NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

TIMOTHY M. BRADY,
Complainant,

v.

ROCHESTER JUNK AND SCRAP, INC.,
Respondent.

NOTICE AND FINAL ORDER

Case No. 10112480

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 November 7, 2007, by Martin Erazo, Jr., 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 29th day of November, 2007.

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KUMIKI GIBSON
COMMISSIONER

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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10112480**

SUMMARY

Complainant alleged that Respondent's owner, Robert Sarfaty ("Sarfaty"), subjected him to sexual harassment by inappropriately touching him during a period of approximately two years. Complainant alleged that Respondent terminated his employment in retaliation for having complained about the sexual harassment. Complainant failed to sustain his burden.

PROCEEDINGS IN THE CASE

On July 20, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent 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 Respondent had engaged in an unlawful discriminatory practice. 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. A public hearing session was held on August 1, 2007.

Complainant and Respondent appeared at the hearing. The Division was represented by former Deputy Commissioner for Enforcement, Joshua Zinner, Richard J. Van Coevering of Counsel. Respondent was represented by Paul J. Vacca, Esq..

Permission to file post-hearing briefs was granted.

FINDINGS OF FACT

Parties

1. Complainant became employed by Respondent as a mechanic in September 2003. (ALJ Exhibit 2; Tr. 17, 34)

2. Safarty is Respondent's owner and operator. (Tr. 74)

Complainant's Allegations

3. Complainant alleged that Safarty inappropriately touched him from March 2003 until August 2005. (Tr. 34) Safarty allegedly grabbed Complainant's rear end and genitals on a weekly or biweekly basis. (Tr. 16-8)

4. Complainant also alleged that Respondent terminated his employment on August 3, 2005 in retaliation for threatening to file a sexual harassment complaint. (ALJ Exhibit 1; Tr. 20, 22)

5. Respondent denied unlawful discrimination. (ALJ Exhibit 2)

Complainant's Work Environment

6. Respondent's shop had approximately 14 employees working with various vehicles at any given time. (Tr. 19)

7. Complainant testified that, at any point in time, four or five employees worked in Complainant's immediate area. (Tr. 19)

8. Complainant testified that no one ever saw Safarty engage in the alleged offensive behavior. Complainant testified that he never told anyone about Safarty's alleged offensive behavior. (Tr. 18-9)

9. None of Respondent's former or current employees saw Safarty act inappropriately towards Complainant. (Tr. 64-5, 68-9,83-4, 88-9)

10. Henry Lewis ("Lewis"), Respondent's former employee, testified that he worked closely with Complainant on a daily basis throughout Complainant's employment. (Tr. 59, 62) Lewis never saw Safarty inappropriately interact or touch Complainant. (Tr. 64-5)

Complainant's Dismissal

11. Complainant admitted that he did "not recall" threatening Safarty with a sexual harassment claim. (Tr. 22)

12. Complainant admitted that Safarty dismissed him because Complainant damaged very expensive stainless steel rods needed for the repair of a tow truck. (Tr. 23-4)

13. Safarty simultaneously fired Lewis because of the same damage done to Respondent's stainless steel rods. (Tr. 24)

14. Lewis admitted that both Complainant's and Lewis' dismissal was justified because of the damage done to Respondent's property. (Tr. 59)

15. Lewis observed Complainant's dismissal. Complainant did not threaten to file a sexual harassment complaint. (Tr. 64)

Complainant's Business Dealings

16. Complainant was involved with Safarty in real estate business dealings, unrelated to Complainant's employment. (Tr. 42)

17. Complainant admitted that he did not have any problems with Safarty until Complainant's business relationship with Safarty soured in May 2006. (Tr. 44-5)

18. After the business dealings soured, Complainant filed the July 2006 Division complaint as well as other claims and charges with other forums. (Tr. 46)

OPINION AND DECISION

Respondent did not unlawfully discriminate against Complainant on the basis of gender. Complainant failed to prove that he was sexually harassed. Complainant also failed to show that he was dismissed in retaliation for having complained about sexual harassment.

Under the 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." One form of unlawful discrimination occurs when an employee is subjected to a hostile work environment because of that person's gender.

A complainant may establish a hostile environment violation by proving that the discrimination was sufficiently severe or pervasive to alter the conditions of the victim's employment and create a hostile or abusive working environment.

A complainant must subjectively view the conduct that creates a hostile environment as unwelcome. In addition, a reasonable person must objectively view the conduct as severe and pervasive enough to create an abusive environment. *Father Belle Community Ctr. v. N.Y. State Div. of Human Rights***,** 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept. 1996), *lv. denied* 89 N.Y.2d 809, 716 N.Y.S.2d 533 (1997)

Complainant failed to establish that Safarty engaged in the alleged offensive conduct. Complainant's testimony was not credible. Complainant alleged that Safarty repeatedly touched him in an inappropriate manner during a period of nearly two years. Complainant worked in a crowded work environment. Complainant worked in close quarters with several employees

during that time period. None of those former or current employees saw the alleged behavior. Complainant complained to no one about the alleged conduct. Most importantly, Complainant testified that he had business dealings with Safarty outside the workplace. Complainant clearly admitted that he had no problems with Safarty until the business dealings soured in May 2006, nine months after Complainant was fired. Complainant filed the Division complaint in July 2006.

Complainant alleged that Safarty unlawfully retaliated, by dismissing him on August 3, 2005, after Complainant allegedly threatened to file a sexual harassment complaint. Human Rights Law §296.1(a) states in pertinent part that "it shall be an unlawful discriminatory practice…for an employer…to…otherwise discriminate against any person because …he has opposed any practices forbidden under this article or because …he has filed a complaint, testified or assisted in any proceeding under this article."

In order to establish a prima facie case of retaliation, Complainant must show that he engaged in protected activity, that Respondent was aware that he had engaged in the protected activity, that Complainant suffered an adverse employment action, and that there is a casual connection between Complainant's engagement in the protected activity and his adverse treatment by Respondent. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 104, 692 N.Y.S.2d 220, 223-24 (3rd Dept. 1999)

Complainant failed to establish a prima facie case of retaliation. The credible evidence established that Complainant did not threaten to file a sexual harassment complaint. Lewis, who was fired along with Complainant, did not observe Safarty touch Complainant. Lewis did not hear Complainant threaten to file a sexual harassment complaint. Complainant clearly admitted that he did "not recall" if he threatened to file a sexual harassment complaint. Most importantly,

Complainant admitted that Respondent fired him for damaging expensive product. There is absolutely no evidence to support that Complainant engaged in protected activity or that any connection exists between the alleged protected activity and the adverse employment action.

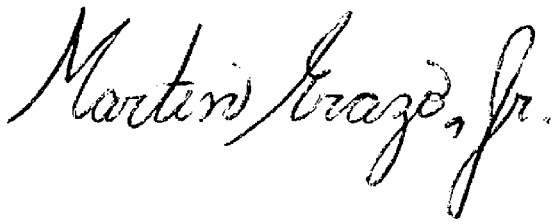
ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that the case be dismissed.

DATED: November 7, 2007

Buffalo, New York



Martin Erazo, Jr.
Administrative Law Judge