 15, 2011. (Tr. 89-90)

Workplace Events

17. During the period August 2011 to September 2011, M. Morinello observed Inglima inappropriately touch Complainant on three occasions. (Tr. 66-67, 71)

18. On one occasion, Inglima placed his hand around Complainant and asked her if he could touch her. Complainant replied, “No.” (Respondent Exh. 1, p.5)

19. M. Morinello observed Inglima place his hand on Complainant. M. Morinello interrupted Inglima by asking, “What’s going on over here?” Inglima responded “Can I touch your sister?” M. Morinello also said “No” and Inglima stopped. (Tr. 66)

20. On a second occasion, Inqlima simultaneously placed his arms around Complainant and M. Morinello, while attempting to fondle their breasts, and said, "Smile for the camera," pointing to a fixed video camera that was on the premises. (Tr. 66-67)

21. Both Complainant and M. Morinello pulled away from Inqlima. (Respondent Exh. 1, p.6)

22. On a third occasion, Inqlima reached under Complainant's buttocks and touched her genitalia while she was bent over and sweeping under a table. (Tr. 68) Complainant jumped back and screamed. (Tr. 74-75)

23. Villella saw Inqlima touch Complainant inappropriately and laughed at her reaction. (Tr. 68, 74-75)

24. Villella did not reprimand or address Inqlima's inappropriate behavior. (Tr. 68, 74-75)

25. Ella (last name unknown) worked for the Waldorf and was Inqlima's girlfriend. (Tr. 71)

26. In September 2011, Ella left Waldorf's employment. After she left, Inqlima's behavior became more aggressive towards Complainant and M. Morinello. (Tr. 71-72, 92; Respondent Exh. 1, pp.5, 7)

27. On two separate occasions, Inqlima grabbed M. Morinello as she exited the bathroom and attempted to touch her genital area. (Tr. 72-73)

28. Inqlima touched Complainant approximately two times a day. He often touched Complainant's genital areas as she walked by. (Tr. 92-93)

29. Complainant and M. Morinello repeatedly told Inqlima "no" but he persisted in his behavior. (Respondent Exh. 1, p.7)

30. On one occasion Inqlima asked Complainant to go into the wine room. (Tr. 95)

31. A. Morinello began to go with Complainant into the wine room and Inqlima said, "Where are you going?" "I didn't tell you to go anywhere." (Tr. 95)

32. When Complainant went into the wine room, Inqlima opened her shirt and began to kiss and lick her neck. (Tr. 95)

33. Complainant eventually broke away from Inqlima. (Tr. 95-96)

34. On another occasion, while Complainant was in the kitchen, Inqlima forced his hand in her pants and touched her genitalia, took her hand, and "forced it to touch his penis." (Tr. 95)

35. On two occasions between mid-September 2011 and mid-October 2011, Complainant approached Villella about Inqlima. (Tr. 83-84, 86-87, 99-102)

36. On both occasions, Complainant told Villella that "Inqlima was touching me that made me uncomfortable." (Tr. 110-13)

37. As Complainant began to inform him about Inqlima's offensive behavior in the workplace, Villella interrupted her, talked over her, and said, "you don't have to tell me anything, I see everything that happens here." (Tr. 86, 99, 100, 113)

38. On one of those occasions, Complainant specifically told Villella that "Filippo Inqlima was out of control." (Tr. 101-02)

39. On October 31, 2011, Inqlima told M. Morinello to leave early. (Respondent Exh. 1, pp.6-8)

40. M. Morinello would not leave Inqlima alone with Complainant. (Respondent Exh. 1, pp.6-8)

41. Inqlima pushed M. Morinello out of the restaurant while physically restraining Complainant and preventing her from leaving. (Respondent Exh. 1, p.6)

42. M. Morinello pushed her way back into the restaurant. "There was like a power struggle for a minute." M. Morinello was able to leave with Complainant. (Respondent Exh. 1, pp.6-8)

43. Inglima "finally gave up and walked away." (Respondent Exh. 1, pp.6-8)

44. On October 31, 2011, Complainant and M. Morinello left the Waldorf's employment because of Inglima's offensive behavior. (Tr. 78, 86-87, 97-98)

45. Complainant and M. Morinello informed their family about Inglima's actions. (Tr. 78, 97-98)

46. A. Morinello confronted Inglima and told him to "leave them alone." Inglima responded "This is who I am, fuck you, go work somewhere else" and then threatened to punch him. (Tr. 98; Respondent Exh. 1, p.6)

47. Complainant's brother, father, aunt, and uncle approached Villella about Inglima's behavior. (Tr. 78, 104-05)

48. Villella told Complainant's family that he would address the situation by closely monitoring the interactions between Inglima, Complainant, and M. Morinello, once they returned to work. (Tr. 105)

49. On November 1, 2011, Complainant and M. Morinello went to the police and reported Inglima's behavior. (Tr. 78, 99)

50. On November 10, 2011, M. Morinello texted Villella and informed him that she and Complainant wanted to continue working for the Waldorf but wanted Inglima's behavior to stop. (Tr. 78-79, 81, 102-03; Complainant Exh. 6)

Other Legal Proceedings

51. Administrative notice is taken that on May 11, 2012, M. Morinello filed a Division complaint, case number 10155003, against Respondents.

52. On September 12, 2012, a grand jury in New York State County Court, Niagara County, indicted Inqlima on nine criminal counts of sexual abuse based on acts he perpetrated against Complainant, as detailed in Indictment No. 2012-065. The indictment alleged violations of the NY Penal Law §§ 130.55, 130.60(2), 130.65(1), 130.65 (1), and 260.10(1). (Complainant Exh. 1)

53. One of the criminal counts was based on Inqlima's actions that occurred in "late July 2011," while Complainant was employed by Respondents. (Complainant Exh. 1)

54. On March 18, 2013, Inqlima resolved grand jury Indictment No. 2012-065 by pleading guilty to sexual abuse in the second degree based on the 2004 incident when Complainant was less than 14 years of age. (Complainant Exh. 2, pp. 2, 8, 14)

55. Inqlima is not a United States citizen. Inqlima pled guilty to the criminal charge with the understanding that the federal government would revoke his visa and deport him, after he was incarcerated for pending federal charges. The nature of those federal charges was not made clear during the course of the public hearing. (Tr. 8; Complainant Exh.2; pp. 15-16)

Mental Anguish

56. Eileen Trigoboff, D.N.S. ("Dr. Trigoboff"), earned her doctorate in nursing science with a specialty in psychiatric nursing and psychopharmacology. Dr. Trigoboff is a clinical specialist in psychiatric nursing and is licensed in New York as a registered professional nurse and mental health counselor. (Tr. 24-25; Complainant Exh. 5)

57. Complainant's counsel referred Complainant to Dr. Trigoboff. (Tr. 49)

58. Dr. Trigoboff testified as Complainant's expert in the field of post-traumatic stress ("PTSD"), depression, and anxiety disorders. Dr. Trigoboff has 31 years of clinical experience in treating patients and has handled approximately 300 cases of PTSD. (Tr. 28; Complainant Exh. 5)

59. Among other credentials, Dr. Trigoboff has authored eight textbooks on psychiatric medications and teaches at the State University of New York at Buffalo, School of Medicine, Department of Psychiatry, and School of Rehabilitation and Social Work. (Tr. 26; Complainant Exh. 5)

60. Dr. Trigoboff diagnosed Complainant with low to moderate PTSD, based on two sessions: August 27, 2013, and September 14, 2014. (Tr. 31, 40; Complainant Exh. 3)

61. Complainant met Dr. Trigoboff to discuss possible treatment for sexual assault that occurred in her adulthood, for a period of months in 2011, while working for Respondents. (Tr. 36, 45-46, 49, 53)

62. Dr. Trigoboff described how Complainant's low to moderate PTSD manifested itself:

"[Complainant] has not been able to interpret other people's motives and the reasons they are doing certain behaviors in a way that matches with what people are probably doing. There's always a menacing or a negative interpretation of what anybody does, especially males and especially people who have any kind of authority. But it has bled into other areas, like her social life. She's not dating, she's not making friends, she is not doing the things a whole year after we talked about how this is very important that she maintain more normal functioning. And in a year, she still has not able to do that and as a matter of fact, is a little worse. Because she used to be dating a certain type of person and when I first saw her in August of 2013 and now is not even dating anybody. And is not interested in having any kind of a social contact in that regard with other people, which is highly unusual for a 23-year-old woman." (Tr. 41)

63. Dr. Trigoboff also described Complainant's resistance to continuing treatment as typical of individuals with PTSD who find it very difficult to take steps towards recovery. (Tr. 33)

64. Dr. Trigoboff was aware of the sexual assaults Complainant was subjected to as a child. (Tr. 53-54)

65. Dr. Trigoboff testified that any of Complainant's experiences as a child "did not contribute" to the PTSD symptoms. (Tr. 54-56)

66. Dr. Trigoboff concluded, after speaking with Complainant about her childhood, that the PTSD arose from "a new set of experiences" at the workplace in 2011. (Tr. 55)

67. Dr. Trigoboff made clear that "it is not unusual for people to have a number of traumatic experiences and not have PTSD." "Not everybody gets post-traumatic stress disorder after a legitimate trauma." (Tr. 56-57)

68. Dr. Trigoboff found that Complainant's therapy would have to continue for a period of at least 14 months in order to see improvement in her PTSD. (Tr. 35-36)

Villella

69. Complainant's allegations that Villella touched her inappropriately on two occasions at the start of her employment in 2011 are not credible based on Complainant's own evidence. (Tr. 114) None of Dr. Trigoboff's extensive treatment notes identify Villella as a source of the workplace sexual harassment. (Complainant Exhs. 4,5) As noted, Complainant appealed to Villella for assistance in responding to Inglima's offensive conduct. (Tr. 110-13) Complainant was willing to return to the same workplace with Villella, as long as Inglima was not present. (Tr. 78-79, 81, 102-03; Complainant Exh. 6) Complainant only informed her family about Inglima's actions. (Tr. 78, 97-98) Complainant did not accuse Villella in any of the criminal legal proceedings. (Complainant Exh. 1; Respondent Exh. 1)

Lost Wages

70. Complainant worked for the Waldorf four days a week and earned \$50 a day and an average of \$65 a day in tips = \$115 daily. Four days x \$115 = \$460 weekly. (Tr. 106)

71. On or about January 1, 2012, Complainant obtained employment at Siros restaurant (“Siros”) two months after she separated from employment from the Waldorf. (Tr. 106)

72. During the eight weeks she was unemployed, Complainant would have earned \$3,680 had she remained employed at the Waldorf. $\$460 \times \text{eight weeks} = \$3,680$. (Tr. 106-07)

73. At Siros, Complainant earned an average of \$25 a day plus \$50 a day in tips = \$75 daily or \$300 weekly at four days a week. (Tr. 108)

74. Complainant’s testimony was vague as to the number of days and the number of hours she worked for Siros. Complainant did not offer any documentary evidence in support of lost earnings. (Tr. 106-07) Complainant last worked for Siros on July 1, 2014. (Tr. 109)

75. Therefore, based on Complainant’s testimony that she eventually worked four days a week at Siros, during 78 weeks between January 1, 2012 and July 1, 2014, at four days a week, Complainant earned \$23,400.

76. During the same 78 week period, Complainant would have earned \$35,880 at the Waldorf. $78 \text{ weeks} \times \$460 = \$35,880$.

77. Complainant’s lost wages between January 1, 2012 and July 1, 2014 was \$12,480. $\$35,880 - \$23,400 = \$12,480$.

OPINION AND DECISION

Hostile Work Environment

Under N.Y. Exec. Law, art. 15 ("Human Rights Law") §296.1(a), 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." Sexual harassment is a form of sex discrimination.

In order to sustain a claim of harassment on the basis of sex, 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. Complainant must subjectively view the conduct as unwelcome that creates a hostile environment. In addition, a reasonable person must objectively view the conduct as severe or pervasive enough to create an abusive environment. *Father Belle Community Center v. New York State Division of Human Rights*, 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept. 1996), *leave to appeal denied*, 89 N.Y.2d 809, 716 N.Y.S.2d 533 (1997). When assessing claims of hostile environment and its pervasiveness, the ultimate decision depends on the totality of the circumstances. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 669 N.Y.S.2d 122 (N.Y. Sup. Ct. 1997), *appeal dismissed*, 256 A.D. 269, 682 N.Y.S.2d 167 (1st Dept. 1998), *appeal dismissed*, 93 N.Y.2d 919, 713 N.E.2d 418 (1999), *leave to appeal denied*, 94 N.Y.2d 753 722 N.E.2d 507 (1999).

Inglima was the Waldorf's manager and supervisor. Contrary to the Waldorf's argument, the proof shows that Inglima was its employee. The Waldorf placed Inglima in the position of

manager in charge of all employee activities and daily business operations. In 2011, Complainant worked as a busser in the Waldorf. Inglima subjected Complainant to a sexually charged work environment from the time-period of July 15, 2011 to October 31, 2011. Inglima engaged in a daily pattern of offensive sexual behavior towards Complainant that included physically touching. Inglima's offensive actions culminated with physically restraining Complainant on October 31, 2011, in his attempt to keep Complainant alone with him at work. By any objective standard, Inglima's actions were sufficiently severe and pervasive to alter Complainant's working conditions. Complainant did not welcome any of Inglima's sexually offending behavior. Inglima's actions constitute a sexually hostile environment under the Human Rights Law.

Complainant's claim that the owner, Villella, sexually harassed her on two occasions is not supported by Complainant's own evidence. Most notably, none of Dr. Trigoboff's extensive treatment notes identify Villella as a source of the workplace sexual harassment. Complainant only identified Inglima. In addition, Complainant was willing to return to the same workplace with Villella, as long as Inglima was not present. Complainant did not accuse Villella in any of the criminal legal proceedings when she complained of Inglima's workplace harassment.

Constructive Discharge

In order to maintain a claim for constructive discharge, a complainant must demonstrate that respondent "deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." *Nelson v. HSBC Bank USA*, 41 A.D.3d 445; 837 N.Y.S.2d 712 (2d Dept. 2007); *Equal Employment Opportunity Commission v. Die Fliegermaus, L.L.C.*, 77 F.Supp.2d 460 (S.D.N.Y. 1999). When a constructive discharge is found, an employee's resignation is treated as if the employer had actually terminated the

employee. *Pena v. Brattleboro Retreat*, 702 F.2d 322, 325 (2d Cir. 1983). Complainant established that Inglima's unlawful discriminatory conduct was intentional and that such conduct created working conditions so intolerable that a reasonable person would have been compelled to resign. *Petrosino v. Bell*, 385 F.3d 210 (2d Cir. 2004). In September of 2011, Inglima increased his sexual harassment from an occasional to daily occurrences of physical touching. Inglima's aggressive behavior culminated with his actions of October 31, 2011. On that date, Inglima sought to isolate Complainant in the workplace by directing her sister, M. Morinello, to leave. M. Morinello refused to leave. Inglima pushed M. Morinello out of the restaurant while he physically restrained Complainant, preventing her from leaving. However, M. Morinello was able to leave with Complainant after struggling with Inglima. Complainant and M. Morinello did not return to work at the Waldorf. Complainant filed a criminal complaint against Inglima.

Retaliation

In order to establish a prima facie case of retaliation, a complainant must show that (1) she engaged in activity protected by N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296; (2) the respondent was aware that she participated in the protected activity; (3) she suffered from an adverse employment action; and, (4) there is a causal connection between the protected activity and the adverse employment action. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3d Dept. 1999). Under an anti-retaliation analysis, there is no requirement that the retaliation only affect compensation, terms, conditions, or privileges of employment. A materially adverse act is one that "...must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)

Once a complainant has met this burden, the respondent has the burden of coming

forward with legitimate, nondiscriminatory reasons in support of its actions. *Pace* at 104, 692 N.Y.S.2d at 224. If the respondent meets this burden, the complainant then must show that the reasons presented are a pretext for unlawful retaliation. *Id.*

Complainant engaged in protected activity in September and October of 2011 when she informed Villella about Inglema's offending behavior. However, there is no evidence to show that Complainant was forced to separate from employment on October 31, 2011 because she complained about workplace sexual harassment. Therefore, this allegation must be dismissed.

Waldorf's Liability

An employer cannot be held liable for an employee's harassment unless it encourages, condones or approves the harassment. Inaction by an employer in response to an employee's harassment can constitute condonation under Human Rights Law. *See Matter of State Division of Human Rights v. St. Elizabeth's Hospital*, 66 N.Y.2d 684, 687, (1985). Complainant twice informed Villella, the Waldorf's owner, of Inglema's harassment. Villella failed to take action to stop it. In particular, the proof established that in early September 2011 Villella personally witnessed one of the incidents where Inglema inappropriately touched Complainant and did not correct the behavior. Instead, Villella laughed at the situation. Complainant established that Villella had knowledge of the offensive conduct and ignored it. *See Vitale v Rosina Food Products, Inc.*, 283 AD2d 141 (4th Dept. 2001).

After Complainant was forced to leave her employment, Complainant gave Villella another opportunity to address the workplace problems caused by Inglema. Complainant and M. Morinello informed Villella that they wanted to continue working at the Waldorf but were concerned about Inglema's behavior. Villella gave an inadequate and tepid response. Villella claimed that if Complainant and M. Morinello returned, he would monitor Inglema's interaction

with them. Villella gave no indication that he would investigate or look into Complainant's concerns. Villella's response gave no assurances that Inglima's behavior in the workplace would stop. The Waldorf is liable for Inglima's actions. *See Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 752, 118 S. Ct. 2257 (1988).

Inglima's Liability

Inglima is an employer under the Human Rights Law. *Patrowich v. Chemical Bank*, 62 N.Y. 2d 541, 43 N.Y.S. 2d 659 (1984). Inglima had no ownership interest in the Waldorf. However, Inglima had the full authority to do more than carry out decisions made by others. The proof at hearing established that Inglima exercised authority on several essential matters such as hiring, supervising employees, and managing the Waldorf's daily business affairs. As an employer, Inglima is personally liable for his sexually offensive acts under the Human Rights Law.

Lost Wage Damages

Respondents owe Complainant total lost wages in the amount of \$16,160. Due to Respondents discriminatory conduct, Complainant was unemployed for a period of eight weeks following her constructive discharge on October 31, 2011. During the period of unemployment, Complainant would have earned \$3,680. Complainant mitigated her losses by seeking and securing a comparable job position but at a reduced rate of pay during the period of January 1, 2012 to July 1, 2014. During that period of time Complainant earned \$12,480 less than what she would have earned with Respondents.

Respondents are also liable to Complainant for predetermination interest on the back pay award at a rate of nine percent, per annum, from April 11, 2013, a reasonable intermediate date

between October 31, 2011, when lost earnings caused by the sexual harassment commenced, and September 22, 2014, the date of the public hearing, through the date of the Commissioner's Final Order. *Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002). In addition, Respondents are liable to Complainant for interest on the back pay award at a rate of nine percent, per annum, from the date of the Commissioner's Final Order until payment is made.

Mental Anguish Damages

Complainant is entitled to recover compensatory damages caused by Respondents' violation of the Human Rights Law. Human Rights Law § 297.4(c)(iii). The award of compensatory damages may be based solely on a complainant's testimony. 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. N.Y. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991); *Cullen v. Nassau County Civil Service Commission*, 53 N.Y.2d 452, 442 N.Y.S.2d 470 (1981). The severity, frequency, and duration of the conduct may be considered in fashioning an appropriate award. *New York State Dep't of Corr. 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). In 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. *N.Y. State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

Respondents' actions had a markedly negative effect on Complainant. Complainant suffers from PTSD as a result of the workplace sexual harassment. Dr. Trigoboff,

Complainant's mental health expert, testified as to the negative impact of PTSD on Complainant's life. Complainant negatively interprets what anybody does; is distrustful of males and persons in authority; is not dating; not making friends; not interested in having any kind of a social contact with other people; and not engaging in the kind of activity that is usual for a 23-year-old woman.

Based on the evidence in this record, Complainant's PTSD manifested itself from the events that occurred in the workplace, starting in July of 2011, up to the point in time that Dr. Trigoboff last treated Complainant on September 14, 2014. Dr. Trigoboff indicated that Complainant was resistant or unwilling to receive further treatment. Complainant's improvement would only occur after a minimum ongoing treatment period of 14 months. However, it should be noted that although Complainant's reaction to treatment may be typical of an individual with PTSD, Complainant has an affirmative duty to mitigate her losses. The Division's award must reflect Complainant's mental anguish balanced against her duty to mitigate.

Given Respondents' conduct, the degree of Complainant suffering, and the duration of Complainant's suffering, an award of \$65,000 for emotional distress is appropriate and would effectuate the purposes of the Human Rights Law in making Complainant whole. *Gollel v. Village Plaza Family Restaurant, Inc.*, SDHR Case No. 7943080, November 14, 2006, *aff'd*, *N.Y. State Div. of Human Rights (Gollel) v. Village Plaza Family Restaurant, Inc.*, 59 A.D.3d 1038, 872 N.Y.S.2d 815 (4th Dept. 2009) (\$65,000 award based on similar facts to the present case where a female employee suffered comparable pain and suffering consequences. The sexual harassment included verbal harassment and physical touching; Court upheld Commissioner's award), *Tyler v. Ashish, et.al.*, SDHR 10124990 (April 20, 2011) (\$65,500 award based on similar facts to the present case where a female employee suffered comparable

pain and suffering consequences).

Civil Fines and Penalties

A civil fine and penalty of \$20,000 is appropriate in this matter. *See Noe v. N.Y. State Div. of Human Rights (Martin)*, et.al., 101 A.D.3d 1756, 957 N.Y.S.2d 796 (4th Dept. 2012) (Commissioner's penalty of \$20,000 affirmed), *also see Johnston v. N.Y. State Div. of Human Rights, et.al.*, 100 A.D.3d 1354, 953 N.Y.S.2d 757 (4th Dept. 2012), *New York State Div. of Human Rights v. Stennett*, 98 A.D.3d 512, 949 N.Y.S.2d 459 (2d Dept. 2012).

Human Rights Law § 297 (4)(c)(vi) permits 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."

Furthermore, 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; 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).

The goal of deterrence, Respondents' degree of culpability, and the nature and circumstances of Respondents' violation, warrant a penalty. Inglima's repulsive behavior cannot be permitted in any workplace in New York State. Inglima gradually escalated his sexually offensive behavior towards Complainant during the period of her employment. Inglima began with an occasional offensive touch, escalated to daily occurrences of outrageous conduct, and finally ended with physically restraining Complainant in his attempt to prevent her from leaving the work premises. Villella condoned Inglima's offensive sexual behavior. Villella permitted Inglima to foster an oppressive sexual environment where Complainant was expected to perform her duties. Nonetheless, although Respondents' behavior is egregious, the amount of civil fine and penalty is commensurate with economic circumstance of Respondents. The Waldorf is a small business and the fine is in proportion to its ability to pay. The facts in this record also indicate that Inglima would find it a challenge to pay any higher amount dictated by the severity of his actions.

There was no proof that Respondents were adjudged to have committed any previous similar violation of the Human Rights Law or are incapable of paying any penalty.

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 Respondents, their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee in the terms and conditions of employment; and it is further

ORDERED, that Respondents, their agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of the Commissioner's Final Order, Respondents Filippo Inglema and Waldorf Niagara Inc. shall pay to Complainant the sum of \$16,160 as damages for back pay. Interest shall accrue on this award at the rate of nine percent per annum, from April 11, 2013, a reasonable intermediate date between October 31, 2011 and September 22, 2014, until the date payment is actually made by Respondents.
2. Within sixty days of the date of the Commissioner's Final Order, Respondents Filippo Inglema and Waldorf Niagara Inc., shall pay to Complainant the sum of \$65,000 as compensatory damages for mental anguish, humiliation and pain, Complainant suffered as a result of Respondents' unlawful discrimination against her. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondents.
3. The payments shall be made by Respondents Filippo Inglema and Waldorf Niagara Inc., in the form of certified checks, made payable to the order of Jacinta Morinello and delivered by certified mail, return receipt requested, to her attorneys at the Law Office of Lindy Korn, PLLC, at 535 Washington Street, 9th Floor, Buffalo, New York 14203. Copies of the certified checks shall be provided to Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.
4. Within sixty days of the date of the Commissioner's Final Order, Respondents Filippo Inglema and Waldorf Niagara Inc., shall pay to the State of New York the sum of \$20,000 as a civil fine and penalty for their violations of the Human Rights Law. Interest shall accrue on this

award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondents.

5. The payment of the civil fine and penalty shall be made by Respondents Filippo Inghima and Waldorf Niagara Inc., 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, Esq., General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

6. Within sixty days of the Final Order, Respondent Waldorf Niagara Inc. shall establish a policy regarding the prevention of unlawful discrimination. This policy shall include a clear reporting mechanism for all employees in the event of discriminatory behavior or treatment. All employees of Waldorf Niagara, Inc., shall attend a training program in the prevention of unlawful discrimination in accordance with the Human Rights Law. A copy of the policy, the reporting mechanism, and proof of attendance at an anti-discrimination program, shall be provided to Caroline Downey, Esq., General Counsel of the New York State Division of Human Rights, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

7. Respondents Filippo Inghima and Waldorf Niagara Inc. shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained in this Order.

DATED: February 17, 2015
Buffalo, New York

A handwritten signature in cursive script, reading "Martin Erazo, Jr.", written in black ink.

Martin Erazo, Jr.
Administrative Law Judge