

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS
on the Complaint of

KATHERINE BLANCH,

Complainant,

v.

NY RESIDENTIAL WORKS, INC., DUNCAN
RICHARDSON,

Respondents.

NOTICE AND
FINAL ORDER

Case No. 10111827

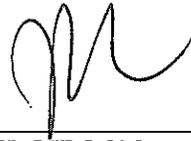
PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on February 28, 2008, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was 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 KUMIKI GIBSON, 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, this 25th day of March, 2008.



KUMIKI GIBSON
COMMISSIONER

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DIVISION OF HUMAN RIGHTS

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on the Complaint of

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RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER

Case No. 10111827

SUMMARY

Complainant alleges that she was sexually harassed by Duncan Richardson while employed by NY Residential Works, Inc. When she complained about the harassment to the owner, she and her complaint were ignored and she lost her employment. As a result, she is entitled to compensation for lost wages and emotional distress owing to the loss of her job and for the harassment she suffered.

PROCEEDINGS IN THE CASE

On May 17, 2006, 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").

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in unlawful discriminatory practices. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on December 20, 2007.

Complainant and Respondents appeared at the hearing. The Division was represented by Robert Alan Meisels. Respondents were represented by Thomas S. Fleishell & Associates, P.C. At the hearing, The Division, by Meisels, moved to amend the Complainant to add Francis Synmoie, Respondent's owner as a Respondent in the case. The Division counsel's motion is granted and the caption is hereby amended to include Francis Synmoie as a Responent. After the hearing, Respondent submitted payroll records showing the number of employees it employed from 2005-20006. Those records have been placed in evidence as Respondent's Exhibit 6.

Permission to file post-hearing proposed findings of facts and conclusions of law was granted. Both Respondent and the Division attorney filed timely submissions.

FINDINGS OF FACT

1. Complainant, a female, was employed by the Residential Works as a tenant services representative in September 2005. (Tr. 11) Her employment was terminated on May 8, 2006, three days after she made a written complaint of sexual harassment to Respondent Synmoie about Respondent Richardson. (Tr. 38)

2. Residential Works is a property management company that manages and develops affordable housing. Respondent Francis Synmoie is the president and sole shareholder. Donna Synmoie, his wife, runs the day to day operations in the office. (Tr. 79-80)

3. Respondent Richardson is a bookkeeper for Residential Works and Respondent Synmoie. (Tr. 140)

4. Residential Works had seven employees on its payroll during 2005. Donna and Francis Synmoie were on the payroll for the entire year, as were Alvin Patterson and Duncan Richardson. Complainant worked from September 21, through the end of the year. Alwin Smith worked for Respondent from July 23 through November 18. Sarina Heyward worked for Respondent from January 31 through September 9. (Respondent's Exhibit 6)

5. In 2005 and 2006, while Complainant worked for Residential Works, there was no sexual harassment policy. (Tr. 107, 116-17)

6. A sexual harassment complaint at Residential Works should be brought to Respondent Synmoie. Residential Works' employees know this because Respondent Synmoie explains it to them "in conversation." Respondent Synmoie never had a conversation about sexual harassment with Complainant, however. (Tr. 119)

7. While she was employed by Residential Works, Complainant sat directly in front of Richardson. (Tr. 141)

8. Richardson, on occasion, would comment about Complainant's relationship with her boyfriend. Complainant said Richardson suggested she was not having sex with her boyfriend often enough. (Tr. 17) Richardson told Complainant that he would make a better companion for her and told Complainant that he was able to satisfy women. He often stared inappropriately at Complainant's buttocks. (Tr. 18-20)

9. Richards claims he only told Complainant she may not be "treating him well." (Tr. 147) Richardson stated that when he suggested that Complainant was not treating her boyfriend well, it was "a general comment" and that "nothing specific was going through [his] mind" when he made the comment. (Tr. 159)

10. Richardson indicated to Complainant that he would be better to her and often commented on the color of Complainant's underwear. He often overheard phone conversations Complainant had with her boyfriend and commented on those conversations. The comments were ongoing, continuous and unwelcome. (Tr. 17-18, 23)

11. Richardson denied Complainant's allegations and asserted that the office was too small for him to have made these comments without being heard by others. (Tr. 149, 160) He also stated, however, that he heard Complainant using her cell phone for personal calls often. (Tr. 152)

12. On Friday, May 5, 2006, Complainant sent a letter to Respondent Synmoie complaining about Richardson's behavior. She said in the letter that Richardson was a "pervert" and stated that she did not want to be alone in the office with Richardson. (Complainant's Exhibit 1)

13. Respondent Synmoie called Complainant on her cell phone after she left work on May 5, 2006 and asked what she meant when she said Richardson was a pervert. Complainant explained that Richardson looked at her "in certain ways" and said inappropriate things. Respondent Synmoie then told her he would look into the complaint and get back to her. Respondent Synmoie was scheduled to be out of town the following week because his mother was ill. (Tr. 28-30)

14. Complainant appeared for work on Monday, May 8, 2006. That afternoon, at about 3:00, Brian Synmoie, Respondent's son, told Complainant to take the rest of the week off until Respondent Synmoie returned to the office. (Tr. 62)

15. On Monday, March 15, 2006, Complainant called and spoke to Respondent Synmoie, who told Complainant he was busy and that he would call her back. Respondent Synmoie never called back and Complainant never returned to work for Respondent. Complainant had also

called Donna Synmoie on March 14 and left a message. That call was not returned either. (Tr. 65)

16. Respondent Synmoie was “blown away” by the complaint and “didn’t know what to do.” (Tr. 96) But, even though he “desperately wanted to talk to” Complainant, he “forgot to call her back,” because he “was busy” and he “overlooked it.” (Tr. 96, 123)

17. Respondent Synmoie never investigated Complainant’s allegations and never confronted Richardson with the charges. (Tr. 103, 124) Richardson, however, claims to have been shown Complainant’s letter sometime between May 10 and May 15, 2006, by Respondent Synmoie. (Tr. 153)

18. The comments made by Richardson to Complainant made Complainant feel “uncomfortable” and “degraded.” She felt they were “disrespectful.” The feelings persisted during her entire tenure with Respondent and thereafter. (Tr. 43)

19. After Respondent Synmoie failed to return her call, Complainant assumed she was fired. (Tr. 65-66) Respondent denied Complainant was terminated at all. Respondent Synmoie said it was never his intention to fire Complainant, but he just forgot to call her. (Tr. 104)

20. After her employment with Residential Works ceased, Complainant received Unemployment Insurance Benefits, then took a night job at K-Mart. She remained there until September 21, 2006, when she found a new job paying a salary that was comparable to the wage she earned from Respondent. Her total wage loss from losing her job with Respondents was \$4060.00. (Complainant’s Exhibits 2-4; Tr. 42-43)

21. As a result of losing her job, Complainant felt stress from not having an adequate income to provide for herself and her children. (Tr. 48)

OPINION AND DECISION

Respondent has argued that the Division does not have jurisdiction over it, because it does not have four employees. Under Human Rights Law § 292.5, an employer must have four or more employees in order to be subject to the Division's jurisdiction. In 2005, Respondent had four employees from July 23, through November 18, plus Francis and Donna Synmoie, who were listed as employees on Respondent's payroll records. The employment of these individuals, including Complainant, continued through a reasonably definite period of time and was not casual. *See, Adams v. Ross*, 230 A.D. 216, 243 N.Y.S. 464, 467 (3rd Dept. 1930) (which construed a provision of New York State Worker's Compensation Law with respect to the duration of the term "four or more employees.") As a result, the Division will take jurisdiction over this matter.

In order to prevail on a charge of sex discrimination by reason of harassment creating a hostile work environment, Complainant bears the burden of establishing that (1) she belongs to a protected group, (2) she was the subject of unwelcome harassment, (3) the harassment was based on her status as a member of a protected group, (4) the harassment affected a term, condition or privilege of employment and (5) the employer knew or should have known of the harassment and failed to take remedial action. *Pace v. Ogden Services Corporation et al.*, 257 A.D.2d 101, 103, 692 N.Y.S. 220, 223 (3rd Dept., 1999). In addition, the Complainant must show that the totality of the circumstances constitutes harassment in the mind of both the victim and a reasonable person. *Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. to app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

With respect to her claim of retaliation, Complainant must make out a prima facie case by showing that (1) she engaged in activity protected by Executive Law § 296, (2) Respondent was aware that she participated in the protected activity, (3) she suffered from a disadvantageous employment action after her activity, and (4) there is a causal connection between the protected activity and the adverse action taken by Respondent. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101; 692 N.Y.S.2d 220 (3rd Dept. 1999), citing *Dortz v. City of New York*, 904 F Supp 127, 156 (S.D.N.Y., 1995).

Complainant in the instant case has established that she was sexually harassed by Richardson and that she can make out a prima facie case for retaliation for having filed an internal complaint of harassment. Richardson's comments were offensive, pervasive and unwelcome. Respondent Synmoie did not tell Complainant how she should make harassment complaints and, therefore, Complainant had no avenue to end the harassment. When Complainant did complain, no effort was made to investigate the Charges. See, *Father Belle* at 747, and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Instead, Complainant was stonewalled until the Respondents' problem went away.

Respondent Synmoie countered that he did not intend to dismiss Complainant, but the reasoning lacks credibility. Respondent Synmoie and Richardson have conflicting stories and the idea that Respondent Synmoie "forgot" to call Complainant, even though he "desperately wanted to talk to her" is simply not believable.

As a result of her unlawful termination, Complainant suffered damages in the form of lost wages totaling \$4,060.00. She is entitled to that be compensated for that amount. No deductions or withholdings should be made from these back wages. *Bell v. NYS Division of Human Rights*, 36 A.D.2d 1129 (3rd Dept., 2007). Complainant is entitled to pre-determination interest on the

back wage award at a rate of 9 per cent per annum, from July 15, 2006, 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. Dairy Farmers of America, Inc.*, 53 F.Supp.2d 194, 197 (N.D.N.Y. 1999).

Complainant testified to the emotional impact on her as a result of Respondents' conduct. Complainant described feelings of discomfort, degradation and disrespect. An award of \$35,000.00 for mental anguish is consistent with prior awards for unlawful harassment and will fulfill the purposes of the Human Rights Law. *New York State Department of Correctional Services v. New York State Division of Human Rights*, 225 A.D. 2d 856, 859; 638 N.Y.S.2d 827 (3rd Dept. 1996).

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 shall take the following actions to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this order:

1. Within sixty days of the date of the Commissioner's Final Order, Respondent Synmoie and NY Residential Works, Inc., shall establish policies regarding the prevention of unlawful discrimination. These policies shall include an official anti-discrimination and sexual harassment 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.

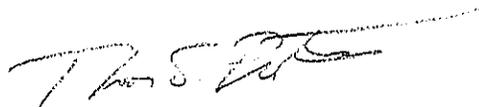
2. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant \$35,000 as compensatory damages due to her emotional distress. Payment shall be made in the form of a certified check made payable to Complainant, Katherine Blanch, and delivered to her at 2333 Creston Avenue, Apartment 2B, Bronx, NY 10468, 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 annum.

3. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant \$4,060 as back wages. Payment shall be made in the form of a certified check made payable to Complainant, Katherine Blanch, and delivered to her at 2333 Creston Avenue, Apartment 2B, Bronx, NY 10468, by certified mail, return receipt requested. Interest on the award shall accrue from July 16, 2006 until the date payment is made at a rate of nine percent per annum.

4. 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.

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

DATED: February 26, 2008
Bronx, New York

A handwritten signature in black ink, appearing to read 'T. S. Protano', with a long horizontal flourish extending to the right.

Thomas S. Protano
Administrative Law Judge