

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

TAKIYA FITZGERALD,

Complainant,

v.

**ALLIANCE MORTGAGE BANKING CORP., AND
JOHN MURPHY, INDIVIDUALLY,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10112798

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 24, 2008, by Robert M. Vespoli, 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.

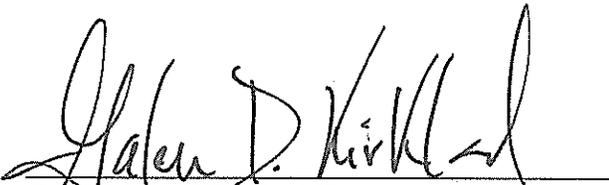
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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: **JUL 03 2009**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

State Division of Human Rights
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Sharon J. Field, Director of Prosecutions
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**ALLIANCE MORTGAGE BANKING CORP.,
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Respondents.

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

Case No. 10112798

SUMMARY

The record establishes that Respondents unlawfully discriminated against Complainant on the basis of sex because they condoned the sexual harassment experienced by Complainant in the workplace. The record also establishes that Respondents retaliated against Complainant by terminating her employment. Accordingly, the instant complaint is sustained and Complainant is awarded \$26,527.00 in back pay and \$25,000.00 in compensatory damages for mental anguish.

PROCEEDINGS IN THE CASE

On August 14, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent Alliance Mortgage Banking Corp. ("Alliance") 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 Alliance 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 Robert M. Vespoli, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on November 19 and 20, 2007.

Complainant and Alliance appeared at the hearing. The Division represented the complaint by Michael Swirsky, Esq., of Counsel. Alliance was represented by its president, John Murphy.

On February 25, 2008, the Commissioner amended the instant complaint to include John Murphy as an individual Respondent and returned this matter to the presiding ALJ for further proceedings to allow Murphy to defend against the complaint. (ALJ's Exh. 7) Accordingly, a public hearing session was held on September 3, 2008. Complainant and Murphy appeared at the hearing. The Division represented the complaint by Aaron Woskoff, Esq., of Counsel. Murphy was represented by Joshua Marcus, Esq.

FINDINGS OF FACT

1. John Murphy is the president and sole owner of Alliance. (Tr. 185-86, 231-32)
2. On or about December 5, 2005, Complainant, a female, met Keith Bailey, manager of Alliance's loss mitigation department, at a networking meeting. (Tr. 16, 17-18, 191) Bailey invited Complainant to interview with him for a position in his department. (Tr. 17-18)

3. Bailey interviewed Complainant later that week. (Tr. 18) At the interview, Bailey told Complainant that he was attracted to her and that he wanted to hire Complainant to work in his department. (Tr. 18-19)

4. On December 9, 2005, Alliance hired Complainant to work as a collections customer service representative. (Tr. 15-16, 23) Bailey was Complainant's supervisor during her employment with Alliance. (Tr. 16, 23, 194, 216)

5. On December 10, 2005, Complainant attended Alliance's Christmas party. (Tr. 21) Complainant socialized with Bailey at the party. (Tr. 21)

6. Later that evening, Bailey and Complainant were alone on a sofa when Bailey told Complainant that she was beautiful and that he was attracted to her. (Tr. 21-22) Bailey then invited Complainant to watch him urinate in the men's room. (Tr. 22)

7. Complainant rebuffed Bailey's offer. She told him that his conduct was inappropriate and that she felt uncomfortable. (Tr. 22-23)

8. After the party, Bailey continued to direct sexually inappropriate conduct toward Complainant. During her employment with Alliance, Bailey regularly touched Complainant's legs and shoulders, asked Complainant for hugs, licked his lips while staring lustily at Complainant and fondled his genitals in Complainant's presence. (Tr. 24-25)

9. Complainant testified that Bailey touched her legs inappropriately on a daily basis, "[s]ometimes two, three times a day." (Tr. 25)

10. Complainant consistently told Bailey that this conduct was unwelcome. (Tr. 26-27) In addition, Complainant often glowered at Bailey and pushed his hands away when he touched her inappropriately. (Tr. 26-27)

11. Bailey's unwanted sexual conduct continued on a regular basis throughout the course of Complainant's employment with Alliance. (Tr. 27, 169) Bailey's actions made it difficult for Complainant to perform her job because Complainant felt anxious about her work environment. (Tr. 44) She was concerned about her job security if she continued to resist Bailey's advances. (Tr. 45)

12. On or about April 21, 2006, Bailey gave Complainant a letter extending her 4 month probation period by 1 month. This letter contained several critiques of Complainant's work performance and listed items that Complainant needed to correct within the next month of her probation. (Tr. 111; Respondent's Exh. 1)

13. Complainant viewed this letter as a means for Bailey to communicate his displeasure because Complainant continued to reject his advances. (Tr. 111)

14. Complainant received Alliance's sexual harassment policy in or about January 2006. (Tr. 70; Complainant's Exh. 6) This policy instructed employees to report incidents of sexual harassment to Alliance's human resources manager. (Complainant's Exh. 6)

15. On June 2, 2006, Complainant sent an email to Ellen Spaventa, Alliance's human resources manager during the relevant time period, requesting to meet privately with Spaventa when Bailey was not in the office. (Tr. 30, 108, 128, 146-47; Complainant's Exh. 1)

16. Complainant met with Spaventa on the morning of June 2, 2006, and Complainant told Spaventa that Bailey was sexually harassing her. (Tr. 35-36, 135, 147-48; Respondent's Exh. 4) Spaventa testified that she prepared a memorandum that day to memorialize her meeting with Complainant. (Tr. 134; Respondent's Exh. 4) Although this self-serving document is undated and unsigned, it states that Complainant reported sexual harassment to Spaventa. (Tr. 160; Respondent's Exh. 4)

17. Complainant testified that, at the June 2, 2006 meeting, Spaventa told Complainant that Bailey is a “very friendly, touchy type of person” and that Complainant should not be upset by Bailey’s conduct. (Tr. 36) Spaventa also stated that she would speak to Bailey and set-up a meeting between Spaventa, Bailey and Complainant the following week to address Complainant’s allegations. (Tr. 36-37, 168)

18. This meeting never took place. Bailey called Complainant into his office at the end of the day on June 2, 2006, and he terminated her employment. (Tr. 38-41)

19. Respondents maintained that Complainant was discharged on June 2, 2006 because Bailey was not satisfied with Complainant’s work performance and did not wish to extend Complainant’s probation. (Tr. 139-40, 196-98) Spaventa testified that Bailey and Murphy had already decided to terminate Complainant’s employment several days before June 2, 2006 due to Complainant’s poor work performance. (Tr. 138-40, 151, 161) Spaventa’s shaky testimony on this issue is not credible.

20. Murphy reiterated Spaventa’s testimony that he approved Bailey’s decision to discharge Complainant several days before June 2, 2006. (Tr. 198, 202-03) However, Murphy testified that Bailey had the authority to terminate Complainant’s employment without Murphy’s approval. (Tr. 205, 220-21) Murphy’s self-serving testimony on this issue is unsteady and is contradicted by Spaventa. (Tr. 139-40, 151, 221)

21. In addition to reporting procedures, Alliance’s sexual harassment policy states that Alliance will perform a prompt investigation into any reported allegations of sexual harassment. It also states that the complaining employee will be notified of the results of the investigation. (Complainant’s Exh. 6)

22. Spaventa discussed Complainant's allegations of sexual harassment with Bailey and Murphy on June 2, 2006 in Murphy's office. (Tr. 138-40, 161-62, 206-07) Nevertheless, Murphy agreed to terminate Complainant's employment that day. (Tr. 140, 161-62, 211, 213) Spaventa did not memorialize this conversation. (Tr. 161-63)

23. Spaventa maintained that she briefly interviewed Complainant's co-workers about Complainant's allegations on June 2, 2006 and interviewed them again in more detail the week after Complainant's employment was terminated. (Tr. 152-57) The record establishes that Spaventa did not memorialize any conversations or statements obtained in her purported investigation into Complainant's sexual harassment allegations. (Tr. 157-58, 161-63)

24. Alliance paid Complainant an annual salary of \$28,000.00. (Tr. 49)

25. Complainant received \$6,457.50 in unemployment benefits. (Tr. 50; Complainant's Exhibits 2, 3)

26. Complainant actively searched for work and applied for more than 100 jobs after her employment was terminated. (Tr. 49, 53-54, 100)

27. Soon after she was discharged, Complainant found temporary work at "accountemps" performing accounting and bookkeeping functions. (Tr. 51-52) Complainant's total earnings in 2006, including unemployment compensation, were \$22,640.00. (Complainant's Exh. 3)

28. In 2007, Complainant continued to perform temporary work at "accountemps" earning \$1,680.00. (Tr. 57; Complainant's Exh. 4) In addition, Complainant performed seasonal accounting work for "H & R Block" in the first quarter of 2007 earning \$1,901.00. (Tr. 59-60; Complainant's Exh. 5) Complainant's total earnings in 2007, up until November 20, 2007, the last public hearing date on which Complainant presented evidence regarding damages, were \$3,581.00. (Tr. 60; Complainant's Exhibits 4, 5)

29. Murphy testified that Alliance ceased business operations in June 2007. (Tr. 187) However, Respondents proffered no documentary evidence to corroborate this testimony.

30. Complainant credibly testified that Bailey's conduct caused her to feel "violated", "uncomfortable", "depressed" and "upset". (Tr. 44, 46) She testified that she felt depressed for approximately 6 to 9 months after her employment was terminated. (Tr. 46)

OPINION AND DECISION

The Division finds that Respondents discriminated against Complainant on the basis of sex because they condoned the sexual harassment experienced by Complainant. Furthermore, the Division finds that Respondents retaliated against Complainant by terminating her employment.

It is unlawful for an employer to discriminate against an employee on the basis of sex. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a). In the instant case, Complainant has filed a claim under the hostile work environment theory of sexual harassment. In order to sustain a claim of sexual harassment based on a hostile work environment, Complainant must show that she is a member of a protected group, she endured unwelcome sexual harassment based on her sex, the unwelcome sexual harassment altered the terms and conditions of her employment, and that Respondents had actual or constructive knowledge of the sexual harassment and failed to take appropriate corrective action. *See Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 103, 692 N.Y.S.2d 220, 223 (3d Dept. 1999).

The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. *See Father Belle Community*

Ctr. v. New York State Div. of Human Rights, 221 A.D.2d 44, 51, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. app. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

In the instant case, the conduct described by Complainant was sufficiently severe and pervasive to create a hostile work environment. The record shows that Bailey, Complainant's supervisor, subjected Complainant to unwanted sexual comments, touching and gestures that began as soon as Complainant started working for Alliance. Bailey directed this harassing conduct toward Complainant because she is a woman, and it occurred on a daily basis throughout the approximate 6 month term of her employment with Alliance.

Furthermore, the harassment described by Complainant altered the conditions of her employment because she felt anxious and was concerned about the impact that Bailey's harassment would have on her job security if she continued to resist his advances. The record establishes that Bailey's unwelcome sexual advances toward Complainant created an abusive work environment that rises to the level of objective severity and pervasiveness required to constitute an actionable claim under the Human Rights Law.

Finally, Respondents must be held accountable for the hostile work environment endured by Complainant. Respondents are liable because they condoned Bailey's discriminatory conduct when they failed to take appropriate remedial action despite having actual knowledge of the ongoing harassment. *See State Div. of Human Rights v. St. Elizabeth's Hosp.*, 66 N.Y.2d 684, 687, 496 N.Y.S.2d 411, 412 (1985).

Murphy, Alliance's president and sole owner, agreed to terminate Complainant's employment on the same day that Spaventa notified him of Complainant's sexual harassment allegations. Alliance's sexual harassment policy states that Alliance will perform a prompt investigation into any reported allegations of sexual harassment. It also states that the

complaining employee will be notified of the results of the investigation. The credible record establishes that Respondents did not perform any meaningful investigation. Rather, Respondents summarily terminated Complainant's employment on the same day that she reported her allegations of sexual harassment.

Accordingly, the Division finds that Alliance effectively condoned the sexual harassment directed at Complainant and is liable to Complainant for compensatory damages resulting from the hostile work environment. In addition, Murphy, the president and sole shareholder of Alliance, is individually liable under the Human Rights Law. *See Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 544, 483 N.Y.S.2d 659, 661 (1984). The record establishes that Murphy condoned Bailey's unlawful conduct when he adopted Bailey's recommendation and decided to summarily terminate Complainant's employment.

Complainant also alleged that Respondents retaliated against her because she complained about Bailey's sexual harassment. The Human Rights Law prohibits an employer from retaliating against an employee for having filed a complaint or opposed discriminatory practices. Human Rights Law § 296.7.

Complainant bears the burden of establishing a prima facie retaliation claim by showing that she engaged in protected activity, Respondents were aware that she participated in this activity, she suffered an adverse employment action, and there is a causal relationship between the protected activity and the adverse action. Once Complainant has met this burden, Respondents have the burden of coming forward with legitimate, nondiscriminatory reasons in support of their actions. Complainant then must show that the reasons presented are a pretext for unlawful retaliation. *See Pace* at 104, 692 N.Y.S.2d at 223-24.

Complainant has established a prima facie case of retaliation. The record firmly establishes that, on June 2, 2006, Complainant reported Bailey's sexual harassment to Spaventa in accordance with Alliance's sexual harassment policy. Next, Complainant suffered an adverse action when Respondents terminated her employment. Finally, Complainant established causation by showing that Respondents terminated her employment on the same day that she engaged in protected activity. See *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir. 2001) (reviewing cases that found temporal proximity to indicate a causal connection for time periods ranging from twelve days to eight months).

Respondents claimed that Complainant was discharged due to her poor work performance. However, the record establishes that the only individual who faulted Complainant's work performance was Bailey, the harasser. Rather than perform a meaningful investigation into Complainant's allegations in accordance with its sexual harassment policy, Respondents adopted Bailey's recommendation and terminated Complainant's employment on the day she complained about Bailey's sexual harassment.

Accordingly, the Division finds that Respondents' explanation for Complainant's discharge is a pretext for unlawful retaliation, and Respondents bear liability for this unlawful conduct under the Human Rights Law.

The Division is granted broad discretionary powers to redress an injury by way of an award of reasonable compensatory damages. *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 79, 436 N.Y.S.2d 231, 235 (1980). However, the award must bear a reasonable relationship to the wrongdoing, be supported by substantial evidence and be comparable to awards for similar injuries. *State of New York v. New York State Div. of Human Rights*, 284 A.D.2d 882, 884, 727 N.Y.S.2d 499, 501 (3d Dept. 2001).

In the instant case, Complainant is entitled to compensation for back pay. Alliance paid Complainant an annual salary of \$28,000.00 when she was discharged on June 2, 2006. Complainant's total earnings in 2006, including unemployment compensation, were \$22,640.00. Therefore, Complainant is entitled to \$5,360.00 in back pay for 2006.

Although Murphy testified that Alliance ceased business operations in June 2007, Respondents proffered no documentary evidence to corroborate this self-serving testimony. Accordingly, calculations for back pay damages end on November 20, 2007, the last public hearing date on which Complainant presented evidence regarding damages. This represents an approximate 46 week period in 2007. Complainant's weekly salary during her employment with Alliance was approximately \$538.00. The difference between the amount Complainant would have earned during this time period if she was still employed by Alliance (\$24,748.00) and the amount she actually earned during this time period (\$3,581.00) is \$21,167.00.

Therefore, Complainant is entitled to a total of \$26,527.00 in damages for back pay.

Complainant is also entitled to recover compensatory damages for mental anguish caused by Respondents' unlawful conduct. In considering an award of compensatory damages for mental anguish, the Division must be especially careful to ensure that the award is reasonably related to the wrongdoing, supported in the record and comparable to awards for similar injuries. *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991). Because of the "strong antidiscrimination policy" of the Human Rights Law, a complainant seeking an award for pain and suffering "need not produce the quantum and quality of evidence to prove compensatory damages he would have had to produce under an analogous provision." *Batavia Lodge No. 196 v. New York State Div. of Human Rights*, 35 N.Y.2d 143, 147, 359 N.Y.S.2d 25, 28 (1974). Indeed, "[m]ental injury may be proved by the complainant's

own testimony, corroborated by reference to the circumstances of the alleged misconduct.” *New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991).

In the case at bar, Complainant credibly testified that the sexual harassment she endured during her approximate 6 month employment with Alliance caused her to feel “violated”, “uncomfortable”, “depressed” and “upset”. Furthermore, she testified that she felt depressed for approximately 6 to 9 months after her employment was terminated. Accordingly, the Division finds that an award of \$25,000.00 for mental anguish is consistent with similar cases and will effectuate the remedial purposes of the Human Rights Law. *See State of New York v. New York State Div. of Human Rights*, 284 A.D.2d 882, 727 N.Y.S.2d 499 (3d Dept. 2001); *Georgeson & Co., Inc. v. Stewart*, 267 A.D.2d 126, 700 N.Y.S.2d 9 (1st Dept. 1999); *New York City Health & Hospitals Corp. v. New York State Div. of Human Rights*, 236 A.D.2d 310, 654 N.Y.S.2d 310 (1st Dept. 1997); *State Div. of Human Rights v. Demi Lass Ltd.*, 232 A.D.2d 335, 648 N.Y.S.2d 925 (1st Dept. 1996).

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, and their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and it is further

ORDERED that Respondents shall take the following action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay to Complainant the sum of \$26,527.00 as damages for back pay. Interest shall accrue on the award at the rate of nine percent per annum from July 18, 2007, a reasonable intermediate date, until the date payment is actually made by Respondents.

2. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall pay to Complainant the sum of \$25,000.00 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 the rate of nine percent per annum from the date of the Commissioner's Order until payment is actually made by Respondents.

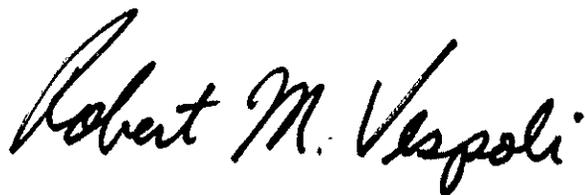
3. The aforesaid payments shall be made by Respondents in the form of two (2) certified checks made payable to the order of Complainant, Takiya Fitzgerald, and delivered by certified mail, return receipt requested, to the New York State Division of Human Rights; Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Respondents shall furnish written proof to the New York State Division of Human Rights, Office of General

Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of their compliance with the directives contained within this Order.

4. Within sixty (60) days of the date of the Commissioner's Order, Respondents shall promulgate policies and procedures for the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. These policies and procedures shall include the establishment and formalization of a reporting mechanism for employees in the event of discriminatory and/or harassing behavior or treatment, and shall contain the development and implementation of a training program in the prevention of unlawful discrimination and harassment in accordance with the Human Rights Law. Training shall be provided to all employees. A copy of these policies and procedures shall be provided, simultaneously, to the New York State Division of Human Rights, Office of General Counsel, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

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

DATED: November 24, 2008
Hempstead, New York

A handwritten signature in black ink that reads "Robert M. Vespoli". The signature is written in a cursive, flowing style.

Robert M. Vespoli
Administrative Law Judge