

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

STATE DIVISION OF HUMAN RIGHTS

On the complaint of

CECELIA DILWORTH,

Complainant,

-against-

**TRATRON, INC., FAYIZ HILAL,
PRESIDENT; CETEK, INC., Successor In
Interest,**

Respondent.

**NOTICE OF ORDER AFTER
HEARING**

CASE No.

3-E-MS-90-141584E

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 Patricia L. Moro. 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.

DATED: MAR 16 2007

BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

A handwritten signature in black ink, appearing to read "Edward A. Friedland", written over a horizontal line.

EDWARD A. FRIEDLAND
Executive Deputy Commissioner

To:

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Complainant alleged that she was discriminated against because of her sex, marital status and in retaliation for opposing discrimination in violation of the Human Rights Law. Complainant submitted sufficient evidence to sustain her sexual harassment claim, but failed to meet her burden with regards to the allegations of marital status and retaliatory discrimination. Complainant was awarded \$2,160 in back wages and \$35,000 in emotional distress damages.

PROCEEDINGS IN THE CASE

On June 18, 1990, Complainant filed a complaint, thereafter amended, with the State Division of Human Rights ("Division") charging Respondents with an unlawful discriminatory practice relating to employment, in violation of the New York State Human Rights Law. The complaint was amended to add Cetek, Inc., as Successor-in-Interest. (ALJ's Exhibits II, III).

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.

After due notice, the case came on for hearing before Patricia L. Moro, an Administrative Law Judge (“ALJ”) of the Division. A Public Hearing was conducted on May 4, 2004. Complainant and Respondents appeared at the hearing. The Complaint was represented by the Division through Christopher R. Knauth, Esq., of Counsel. Respondents were represented by Thomas P. Halley, Esq.

Respondents filed a post-hearing brief.

On June 22, 2007, ALJ Moro issued a Recommended Findings of Fact, Decision, Opinion and Order (“Recommended Order”). Respondent filed objections to the Recommended Order with the Order Preparation Unit dated February 5, 2007.

FINDINGS OF FACT

1. Complainant alleged that she was discriminated against because of her sex, marital status and in retaliation for opposing discrimination in violation of the Human Rights Law. Complainant alleged that Respondent made “suggestive sexual comments and advances toward her.” Complainant also alleged that she was sexually harassed because she was “perceived as being more vulnerable as a divorced woman.” (ALJ’s Exhibit I).

2. Respondent denied all the allegations in the complaint. (ALJ’s Exhibit IV).

3. Complainant is a forty-one year old, divorced female. Complainant was referred to Tratron Electronics by the New York State Department of Labor (“DOL”) on April 18, 1990. On April 23, 1990, Complainant commenced employment with Respondent as an Administrative Assistant. Her hours were 8 a.m. to 5 p.m., Monday through Friday. Complainant's rate of pay was nine dollars per hour. Complainant also received health benefits. (Complainant's Exhibit 4, Tr. 14, 15, 20).

4. Respondent Hilal began making sexual comments during the first week of Complainant’s employment. (Tr. 59). Respondent Hilal pointed to Complainant’s breasts and said he would like to “suck those.” (Tr. 21). Respondent Hilal continued to make numerous sexual comments and

offensive hand gestures. Respondent Hilal told Complainant "I would like to eat you." On another occasion, Respondent Hilal stated "Do you know what you need ... you need a good one." Complainant, at first, tried to "laugh it off, hoping Respondent would stop." When Respondent Hilal's comments persisted, Complainant asked him to stop repeatedly, but was ignored. (Complainant's Exhibit 4, Tr. 21-23).

5. During the second week of her employment, Respondent Hilal ran his hands up and down Complainant's leg. (Tr. 22, 23). Complainant moved away and told Respondent "[d]on't start anything you can't stop ... in front of people in this office." Respondent Hilal "laughed." (Tr. 22). On another occasion, Respondent Hilal said "I'd like to lick you all over ... to give you a tongue bath." Complainant credibly testified "I replied by just ignoring him ... because that was all I could do at the time. And it was very upsetting because I needed the job." (Tr.23).

6. No other employees were present during the harassment of Complainant by Respondent Hilal. (Tr. 22).

7. Working conditions remained unpleasant throughout Complainant's employment. Respondent Hilal asked Complainant to find something in a catalogue and when Complainant asked a question, Respondent Hilal "pulled two rows of catalogues off the wall, began yelling" and ordered Complainant to pick them up. Complainant complied and picked up the catalogues. (Tr. 24-25).

8. Respondent Hilal's testimony, in which he denied that he spoke to Complainant in a sexual manner and/or harassed her, was vague and lacked credibility. (Tr. 94).

9. Respondent Hilal contended that during the four weeks of Complainant's employment, Complainant arrived late to work in the morning, took extended lunch hours and took time off due to illness. (Tr. 90). For these alleged reasons, Respondent Hilal informed Complainant that she would be paid on an hourly basis, rather than by salary. (Tr. 91-93). Complainant admitted that she took off

two days for sickness, but denied being late or taking extended lunches. Complainant felt that being paid by the hour, rather than by salary, was a “slap in the face.” (Tr. 30).

10. Complainant did not complain to anyone other than Respondent Hilal regarding the sexual harassment at her job until she resigned. (Tr. 59). Complainant returned to the DOL and explained that she resigned because of Respondents’ harassment. (Complainant’s Exhibit 4).

11. Complainant resigned on May 23, 1990, four weeks after she commenced employment. (ALJ’s Exhibit I, Tr. 15).

12. Complainant’s rate of pay with Respondent was \$9.00 per hour and she worked 8 hours per day, 5 days per week, for \$360.00 per week. Complainant earned \$1,440 in the four weeks that she was employed by Respondent. (Complainant’s Exhibit 4, Tr. 14, 15, 20).

13. Complainant was unemployed for a period of six weeks, from May 23, 1990, to July 1, 1990. (Tr. 23, 64).

14. Complainant obtained new employment in July 1, 1990, at \$7.00 per hour, 8 hours per day, 5 days per week, for \$280.00 a week. (Complainant’s Exhibit 4).

15. Complainant stayed at that new job and stopped seeking other employment that paid her the same or more than what she was earning with Respondent. (Complainant’s Exhibit 4).

16. Complainant had been in counseling for personal reasons since 1989, and continued counseling during her employment with Respondent, at times discussing the distress caused by Respondents’ harassment. Complainant’s mental state was affected by her employment with Respondent. (Tr. 32, 48, 70). Complainant's husband, Stanley Cole, credibly testified that Complainant, "is still bothered by what occurred while she was employed" by Respondent. (Tr. 86). Complainant credibly testified that “this has been following me for this number of years and I can remember it like it was yesterday, his attitude and his demeanor towards me.” (Tr. 42).

DECISION AND OPINION

Complainant alleged that she was the victim of sexual harassment and retaliation. The Division finds that Respondent did discriminate against Complainant, by subjecting her to a hostile work environment. Respondent's discriminatory actions resulted in Complainant's constructive discharge. The Division finds that Complainant did not meet her burden in proving retaliation.

The evidence submitted at hearing demonstrated that Respondent discriminated against Complainant by denying her equal terms, conditions, or privileges of employment, by subjecting her to a hostile work environment.

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions or privileges of employment because of that individual's sex. Human Rights Law §296.1(a).

Sexual harassment constitutes discrimination when an employee is subjected to a hostile work environment. A hostile work environment exists where the conduct complained of is so objectively offensive that it alters Complainant's work environment. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 802, 669 N.Y.S.2d 122 (N.Y. Sup. Ct. 1997), *appeal dismissed*, 256 A.D.2d 269 (1st Dept. 1998), *appeal dismissed*, 93 N.Y.2d 919 (1999), *leave to appeal denied*, 94 N.Y.2d 753 (1999). "A hostile work environment exists when 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" (internal quotations omitted). *Father Belle Community Center V. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 (4th Dept. 1996) *lv. denied*, 647 N.Y.S.2d 652 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997). *see also, Harris v. Forklift System, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993) and *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986).

"Whether conduct or words are unwelcomed and whether a workplace should be viewed as hostile or abusive can only be determined by considering the totality of the circumstances. In determining whether a plaintiff was subjected to a hostile work environment, a court may consider the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating or a mere offensive utterance and whether it unreasonably interfered with the plaintiff's work performance." *McIntyre* at 803.

Complainant credibly testified that she was repeatedly subject to unwelcome sexual comments by Respondent Hilal, at the business premises, during work hours. Respondent Hilal's conduct was pervasive and sufficiently severe to create a hostile work environment. The individual accused of the wrongful conduct was not simply a supervisor, but rather the company owner, Complainant's employer and the most powerful individual in the work place. Here, there was no opportunity for Complainant to make a complaint to upper-level management as Respondent was the owner, president and only official in charge of the Company. *Father Belle Community Center V. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 (4th Dept. 1996).

Complainant could not avail herself of any preventive opportunities. Respondent had no anti-harassment policy nor any complaint procedure in place. When asked by Complainant to cease from discriminatory conduct, Respondent did not correct the harassment. Respondent's denial of sexual harassment was vague and lacked credibility.

Respondent is personally subject to liability under the Human Rights Law because he is an employer, with ownership interest and has engaged in discriminatory conduct. *Graaf v. North Shore University Hospital*, 1 F.Supp.2d 318, 1998. Therefore, the Division finds that Complainant was subjected to a hostile work environment in violation of the Human Rights Law.

For purposes of computing damages, Complainant's resignation will be considered a constructive discharge. A constructive discharge occurs when an employer deliberately creates working conditions for an employee so difficult or unpleasant as to permit an inference that a reasonable person in the employee's position would have felt compelled to resign. *Civil Service Employees Ass'n v. N.Y.S. Public Employee Relations Board*, 8 A.D.3d 796 (3rd Dept. 2004); *Fisher v. KPMG Peat Marwick*, 195 A.D.2d 222, 225 (1st Dept. 1994); *Martinez v. State Univ. of N.Y.*, 294 A.D.2d 650, 741 N.Y.S.2d 602 (3rd Dept. 2002). Here, Complainant has shown sufficient facts which would indicate that her resignation was prompted by such difficult or unpleasant working conditions that a reasonable person would have concluded that he or she had no choice but to resign.

Complainant credibly testified that she was repeatedly subjected to remarks of a sexual nature by Respondent Hilal. This harassment occurred at the business premises, during working hours and over her continued objections. The evidence shows that Respondents subjected Complainant to sexual comments and conduct on an almost daily basis. When Respondent Hilal's behavior continued, Complainant asked him to stop repeatedly but was ignored. Complainant needed her job. Due to the hostile working conditions, Complainant was forced to resign. The Division finds that based on the totality of the credible evidence, any reasonable person would feel compelled to leave this employment. The Division finds that Complainant suffered mental anguish as a result of this harassment. As credibly described by Complainant, the actions were frequent and constituted more than isolated remarks or occasional episodes. *Father Belle Community Center V. New York State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 (4th Dept. 1996).

However, Complainant has failed to show that her change from a salary to hourly worker constituted unlawful discrimination due to retaliation.

In order to establish a prima facie case of retaliation, Complainant must show that: (1) she engaged in a protected activity; (2) Respondents knew that she engaged in the protected activity (3) Complainant suffered an adverse action; and (4) there was a causal connection between the protected activity and the adverse action. *Pace v. Ogden Servs. Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 22 (3rd Dept. 1999).

When Complainant told Respondent Hilal to stop his sexual harassment of her, she engaged in protected activity. Complainant suffered adverse action when Respondent changed her employment status from a salaried position to an hourly position. Respondent's action was sufficiently close in time to infer a causal connection between the protected activity and the adverse action. *Rosenblum-Wertheim v. New York State Div. of Human Rights*, 228 A.D.2d 237, 643 N.Y.S.2d 117 (1st Dept. 1996). Thus, Complainant has proven a prima facie case of retaliation.

Once Complainant has established a prima facie case, the burden of proof then shifts to Respondent to articulate a legitimate, non-retaliatory reason for the adverse action. *Pace University v. New York City Commission on Human Rights*, 85 N.Y.2d 12, 128 (1995), 623 N.Y.S.2d 765 (1995). Here, Respondent has stated a legitimate business reason for his proposed change. Respondent contends that he changed Complainant's status from salary to hourly because during the four weeks of Complainant's employment, Complainant arrived late to work in the morning, took extended lunch hours and took time off due to illness.. The burden then shifts back to Complainant to prove that the articulated reason is pretext and the true reason for the adverse action was retaliation. *Ferrante v. American Lung Association*, 90 N.Y.2d at 629. Complainant has not met her burden in this regard.

In regards to Complainant's claim of discrimination based on her marital status, no proof has been offered to substantiate her allegation she was sexually harassed by Respondent because she was divorced. Thus, Complainant's claim in this regard is dismissed.

As the victim of discrimination, Complainant is entitled to damages. The damages available under the Human Rights Law include compensatory damages for lost wages and for pain and suffering. Complainant lost approximately six weeks of pay because of Respondent's adverse employment action. Respondent therefore is liable to Complainant for back pay. Complainant credibly testified that she earned \$360.00 per week. Complainant was constructively discharged on May 23, 1990. She began new employment on July 1, 1990. Therefore, Complainant is owed six weeks back pay at \$360.00 per week which comes to \$2,160.00.

Respondent is also liable to Complainant for pre-determination interest on the back pay amount at a rate of nine percent per annum from August of 1998, a reasonable intermediate date, through the date of this Order. *Aurecchione v. New York State Div. of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002).

The Division finds that the frequency and incessant nature of Respondent's comments and conduct, despite Complainant's verbal objections and requests for him to stop, caused her to be upset and suffer anguish. Therefore, Complainant is entitled to be compensated.

Making Complainant whole entails compensating her for the emotional suffering that she endured because of Respondent's harassment and adverse employment action. Complainant is entitled to compensatory damages for the emotional distress, pain and suffering that Respondent's actions caused her. Such compensation may be based solely on Complainant's testimony. *Cosmos Forms Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989); *Wantagh Union Free School Dist. v. State Div. of Human Rights*, 122 A.D.2d 846, 505 N.Y.S.2d 713 (2d Dept. 1986), *appeal dismissed*, 69 N.Y.2d 823 (1987). It must be reasonably related to the discriminatory conduct. *New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 573 N.Y.S.2d 49 (1991). The severity of the conduct, duration and the number of discriminatory offenses can be

Dept. of Correctional Svs. v. State Div. of Human Rights, 225 A.D.2d 856, 638 N.Y.S.2d 827 (3rd Dept. 1996).

An award for emotional damages is supported by Complainant's description of Respondent's conduct, its duration of four weeks and Complainant's reaction to that conduct. She credibly testified that "this has been following me for this number of years and I can remember it like it was yesterday, his attitude and his demeanor towards me." (Tr. 42). The Division credits Complainant's testimony of how her emotions were affected by Respondent's actions. Complainant was so affected by Respondent's actions that she was compelled to leave her employment.

Complainant was in counseling prior to employment with Respondent and continued during employment with Respondent. The record shows that Complainant was caused to work in a climate of fear of sexual harassment and abusive anger for her rejection of Respondent's persistent sexual advances. Complainant needed her job to financially support herself and her family. The evidence presented in this case shows a continual pattern of sexual harassment beginning at the time of Complainant's employment with Respondent and culminating with her resignation, a period of four weeks, during which she was subjected to unwelcome words and conduct on an almost daily basis. The incidents of harassment and discrimination were numerous and continuous throughout her employment. Complainant was forced to resign in order to free herself from Respondents' abuse.

The record demonstrates that Complainant suffered from the beginning of Respondents' discriminatory conduct through the date of the hearing. As a result of Respondents' discriminatory actions, Complainant was made to feel humiliated and demeaned. She is, therefore, entitled to be compensated \$35,000.00 for the mental anguish and distress she suffered. *Kowalewski v. New York*

State Div. of Human Rights, 26 A.D.3d 888, 809 N.Y.S.2d 347 (4th Dept. 2006) (\$35,000.00 for mental anguish).

Interest shall accrue on the award at a rate of nine percent per annum, from the date of this Order until the date payment is actually made by Respondent. Complainant is also entitled to post-determination interest award on the mental anguish award from the date of a final order. *New York State Div. of Human Rights v. Marcus Garvey Nursing Home*, 249 A.D.2d at 550.

ORDER

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

ORDERED that Respondents, their agents, representatives, employees, successors and assigns shall not discriminate in violation of the Human Rights Law, and it is further

ORDERED that Respondents shall take the following affirmative actions to effect the purposes of the Human Rights Law:

1. Within sixty days of the date of this Order, Respondents shall pay to Complainant the sum of \$2,160.00 as damages for back pay. Interest shall accrue on the award at the rate of nine percent per annum from a reasonable intermediate date, August of 1998, until the date payment is actually made by Respondents.

2. Within sixty days of the date of this Order, Respondents shall pay to Complainant the sum of \$35,000.00 without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondents' unlawful discrimination against her. Interest shall accrue on the award at a rate of nine percent per annum, from the date of this Order until the date payment is actually made by Respondents.

checks made payable to the order of Complainant, Cecelia Dilworth-Cole and delivered to her at her address of 7029 Palazzo Reale, Boynton Beach, Florida 33437, by registered mail, return receipt requested. Respondents shall simultaneously furnish written proof of the aforesaid payments of the sums required by this Order to Caroline J. Downey, Acting General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

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

DATED: **MAR 16 2007**

BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS



EDWARD A. FRIEDLAND
Executive Deputy Commissioner