ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION OF HUMAN RIGHTS
on the Complaint of

DEBORAH M. BRIDGES,
Complainant,

v.

KK RESTAURANTS, LLC, KASHIKA MANAGEMENT, LLC, JENNIFER HAMMELL, OFFICE MANAGER; AS AIDER & ABETTOR,
Respondents.

NOTICE AND FINAL ORDER

Case No. 10152343

Federal Charge No. 16GB200975

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 30, 2012, by Michael T. Groben, an Administrative Law Judge of the New York State Division of Human Rights ("Division"). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One

Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: 1/14/2013
Bronx, New York

Galen D. Kirkland
GALEN D. KIRKLAND
COMMISSIONER

ANDREW M. CUOMO
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RECOMMENDED FINDINGS OF FACT, OPINION AND DECISION, AND ORDER

Case No. **10152343**

SUMMARY

Complainant alleges that she was subjected to unlawful discrimination in the form of sexual harassment in the workplace. Respondents denied the allegations. Complainant has failed to sustain her burden of proof, and the complaint is dismissed.

PROCEEDINGS IN THE CASE

On December 15, 2011, 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 Michael T. Groben, an Administrative Law Judge ("ALJ") of the Division. The public hearing session was held on June 27, 2012.

Complainant and Respondents appeared at the hearing. Complainant was represented by Duke, Holtzman, Photiadis & Gresens LLP, by Elizabeth A. Kraengel, Esq., of counsel. Respondents were represented by Justin S. White, Esq.

At the hearing, the parties requested permission to file post-hearing affidavits regarding the issue of spoliation of evidence by Respondents. Permission was granted, and both parties filed affidavits, which were received in evidence as Complainant's Exhibit 5 and Respondents' Exhibit 2.

Permission to file post-hearing briefs was granted. The date by which said briefs were to be filed and exchanged was extended at the request of Complainant, to September 13, 2012. Complainant timely filed proposed findings of fact and conclusions of law. Respondents filed their proposed findings of fact and conclusions of law several days after the date set by ALJ Groben, and Respondents' submission was rejected as untimely.

FINDINGS OF FACT

1. Bharat Aggarwal and Renu Aggarwal ("the Aggarwals") are husband and wife. In February 2010, the Aggarwals purchased a number of operating Subway restaurant franchises in

western New York. Together, they own Respondents KK Restaurants, LLC and Kashika Management, LLC, which operate said franchises. (Tr. 148-49, 150-51, 153, 206)[1]

2. The Aggarwals live in Texas. They travel to western New York several times each month to oversee the operation of their Subway restaurants. (Tr. 164)

3. Prior to Respondents' acquisition of the Subway restaurants, Complainant worked as an area manager for several of those restaurants in the Rochester area. (Tr. 17-19, 73-74) Respondents maintained Complainant in that position when they acquired the restaurants. (Tr. 19-20, 77-78, 105-06, 153-54)

4. Complainant's duties as area manager included enforcing company policy, ordering supplies, and hiring and overseeing the performance of the location managers for each of the individual restaurants under her authority. (Tr. 78, 138, 154-56, 206-07)

5. At the time Respondents acquired the Subway restaurants, Michael Lewkowitz ("Lewkowitz") was Complainant's supervisor. Respondents maintained him in that position until September 2011, when he left Respondents' employ. (Tr. 73-74, 138, 155-56, 161, 207)

6. Since 2010, Arlinda Fleck ("Fleck") had worked as an area supervisor of a number of Respondents' Subway restaurants in western New York. She reported to Lewkowitz. (Tr. 136)

7. When Lewkowitz left, the Aggarwals appointed Fleck as district manager for the Rochester and Buffalo area. (Tr. 136, 207) Her responsibilities included the supervision of four of Respondents' area managers, including Complainant. (Tr. 99, 135-38, 207)

8. Approximately one week after Lewkowitz left, the Aggarwals met with Complainant at Respondents' office located at Transit Road, Buffalo, and advised Complainant that they, together with Fleck, would supervise her. (Tr. 157, 160-64)

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[1] KK Restaurants, LLC is also referred to in the transcript as "KK Inc." and "KK Sub." (Tr. 122, 135)

9. Since 2010, Respondent Jennifer Hammel ("Hammel") has been Respondents' office manager for the Buffalo office. Her responsibilities include billing, posting advertisements, interviewing prospective employees, ordering supplies, and performing data entry for the various Subway locations. (Tr. 139-41, 151-52, 166, 176-78, 194, 220)

10. Hammel also acts as a liaison to Respondents' Human Resources personnel, located at Respondents' Houston, Texas, office. (Tr. 143-44, 165-66, 194-95)

11. Prior to September 2011, Hammel reported to Lewkowitz. (Tr. 179-80) After Lewkowitz left, she reported to the Aggarwals. (Tr. 157, 179, 190)

12. Respondents maintain a corporate policy which forbids sexual harassment. (Complainant's Exhibit 1 ["B"]; Tr. 48-52, 56-60, 199-200).

13. Both Complainant and Hammell owned cell phones, which they used for both personal and business purposes. Respondents reimbursed them for business use of their cell phones in the amount of approximately $50 per month. (Complainant's Exhibit 2; Tr. 22-23, 24-30, 83, 85, 164-65, 167, 189)

14. In August 2011, Hammel began sending objectionable text messages to Complainant's cell phone, both during and after work hours. (Tr. 36-38, 68, 91-92, 224) These text messages included photographs, such as a picture of an unclothed obese woman with text reading "Who the fuck wears tennis shoes to the shootin range" (*sic*), a nude woman with one leg, a man's penis, a deformed nude man, and other illustrations that were either risqué or in poor taste. (Complainant's Exhibit 3; Tr. 30-37)

15. Hammel received these text messages from friends, and re-sent them to Complainant and other acquaintances, believing that they were amusing. (Tr. 181-84, 195-98)

16. Complainant complained to her husband and one of her co-workers about the text messages. (Tr. 38-39, 40-42, 111-18, 121-30)

17. Complainant communicated regularly with Hammel, both by telephone and during individual, in-person meetings. Complainant never asked Hammel to stop sending the messages or otherwise complained to her about them. (Tr. 21-22, 37, 92, 94, 186-90, 195)

18. Complainant testified that she did not complain to Hammel because believed that Hammel was her supervisor, with the power to hire and fire employees, and that Hammel would fire her if she complained. (Tr. 20-22, 40, 46, 80, 106)

19. Hammel was not Complainant's supervisor, and did not have the power to fire Complainant. Respondents did not direct Complainant to report to Hammel. (Tr. 70-73, 78-79, 141, 156, 165-66, 180, 190-93, 207)

20. Complainant never complained to Fleck regarding the text messages (Tr. 141)

21. Complainant met with the Aggarwals on at least two occasions after Lewkowitz left Respondent's employ, and after she had begun receiving the text messages from Hammel. Complainant did not mention the text messages to the Aggarwals on either occasion. (Tr. 108, 207-08, 208-14, 218-19, 221-22, 224-26)

22. On November 3, 2011 Complainant sent an e-mail to Renu Aggarwal stating that she was confused, and requesting guidance as to whether Hammel, Fleck, Renu Aggarwal, Bharat Aggarwal, "or all" was her superior. Renu Aggarwal then agreed to a Skype video conference with Complainant, and later that same day Complainant again e-mailed her, stating "I just feel uncomfortable about some things. I will tell u when we skype." (*sic*) (Complainant's Exhibit 4; Tr. 43-46)

23. On November 3, 2011, Complainant and the Aggarwals conferenced via Skype. Complainant attended the November 3 Skype conference in a back room at one of Respondents' Subway restaurant locations. That room was equipped with a video surveillance camera, which would record the activities of a person within the room. The surveillance camera did not record sound. (Tr. 61-62, 101, 126-27)

24. During the November 3, 2011 Skype conference, Complainant and the Aggarwals discussed who Complainant should report to. Complainant expressed concern about this issue because, after Lewkowitz left, she had been directed to have restaurant repair costs reviewed by Hammel. Complainant wanted more direct control over this function. The Aggarwals directed Complainant to report to them, or to Fleck. (Tr. 158-60, 169-72, 173-74, 214-15)

25. Complainant testified that she had requested the November 3, 2011, Skype conference in order to determine who in Respondents' organization she should complain to regarding the text messages. Complainant further testified that during that Skype conference she complained to the Aggarwals about Hammel's text messages. (Tr. 42-43, 45-46, 80-82, 94) However, this claim was credibly denied by Respondents. (Tr. 158-60, 173-74) I do not credit Complainant's testimony on this issue.

26. On November 18, 2011, Complainant and the Aggarwals participated in another Skype conference. Complainant did not mention Hammel's text messages. (Complainant's Exhibit 4; Tr. 65, 215-16)

27. On November 27, 2011, Complainant resigned her position by e-mail to the Aggarwals, stating therein that she had complained to them during the November 3, 2011 Skype conference regarding Hammel's text messages, and that she had received more of same. In their e-mail

response that same day, the Aggarwals denied these allegations. (Complainant's Exhibit 4; Tr. 65-66, 95-98, 216-17)

28. Complainant alleged at the hearing that the Respondents had destroyed a video surveillance recording of Complainant's participation in the November 3, 2011, Skype conference, requested by Complainant, and further alleged that this recording would have depicted Complainant holding her cell phone up to the Skype screen in order to show the Aggarwals Hammel's offensive text messages. Complainant requested an adverse inference against Respondents regarding this alleged spoliation of evidence. (Tr. 61-62, 100-03, 106, 231-35)

29. Kamran Maqvi installed the video surveillance equipment at the location in question, as well as others. He testified that the video recordings are generally accessible for no more than 30 days. (Tr. 240-47)

30. The parties were permitted to submit affidavits after the hearing regarding the issue of spoliation of evidence. Complainant's first request for a copy of the video surveillance recording in question was made on or about April 5, 2012, several months after the date of the recording. Absent a demand, Respondents would have had no reason to preserve the recording. (Complainant's Exhibit 5; Respondents' Exhibit 2) Upon review of these Exhibits, and the testimony, I find that the video recordings are generally accessible for no more than 30 days after the recording date, and that Respondents did not deliberately destroy the surveillance video of the November 3, 2011, Skype conference.

OPINION AND DECISION

Pursuant to the N.Y. Executive Law, art. 15 ("Human Rights Law"), 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." Human Rights Law § 296.1 (a).

Sexual harassment, in the form of a hostile work environment, has been recognized as a form of sexual discrimination which is actionable under the Human Rights Law. *Matter of 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. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997). The law forbids not only opposite-sex sexual harassment in the workplace, but same-sex harassment as well. *State Div. of Human Rights v. Stoute*, 36 A.D.3d 257, 263, 826 N.Y.S.2d 122, 126 (2d Dept. 2006).

In order to prevail in a case of hostile work environment sexual harassment, a 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 Svcs. Corp.*, 257 A.d.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999). The complainant must also demonstrate that the conduct was sufficiently severe or pervasive so as to alter the conditions of her employment and create an abusive working environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986). Whether a workplace may be viewed as hostile or abusive-from both a reasonable person standpoint as well as from the victim's subjective perspective-can be determined only by considering the totality of

the circumstances. *Matter of 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. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant is female, and belongs to a protected group. She received text messages on a regular basis from a co-worker which were generally obscene, or otherwise in poor taste, and she found the messages to be highly offensive. However, Complainant failed to demonstrate that she had made her concerns known to Respondents. Complainant admitted that she had had many opportunities to do so. Respondents' owners, as well as Complainant's immediate supervisor, credibly denied that Complainant had made her concerns known to them during her employment. Respondents did not know of, or condone, the sending of the offensive text messages. In addition, Complainant never told Hammel, the sender of the messages, that the text messages were unwelcome.

Complainant alleged that she had, in fact, informed Respondents' owners of her concerns during a Skype conference, and that a depiction of Complainant holding her cell phone up to the Skype conference screen had been preserved in a video surveillance recording. Complainant further alleged that Respondents had deliberately destroyed the recording. The intentional destruction of relevant evidence may give rise to the inference that the matter destroyed is unfavorable to the spoliator. The presumption does not arise from the mere act of destruction, rather it must appear that the documents or other matter contained evidence relevant to the issues. *Matter of Eno*, 196 A.D. 131, 163, 187 N.Y.S. 756 (1st Dept. 1921). In the instant case, the video recording of the November 3, 2011, Skype discussion certainly was relevant to Complainant's case. However, the evidence adduced at the hearing and submitted by the parties after the hearing makes it clear that Respondents did not deliberately destroy said evidence;

rather, the video recording was rendered non-recoverable within approximately 30 days of the Skype conference due to the nature of the recording system itself. These facts do not give rise to a negative inference against Respondents.

Complainant has the burden to establish by a preponderance of the evidence that discrimination occurred. *See, Mittl v. New York State Div. of Human Rights*, 100 N.Y.2d 326, 763 N.Y.S.2d 518 (2000). Complainant has failed to present a prima facie case against the corporate Respondents, and the complaint must be dismissed.

Human Rights Law § 296.6 makes it an unlawful discriminatory practice "for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so." When the case against the employer is dismissed, the case against an aider and abettor must also be dismissed. *Yerry v. Pizza Hut of Southeast Kansas*, 186 F. Supp. 2d 178 (N.D.N.Y. 2002); *Kent v. Papert Companies, Inc.*, 309 A.D.2d 234, 247, 764 N.Y.S.2d 675, 685 (1st Dept. 2003). The complaint alleges liability on the part of Respondent Hammell as an aider and abettor of discrimination by the corporate Respondents. The complaint against Respondent Hammell is also dismissed.

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 complaint be, and hereby is, dismissed.

DATED: November 30, 2012
Bronx, New York

Michael T. Groben
Administrative Law Judge