



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

ROSANGEL FIORILLO,

Complainant,

v.

EXSIF WORLDWIDE, INC., DAVID WEINFURT,
Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10145046

Federal Charge No. 16GB100569

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 19, 2014, 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 HELEN DIANE FOSTER, ACTING 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: **APR 16 2014**
Bronx, New York


HELEN DIANE FOSTER
ACTING COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION OF
HUMAN RIGHTS**

on the Complaint of

ROSANGEL FIORILLO,

Complainant,

v.

**EXSIF WORLDWIDE, INC., DAVID
WEINFURT,**

Respondents.

**RECOMMENDED FINDINGS OF
FACT, OPINION AND DECISION,
AND ORDER**

Case No. **10145046**

SUMMARY

Complainant, a former employee of Respondent EXSIF Worldwide, Inc., alleges she was sexually harassed by Respondent David Weinfurt. She further alleges that she was retaliated against by Respondent EXSIF Worldwide, Inc. when she complained about harassment. Complainant has established that she was harassed and is, therefore, entitled to damages. She has not shown that she was retaliated against, however. Civil fines and penalties are assessed against Respondents for their actions.

PROCEEDINGS IN THE CASE

On November 1, 2010, 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 July 29, 2013, July 30, 2013, September 23, 2013 and September 24, 2013.

Complainant and Respondents appeared at the hearing. Complainant was represented by Matthew S. Hirsch, Esq. Respondents were represented by Samantha E. Beltre, Esq., Stephen H. Kahn, Esq. and Neil G. Sparber, Esq.

FINDINGS OF FACT

1. Complainant was employed by Respondent EXSIF Worldwide, Inc., (“EXSIF”) as a senior accountant on February 1, 2005. (Tr. 17)

2. As a senior accountant, Complainant prepared financial statements, assisted in monthly end closings, assisted with audits, did account reconciliations and prepared various analyses. (Tr. 19)

3. EXSIF is in the business of leasing tanks designed for transporting liquid and gas over land, sea and air. (Tr. 380)

4. Keith DiPaolo, accounting manager, was Complainant’s immediate supervisor. (Tr. 22, 179)

5. DiPaolo’s supervisor was Todd Michalka, director of accounting. Mary Martinez was the chief financial officer for EXSIF. (Tr. 21-22)

6. DiPaolo completed Complainant's performance appraisals and Michalka reviewed the appraisals thereafter. (Complainant's Exhibit 8 & 9)
7. Respondent David Weinfurt is the manager of business analysis for EXSIF. (Tr. 24)
8. In the middle of 2008, Complainant began receiving emails from Weinfurt that were not work related. (Tr. 26)
9. From early 2009 until the spring of 2010, Weinfurt sent over 100 emails to Complainant that were unrelated to their work duties. (Complainant's Exhibits 1 & 17)
10. Many of Weinfurt's emails contained sexual remarks and innuendo, including comments about Complainant's cleavage, "backside" and the color of Complainant's undergarments. (Complainant's Exhibit 1)
11. Weinfurt's emails also suggest that he and Complainant have a "make-out session" in the elevator and to gave Complainant "permission to dream" about him. Weinfurt jokingly accused Complainant of "cock blocking." (Complainant's Exhibit 1; Tr. 26, 279-80)
12. The emails were numerous and frequent, often occurring multiple times within a single day. (Complainant's Exhibits 1 & 17)
13. Complainant said the emails were "creepy" and made her feel uncomfortable. She found them to be offensive. (Tr. 37-41, 55, 61, 63-65, 73)
14. Despite the emails, Complainant maintained a friendly relationship with Weinfurt. Complainant ignored many of the emails; however she responded to many of Weinfurt's emails with jokes, including jokes that contained sexual connotations and/or content. (Complainant's Exhibit 1; Tr. 131-33, 201-05)

15. In late 2009, Complainant showed the emails to DiPaolo. Complainant told DiPaolo that she thought they were strange and weird. DiPaolo told Complainant that she should report the emails to human resources. (Tr. 79, 552)

16. In October 2009, Weinfurt sent an email to Complainant in which he jokingly indicated he was trying to save 295 dollars in order to secure the services of a prostitute. Complainant responded, via email, that he was a “cheapo.” (Tr. 253)

17. EXSIF has a sexual harassment policy. DiPaolo understands the policy to mean, “If you witness [sexual harassment] you should report it to human resource[s].” (Tr. 552)

18. Martinez confirmed that DiPaolo, as a supervisor, had an obligation to report sexual harassment if he saw it. (Tr. 523)

19. The offensive emails continued until April 23, 2010. The previous day, Weinfurt left a post-it note on Complainant’s desk that said, “Yes or No?” The next day, Weinfurt said to Complainant, “You never answered my question.” Complainant asked what he meant and Weinfurt gave her another post-it note that said “[do] you want to, yes or no?” When Complainant asked what Weinfurt was talking about, Weinfurt walked away. (Tr. 82-83)

20. Later that day, Weinfurt emailed Complainant, telling her “stop by to discuss that open question.” A few minutes later, Weinfurt appeared at Complainant’s desk and, said “‘the answer to the open question is’ and he held a post-it note with the word F-U-C-K.” (Tr. 84)

21. Complainant felt “very upset and very angry.” She reported the incident to EXSIF’s human resources department on Tuesday, April 27, 2010, and supplied them with emails that Weinfurt had sent to her. (Tr. 86)

22. Martinez and Michalka were advised of the allegations. Martinez conducted an investigation. Weinfurt did not deny the allegations. (Tr. 87, 440)

23. After investigation, Weinfurt was instructed to apologize to Complainant, refrain from sending her emails that were not work related and take a sexual harassment training course.

Weinfurt apologized to Complainant on April 28, 2010. (Tr. 88, 90, 440-42)

24. Complainant asked that Weinfurt's desk be moved as well, since he looked directly at her back. Martinez agreed to move Weinfurt's seat to another area. (Tr. 91)

25. Complainant felt depressed after the incident and sought counsel from a social worker in October of 2010. She saw the counselor "about 15 or 16 times" until January of 2011. (Tr. 101-02, 110)

26. Weinfurt did not make any inappropriate comments or send any emails to Complainant after that incident. Complainant did not have any further contact with Weinfurt and did not make any further complaints about Weinfurt while she was employed by EXSIF. (Tr. 307-08)

27. Despite the fact that the harassment ceased, Complainant remained unhappy with her working situation. As a result, in August of 2010, EXSIF offered Complainant a buyout, by which Complainant would separate from her employment with EXSIF while being paid for nine months while she sought other employment. (Tr. 495)

28. After considering Respondent's offer, Complainant declined to accept it. Instead, Complainant asked for 30 months pay, which Martinez refused. Complainant, therefore, continued her employment with Respondent. (Tr. 495-96)

29. On September 8, 2010, Complainant's attorney sent Martinez a letter which takes EXSIF to task for the handling of Complainant's sexual harassment complaint. In addition, the letter stated that Complainant was "in possession of information with regard to gross financial irregularities at Exsif..." The letter accused EXSIF's officers of attempting to remove

Complainant from her employment with EXSIF so that the “gross fraud” would not be revealed. (Respondents’ Exhibit 22; Tr. 499)

30. In response to that letter, EXSIF hired outside counsel to investigate. Complainant, who claimed to have evidence of fraud and financial irregularity, was part of the investigation. No evidence of fraud or financial irregularities was discovered. (Tr. 500)

31. During the period between 2009 and 2011, EXSIF underwent a series of staff reductions. In 2009, five positions were eliminated and two more were eliminated in 2010. (Tr. 500-01)

32. During that period of time, EXSIF was attempting to increase its business by taking over the paperwork processing related to tanks leased by Baker Petrolite, one of EXSIF’s clients. (Tr. 503)

33. The increase in business from Baker Petrolite would have significantly increased the work in EXSIF’s accounting unit. (Tr. 507-10)

34. In December of 2010, Baker Petrolite informed EXSIF that it would not be employing EXSIF for the additional paperwork processing. (Tr. 511)

35. As a result of Baker Petrolite’s refusal, Michalka determined that his accounting team was overstaffed and he could eliminate one position. (Tr. 513)

36. Michalka’s unit consisted of DiPaolo, Complainant, another senior accountant and a staff accountant. It was determined that DiPaolo, as supervisor, was necessary. The staff accountant, who earned less money than the senior accountants, was also retained. (Tr. 513-14)

37. Martinez and Michalka decided that of the two senior accountants, much of Complainant’s work had already been automated. Therefore, Complainant’s position was

chosen for reduction. Complainant's employment was terminated on January 14, 2011. She was not replaced. (Tr. 514-15)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in compensation or in terms, conditions or privileges of employment because of that person's sex or in retaliation for having complained of discrimination. Human Rights Law §§ 296.1(a) & 296.7.

Sexual harassment is a form of sex discrimination. In order to sustain a claim of sexual harassment, Complainant must demonstrate that she was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *Father Belle Community Ctr. v. N.Y. 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).

In this case, Weinfurt sent a voluminous amount of offensive, sexually oriented emails to Complainant over the course of several months. Often, he sent multiple emails in a single day. They were disruptive and, by any objective standard, were sufficiently severe and pervasive to alter Complainant's working conditions. Complainant neither welcomed the emails nor solicited them. Weinfurt's actions constitute a hostile environment under Human Rights Law.

An employer cannot be held liable for an employee's harassment unless it encourages, condones or approves the harassment. Inaction by an employer in response to an employee's

harassment can constitute condonation under Human Rights Law. *Matter of State Division of Human Rights v. St. Elizabeth's Hospital*, 66 N.Y.2d 684, 687, (1985). DiPaolo, as a supervisor, knew of the harassment and failed to take action to stop it—beyond advising Complainant to see human resources—despite the fact that Martinez indicated he had a duty to report the harassment.

Respondent EXSIF argues that DiPaolo's knowledge of the harassment does not constitute condonation. Citing *Doulis v. Research Foundation of City University of New York*, 2008 N.Y. slip Op. 32848(U)(Sup. Ct. New York, October 14, 2008), which stated that in order to prevail an alleged harassment victim must show that "upper-level supervisors had knowledge of the conduct and ignored it," and *Vance v. Ball State University*, 133 S. Ct. 2434, 2439 (2013), EXSIF contends that because DiPaolo did not have the power to hire or fire or take "tangible employment actions" against Complainant, he cannot be considered her "supervisor" under these circumstances. Unlike the "supervisor" in *Vance*, however, DiPaolo conducted and wrote Complainant's performance appraisals. The appraisal document, by itself, is a tangible object that has the power to effect actions, positive and negative, with respect to Complainant's employment. Therefore, DiPaolo's admitted knowledge of the harassment and failure to act can be considered condonation on EXSIF's part.

Weinfurt is not, however, an employer under the Human Rights Law. There is no evidence that he is anything more than an employee of EXSIF, which was Complainant's employer as well. An employee cannot be sued as an employer under the Human Rights Law unless he has some ownership interest or some authority to do more than carry out decisions made by others. *Patrowich v. Chemical Bank*, 62 N.Y. 2d 541, 43 N.Y.S. 2d 659 (1984). Nothing in the record supports a conclusion that Weinfurt has the type of authority that could

classify him as an employer under the Human Rights Law. The Human Rights Law does state that it is 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.” Human Rights Law § 296.6. Thus, as the individual who is responsible for the harassment of Complainant, Weinfurt can be considered an aider and abettor under the Human Rights Law and liable for damages.

As a result of the Respondents’ discriminatory actions, Complainant is entitled to recover damages from Respondents owing to her emotional distress. She suffered stress and anxiety from the harassment she received. Complainant was subjected to a long stream of offensive emails and even though Complainant continued to socialize with Weinfurt and have lunch with him, the Court has stated that “distress follows such bias and exclusion as night follows day.” *300 Gramatan Avenue Associates v. New York State Division of Human Rights*, 45 N.Y.2d 176, 408 N.Y.S.2d 54, 59 (1978). Complainant is therefore entitled to \$15,000.00, which is reasonably related to the harm she suffered and will effectuate the purpose of the Human Rights Law. *Kowalewski v. New York State Division of Human Rights*, 26 A.D.3d 888, 809 N.Y.S. 2d 347 (4th Dept. 2006); *Bayport-Blue Point School District v. State Division of Human Rights*, 131 A.D. 2d 849, 517 N.Y.S. 2d 209 (2d Dept. 1987).

Pursuant to § 297 of the Human Rights Law, the Division may assess civil fines and penalties. In this case, a civil fine is appropriate to deter Respondents from future discriminatory behavior. Weinfurt’s harassing words and actions were deliberate, and resulted in humiliation to Complainant. Evidence adduced at the hearing indicated that EXSIF is a leasing corporation with interests around the world. Mitigating in EXSIF’s favor is the fact that although DiPaolo failed to act, Martinez, when she became aware of the harassment, took swift and decisive action to end

the harassment. Given the circumstances, considering the goal of deterrence, the nature and circumstances of the violation, the degree of Respondents' culpability, and Respondents' size and financial resources, \$10,000 is an appropriate civil fine and penalty. *See Noe v. Kirkland*, 101 A.D.3d 1756, 1758, 957 N.Y.S. 2d 797 (4th Dept. 2012) (\$20,000 civil fine and penalty confirmed); *Div. of Human Rights v. Stennett*, 98 A.D.3d 512, 514, 949 N.Y.S. 2d 459 (2d Dept. 2012) (\$25,000 civil fine and penalty confirmed).

With respect to her retaliation claim, Complainant must first make out a prima facie case of retaliation before she can prevail. In order to establish a prima facie case of retaliation, a complainant must show that (1) she engaged in activity protected by Human Rights Law § 296; (2) the respondent was aware that she participated in the protected activity; (3) she suffered from an adverse employment action; and, (4) there is a causal connection between the protected activity and the adverse action. *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999) (citing *Fair v Guiding Eyes for the Blind*, 742 F Supp 151, 154 (S.D.N.Y. 1990); *Matter of Town of Lumberland v New York State Div. of Human Rights*, 229 AD2d 631, 636 (3d Dept. 1996).

Complainant in this case does not establish a prima facie case of retaliation. Although the first two prongs of the test outlined above were clearly met, Complainant cannot show that an adverse employment action was causally connected to her complaint. She made a harassment complaint in April 2010 and, nearly nine months later, was removed from her position and not replaced. In between, Complainant and EXSIF engaged in brief "buyout" discussions and, when those did not result in a buyout, Complainant continued her employment with EXSIF. Moreover, had EXSIF and Baker Petrolite reached an agreement for additional business, Complainant's employment would not have been terminated. No inference of retaliation can be

drawn from those circumstances.

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 EXSIF and Weinfurt, and their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and

IT IS FURTHER ORDERED that Respondents EXSIF and Weinfurt 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 Commissioner's Final Order, Respondents shall pay to Complainant the sum of \$15,000, without any withholdings or deductions, as compensatory damages for mental anguish and humiliation she suffered as a result of its sexual harassment. Interest shall accrue on this award at the rate nine percent per year, from the date of the Commissioner's Final Order until payment is actually made by Respondents.

2. The aforementioned payments shall be made in the form of a certified check, made payable to the order of Complainant, Rosangel Fiorillo, and delivered by certified mail, return receipt requested, to her attorney, Matthew S. Hirsch, Esq., Hirsch Law LLC, 55 Corporate Drive, Trumbull, CT, 06611. Respondents shall simultaneously furnish written proof of their compliance with the directives contained in this Order by certified mail, return receipt requested to Barbara Buoncristiano, Order Compliance Unit of the New York State Division of Human Rights, at her office at One Fordham Plaza, 4th floor, Bronx, NY 10458.

3. Within sixty days of the date of the Commissioner's Order, Respondents shall pay the sum of \$10,000 as a civil fine and penalty, by certified check made out to the "State of New York" and delivered by certified mail, return receipt requested, to the offices of the New York State Division of Human Rights at One Fordham Plaza, 4th floor, Bronx, New York 10458, attention: Caroline Downey, General Counsel. Interest shall accrue on this assessment at a rate of nine per cent per year from the date of this Order until payment is made.

4. Within sixty days of the date of the Commissioner's Order, Respondent EXSIF shall establish policies and procedures for the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. These policies and procedures shall include an official anti-discrimination and 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. A copy of the policies and procedures shall be provided, within sixty days of the date of the Commissioner's Final Order, to Barbara Buoncristiano, Order Compliance Unit of the New York State Division of Human Rights, at her office at One Fordham Plaza, 4th floor, Bronx, NY 10458.

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

DATED: February 19, 2014
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano". The signature is stylized with a long horizontal stroke at the end.

Thomas S. Protano
Administrative Law Judge