

**STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS**

STATE DIVISION OF HUMAN RIGHTS

On the complaint of

ANGELA M. BRANCATI,

Complainant,

-against-

**ABS ELECTRONICS, INC., STEVEN
FIELMAN, MANAGER, as Aider and
Abettor,**

Respondents.

**NOTICE OF ORDER AFTER
HEARING**

Case No:

9S-E-S-00-7942696

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by the Hon. Edward A. Friedland, Executive Deputy Commissioner of the State Division of Human Rights, after a hearing held before Administrative Law Judge Lilliana Estrella-Castillo. 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, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

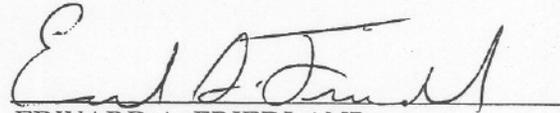
PLEASE ALSO TAKE NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice which is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or 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 days after service of this Order. The Petition and Notice of Petition must also be served on all parties, including the Division of Human Rights.

PLEASE TAKE FURTHER NOTICE that a complainant who seeks state judicial review, and who receives an adverse decision therein, may lose his or her right to proceed subsequently under federal law, by virtue of Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982).

DATED: 1/22/07

BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS



EDWARD A. FRIEDLAND
Executive Deputy Commissioner

To:

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Attention Steven Fielman, Manager

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**STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS**

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On The Complaint Of**

ANGELA BRANCATI,

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PROCEEDINGS IN THE CASE

On December 27, 2000, Complainant filed a verified complaint with the State Division of Human Rights (Division) charging Respondents with an unlawful discriminatory practice in violation of the Human Rights Law of the State of New York.

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

After due notice, the case came on for hearing before Lilliana Estrella-Castillo, an Administrative Law Judge (ALJ) of the Division.

A preliminary conference was held on June 16, 2004. Complainant appeared at the preliminary conference. Respondent Steven Fielman appeared pro se and advised that he is not a principal of ABS. (Tr. 4). Respondent ABS Electronics, Inc. did not appear.

The complaint was represented by the Division through Bellew McManus, Division Counsel.

During the preliminary conference, the hearing was scheduled for October 19, 2004. Fielman was advised during the preliminary conference and by mail dated June 16, 2004, that: (1) he and Respondent ABS Electronics, Inc. were in default since they had not filed an answer to the complaint; (2) while he could appear pro se he was encouraged to retain an attorney to represent his interests; and (3) the corporation could only appear by an attorney and one should be retained prior to the hearing date. Respondents failed to comply with the directives given at the preliminary conference.

The hearing in October of 2004 was adjourned. (ALJ Exhibit VII). The hearing was re-scheduled to February 1, 2005, and a new Notice of Hearing was mailed to the parties. None were returned as undeliverable. (Tr. 5). On February 1, 2005, the hearing was adjourned to May 2, 2005. (Tr. 4-5).

The Calendar Unit was instructed to send out new notices to all parties advising them of the hearing dates. (Tr. 5). The notices sent to Respondents were not returned, and a search revealed that they were still conducting business out of the same address. (ALJ Exhibits IV, VI, VII, VIII, IX; Tr. 4-5).

A public hearing was held on May 2, 2005. Complainant appeared at the hearing. The complaint was represented by the Division through Bellew McManus, Division Counsel. Respondents did not appear at the hearing and are in default. (Tr. 6).

During the public hearing, the Division requested that the caption in the complaint be amended to correctly reflect Fielman's position in the corporation. Fielman was not an officer of the corporation or the president. Fielman was the manager. The Division's

request was granted, and the caption is hereby corrected to reflect Fielman's position with Respondent ABS Electronics, Inc. (Tr. 8).

On June 26, 2006, a recommended Findings of Fact, Opinion, Decision and Order (Recommended Order) was issued. No objections to the Recommended Order were received by the Order Preparation Unit.

FINDINGS OF FACT

1. Complainant, a female, alleged that she was subjected to a hostile work environment based on her sex while employed by Respondents and then terminated when she rebuffed Fielman's sexual advances. Respondents did not appear at the hearing and are in default. (ALJ Exhibit I; Tr. 4-13, 25).

2. Complainant was interviewed and hired as a sales representative on January 3, 2000, by Respondent ABS Electronics, Inc. through its manager, Fielman. (Tr. 20-21).

3. Fielman told Complainant and everyone in the office that he was the president of the company and ran the company. Complainant believed him because he did the hiring. (Tr. 21).

4. Complainant was hired at a weekly salary of \$425.00. Complainant's salary was later increased to \$450.00 per week. (Tr. 21).

5. Complainant's duty as a sales representative was to assist customers on the telephone when they called inquiring about electronic parts. (Tr. 24). Complainant then located and re-sold the part to the customer at a profit. (Tr. 25).

6. Complainant worked in an office with other female employees. (Tr. 19, 23). They were all located in an open office area with desks. (Tr. 24).

7. Complainant's work environment was made "unbearable" by Fielman because all he talked about was sex. (Tr. 25). Shortly after Complainant was employed by

Respondents, Fielman asked Complainant to go to the bank with him. During this trip, he insinuated that they have sex by leaning over to her in the car and saying, "we could take a couple of hours." (Tr. 28). Complainant told Fielman that he was scaring her. (Tr. 29). Fielman then started to brush up against her when he would pass by her on an almost daily basis. (Tr. 30). When he did so, he made statements such as, "we have an hour," insinuating that they could go out and have sex. (Tr. 26, 31). Complainant rebuffed him by saying that she had work to do. (Tr. 26). Fielman called Complainant "Hot Stuff" in front of everyone in the office. (Tr. 28). He commented about his wife by saying that, "he was getting too big for his wife." (Tr. 30). He asked Complainant about her sex life. (Tr. 33). Complainant found Fielman's behavior and comments "offensive," "disgusting" and "unprofessional." (Tr. 28, 30, 33).

8. Fielman also offended Complainant by telling her that her daughters, ages sixteen, fourteen and twelve, were having sex. (Tr. 26, 32). Fielman told a story in which a girl gave her brother a "blow job" every morning before they left for school. When Complainant objected to the story, Fielman asked her whether it was "too close to home." (Tr. 26). When Complainant told him that the story was disgusting and she did not want to hear it, he became very angry with Complainant. (Tr. 26).

9. Complainant found it very difficult to work in Respondents' environment because, as a sales person, she needed to have a positive attitude and be cheerful and bright. It became difficult for Complainant to be cheerful and bright because she was crying at home and during her lunch hour every day. (Tr. 33-34). It became very hard for Complainant to get up in the morning to go to work because Fielman made it so

unbearable. (Tr. 33-34). Fielman made work unbearable with his daily sex talks and his chauvinistic attitude towards women. (Tr. 34).

10. Complainant remained in Respondents' employment because she needed the income. When she became employed by Respondents, she did not own a home and was a single mother of three who did not receive child support. She needed to support her family. (Tr. 36). However, on November 29, 2000, Complainant could not tolerate Fielman's comments any longer. She told Fielman that she "did not want to hear it any more." (Tr. 34-35). Fielman became angry and responded by telling Complainant to pack her "stuff and take your kids' pictures and leave." (Tr. 35). Complainant did as she was told and left. (Tr. 35). Complainant was "very, very depressed after I left there and very upset and my self esteem was low..." (Tr. 36).

11. Complainant testified about the impact that Fielman's conduct has had in her life. (Tr. 36). Working in this environment has had an adverse impact on Complainant's life and relationships because it affected her self esteem. (Tr. 43). Although at the time of the public hearing, it had been five years since Complainant's experience with Respondents, she was still bothered by it, stating that having to re-live it was very "draining." (Tr. 43).

12. Complainant was out of work for five months. During that period, Complainant collected unemployment insurance in the amount of \$4,862.00. (Tr. 35, 38, 42). Complainant became employed in May of 2001 by Ambassador Electronics at a salary of \$500.00 per week, plus health benefits. (Tr. 35, 37-38). By 2002, Complainant was earning \$40,000 per year with Ambassador Electronics. (Tr. 37, 43). Complainant left Ambassador Electronics in late 2003 to work for Classic Components. (Tr. 43).

DECISION AND OPINION

Respondents failed to answer the complaint and did not appear at the hearing. Respondents are therefore in default. The hearing proceeded without Respondents as an inquest, pursuant to Executive Law, Article 15, §297(4)(b) and 9 NYCRR §465.12(b)(3). See Goldsmith v. New York Psychoanalytic Institute, 73 A.D.2d 16, 425 N.Y.S.2d 561 (1980).

Complainant alleged that Respondents unlawfully discriminated against her based on sex by subjecting her to a hostile work environment and terminating her employment in violation of the Human Rights Law. The Division finds that Respondents did discriminate against Complainant because of her sex in violation of the Human Rights Law.

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual because of her sex. Human Rights Law §296.1(a). In the instant case, Complainant has demonstrated that the hostile work environment and discharge from employment were the result of Respondents' discrimination against her on the basis of sex.

Hostile Work Environment

In a claim of hostile work environment harassment, Complainant must produce evidence that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is sufficiently severe or pervasive to alter the conditions of the victim's employment." Whether a workplace may be viewed as hostile or abusive, from both a reasonable person's standpoint as well as from the victim's subjective perspective, can be determined only by considering the totality of the circumstances. Father Belle Community Ctr. v. New York State Div. of Human Rights, 221 A.D.2d 44, 642 N.Y.S.2d 739 (4th Dept.

1996), appeal denied, 647 N.Y.S.2d 652 (4th Dept. 1996), lv. denied, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant has proven the elements of a prima facie hostile work environment case. She is a member of a protected class. The conduct and words upon which her claim is based were unwelcome and prompted because of her sex. She described conduct in the workplace which is sufficiently frequent, pervasive and severe to create a hostile work environment. Complainant credibly testified that Fielman constantly engaged in vulgar and sexual conversations. Fielman implied that Complainant should have sex with him and brushed up against her body on an almost daily basis. Complainant was offended and disgusted by Fielman's comments and behavior and found it very difficult to do her job in that environment. Complainant's work conditions were altered because of the hostile work environment. She had to appear cheerful and pleasant on the telephone with customers while struggling against Fielman and his unwelcome sexual advances. The comments and physical touching occurred almost daily from the time Complainant's employment began in January of 2000 until the time that Fielman terminated her. Complainant has, therefore, made out a prima facie case of sex discrimination for hostile work environment.

Once Complainant has established a prima facie case of unlawful discrimination, the burden of proof requires Respondent to articulate a legitimate, non-discriminatory reason for its actions. Ferrante v. American Lung Association, 90 N.Y.2d 623, 655 N.Y.S.2d 25 (1997). Respondents here have failed to demonstrate legitimate business reasons for their actions. Therefore, the Division finds that Complainant was subjected to a hostile work environment because of her sex in violation of the Human Rights Law.

Respondent ABS is liable to Complainant for the sexual harassment by Fielman. At the time of the sexual harassment, Fielman was Respondent ABS's manager. He had the power to hire and terminate employees, as evidenced by his actions with respect to Complainant's employment. Fielman was also the principal actor of Complainant's sexual harassment complaint. As a result, Fielman is also liable to Complainant as an aider and abettor of the sexual harassment experienced by Complainant. Tomka v. Seiler Corp., 66 F.3d. 1295, 1317 (2d Cir. 1995). In Tomka, the court held that, "an individual who actually participates in the conduct giving rise to a discrimination claim may be held personally liable under the [Human Rights Law]."

Complainant is entitled to the salary that she would have earned, but for Respondents' unlawful discrimination. At the time that Complainant was unlawfully terminated by Respondents, she was earning \$450.00 per week. She was out of work for five months. Therefore, she would have earned \$10,125.00 from December of 2000 through April of 2001. During the same time period, she collected unemployment insurance benefits in the amount of \$4,862.00. Complainant is therefore entitled to \$5,263.00 as a back pay award. This represents the difference between what Complainant would have earned and what she received from unemployment insurance benefits over that time period. Therefore, Complainant is owed \$5263.00 in back wages and is hereby awarded that amount. Complainant is not entitled to back pay after she became employed by Ambassador Electronics because she was earning a higher salary than she 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 December of 2003, a reasonable

intermediate date, through the date of this Order. Aurrecchione v. New York State Div. of Human Rights, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002). Furthermore, Respondents are liable to Complainant for interest on the back pay award at a rate of nine percent per annum from the date of this Order until payment is made.

Complainant is also entitled to compensatory damages for the sexual harassment and unlawful termination. Regarding the harassment, which occurred over the course of approximately one year, Complainant testified that she found Fielman's behavior and comments to be "offensive," "disgusting" and "unprofessional." She further testified that it became very hard for her to get up in the morning to go to work because Fielman made it so "unbearable." Complainant testified that, as a result of the termination, she felt very depressed and her self-esteem was low. Complainant further testified that she had not been able to put this matter behind her and was still bothered by what happened to her. An award of \$50,000.00 will effectuate the purpose of the Human Rights Law. Gleason v. Callanan Industries, Inc., 203 A.D.2d 750, 610 N.Y.S.2d 671 (3rd Dept. 1994).

ORDER

Based on the foregoing Findings of Fact, Decision and Opinion, and pursuant to the provisions of the Human Rights Law, it is

ORDERED that Respondents, their agents, representatives, employees, successors and assigns shall cease and desist from discriminating in violation of the Human Rights Law; and it is further

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

1. Within thirty days of the date of this Order, Respondents shall pay to Complainant the sum of \$5,263.00, as back wages. Complainant is entitled to pre-determination interest at the rate of 9% per annum from December of 2003, a reasonable intermediate date, through the date of this Order. Complainant is also entitled to interest at the rate of 9% per annum from the date of this Order until this payment is made to Complainant.

2. Within thirty days of the date of this Order, Respondents shall also pay to Complainant the sum of \$50,000.00 without any withholding or deductions, as compensatory damages for mental anguish and humiliation suffered by Complainant as a result of Respondents' unlawful discrimination. Complainant is entitled to interest at the rate of 9% per annum from the date of this Order until this payment is made to Complainant.

3. The aforesaid payments shall be made by Respondents in the form of two certified checks made payable to the order of Complainant and delivered by registered mail, Return Receipt Requested, with copies to Caroline Downey, Acting General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Respondent ABS shall transmit a memorandum to its employees, agents and officers notifying them that it has a policy of non-discrimination based on sex. Respondent ABS shall also provide formal training to all personnel about sexual harassment policies and procedures as well as the laws prohibiting discrimination in employment.

5. Respondent ABS shall also transmit a memorandum to its employees, agents and officers notifying them that retaliation for filing a complaint or testifying or assisting in any proceeding under the Human Rights Law is forbidden.

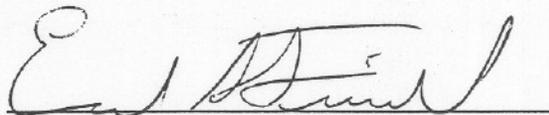
6. Respondent ABS shall post a copy of this order in a prominent location at its facilities.

7. Respondents shall furnish written proof of their compliance with the directives herein contained, and shall cooperate with representatives of the General Counsel and the Division during any investigation into the compliance with the directives of this Order.

DATED: 11/22/07

BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS



EDWARD A. FRIEDLAND
Executive Deputy Commissioner