

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

BEVERLY JOHNSON,

Complainant,

v.

MEDICAL EXPRESS AMBULANCE CORP.;
FRANK MARTINEZ AS AIDER AND ABETTOR,
Respondent.

NOTICE AND
FINAL ORDER

Case No. 10113900

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 June 17, 2008, by Rosalie Wohlstatter, 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”), WITH THE FOLLOWING AMENDMENT:

- The compelling testimony of Dr. Goldstein bolsters the credibility of Complainant’s claim for mental anguish damages and supports the award of \$80,000.

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: **SEP 30 2008**
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER

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**MEDICAL EXPRESS AMBULANCE CORP.;
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Respondent.

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

Case No. **10113900**

SUMMARY

Complainant was subjected to sexual harassment by her supervisor for a period of months in 2005. As a result of this harassment, she has suffered mental anguish, and is entitled to compensatory damages in the amount of \$80,000.

PROCEEDINGS IN THE CASE

On September 16, 2006, Complainant filed a verified complaint with the New York State Division of Human Rights ("Division"), charging Respondent 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 Respondent 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 Rosalie Wohlstatter, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on April 7 and 8, 2008.

Complainant and Respondent appeared at the hearing. Complainant was represented by Joshua Friedman, Esq. Respondent was represented by Wayne J. Schaefer, Esq.

On Complainant’s motion, and pursuant to 9 NYCRR §465.12 (f)(14), the complaint is hereby amended to conform to the proof to include the claims of hostile work environment and retaliation.

Permission was granted for Frank Martinez to file a a post-hearing affidavit. The affidavit was submitted and will be Respondent’s Exhibit 15.

Permission to file post-hearing briefs was granted. Both parties filed timely post-hearing briefs.

FINDINGS OF FACT

1. Complainant, a female, began working for Respondent as an Emergency Medical Technician, (“EMT”) in July of 2005. (ALJ’s Exh. 2; Tr. 168)
2. When she was first hired by Respondent, Complainant’s supervisor was Michael Collins, who oversaw the ambulance drivers. Collins reported to Ronald O’Grady, Respondent’s Vice-President and Chief Operating Officer. (Tr. 171, 605)
3. O’Grady oversaw Respondent’s Long Island and New York City operations; this included both the ambulance and ambulette divisions. (Tr. 607)

4. Because there was not enough work in the ambulance division when Complainant started working for Respondent, Collins introduced Complainant to Frank Martinez, who supervised the ambulette drivers. (Tr. 180-81)

5. Martinez interviewed Complainant and told her that she could be an ambulette driver. (Tr. 181)

6. Initially, Complainant worked approximately 30-40 hours a week driving in the ambulette division. (Tr. 182)

7. Sometime in September of 2005, Martinez asked Complainant whether she would be willing to help out in the office. She agreed to help and began to do office work for him shortly thereafter. (Tr. 183-85)

8. At first, Complainant spent only an hour or two in the office and then would go out to drive her shift. However, after a few weeks, at the request of Martinez, Complainant started spending more time in the office and less time driving. (Tr. 185-86)

9. After a while, Martinez began to make Complainant uncomfortable in the office: he told Complainant that he loved her; he offered her alcohol; he asked her for kisses; he found a way to touch her when he passed by her in the office; sometimes he hugged her. Even after Complainant told him to get away from her, he would not let her go. Martinez would do something inappropriate every day. Complainant felt disgusted and wondered how she was going to get out of there yet keep her job. (Tr. 187-89, 191, 194-95)

10. As a result of Martinez's actions, Complainant was uncomfortable and confused; she felt like a "hostage." Her whole life changed. She was depressed; she lost weight. (Tr. 212-14)

11. Kim Carpenter, an EMT, who began working for Respondent in July, 2006 observed Martinez in the office touching women and whispering in their ears. She overheard Martinez say things of a sexual nature to Complainant. (Tr. 41, 45-46)

12. Angela Jones, another EMT, who worked for Respondent for two years, beginning in 2004, had also been grabbed by Martinez. Martinez rolled up his belly on top of her back and fondled her buttocks. Every time he saw her he did something inappropriate. (Tr. 66, 71-72)

13. In December of 2005 or January of 2006, Martinez told her Complainant not to punch in on the time clock while she was doing her own work on the office computer. This admonition upset Complainant, and on January 20, 2006, Complainant wrote a letter expressing her anger over this to Martinez. In the letter, she also referred to a possible secretarial position Martinez had told her about and which had not materialized. There was no reference in this letter to sexual harassment. (Complainant's Exh. 4; Tr. 219-24)

14. Martinez showed the letter to O'Grady, who spoke to Complainant to discuss the reasons for the letter. Complainant did not tell O'Grady that Martinez had harassed her. However, she claims that O'Grady "knew" why she was upset with Martinez. (Tr. 227-28, 615)

15. Complainant believed that O'Grady spoke to Martinez because, after this, Martinez avoided contact with her and called her a "bitch." (Tr. 229)

16. Complainant approached Collins and O'Grady to see if she could return to driving the ambulance. Collins offered her work in the ambulance division. (Tr. 247-48, 621-22)

17. Complainant was getting less work in the ambulance division than she had in the ambulette division; however, she, herself, cancelled days that she had been scheduled to work. (Tr. 251-52)

18. In June of 2006, Complainant returned to school to train to be a Medical Assistant.

She was in school from July of 2006 until September of 2006. She was available to work on weekends only during this time. (Tr. 266-68)

19. On September 16, 2006, Complainant filed a complaint with the Division of Human Rights alleging that she was subjected to unwanted sexual advances from Martinez. When O'Grady received the complaint, he interviewed Martinez, who denied the allegations. O'Grady then told his own immediate supervisor, John Lauinger, about the charges. O'Grady did not ask Complainant about the charges. Nor did he conduct any further investigation with respect to Complainant's allegations. No disciplinary action was taken against Martinez. (ALJ's Exh. 2; Tr. 682-84)

20. On October 3, 2006, Collins asked Complainant to come to work even though she was not scheduled to work that day. Complainant developed a headache and tried to call Collins to ask him to get a replacement for her. Collins told her that he understood that she had a headache, but told her that she had to pick up one more patient before she could go home. Instead of going to pick up the patient, Complainant took the ambulance back to a place around the corner from the base and walked away. (Tr. 280-81, 283-85, 545-47)

21. A couple of days later, after speaking with O'Grady, Collins called Complainant to tell her that she was fired because she had walked off the job. (Tr. 287, 548-49)

22. Neither Collins nor Martinez could terminate anyone without O'Grady's approval. (Tr. 608)

23. Martinez denied acting inappropriately towards women in the office. (Respondent's 15)

24. Martinez left Respondent's employ at the end of October or the beginning of November in 2006. (Tr. 678)

25. Martinez had been asked to resign from a position with Long Island College Hospital because a woman had accused him of sexual harassment, and O'Grady was aware of this when he hired Martinez to work for Respondent. (Tr. 677)

26. Until the filing of the complaint in this matter, O'Grady was not explicitly told that Martinez was sexually harassing Complainant. Nor did he witness any sexual harassment. (Tr. 622-23, 664-65)

27. Respondent had neither a sexual harassment policy nor an employee manual. It did not provide any training on how to report sexual harassment. (Tr. 47-48,66, 114, 172)

28. O'Grady testified that he had an "open door" policy with respect to employee complaints. (Tr. 611)

29. Complainant produced an expert witness, Robert Goldstein, M.D., a psychiatrist, who testified that he spoke with Complainant on March 7, 2007 for approximately two and a half hours and diagnosed her as depressed with post-traumatic features. (Tr. 432, 452-54)

30. After Complainant left Respondent's employ, she could not sleep. She was so depressed that she could not get herself out of the house to look for work until January of 2008 (Tr. 293-94, 296)

OPINION AND DECISION

Hostile Work Environment

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an employee in the terms, conditions, or privileges of employment because of that employee's sex. *See* Executive Law § 296.1 (a). One type of unlawful gender or sexual discrimination is sexual harassment. To establish a prima facie case of sexual harassment,

Complainant must prove (1) that she belongs to a protected group; (2) that she was the subject of unwanted sexual harassment; (3) that the harassment was based on gender; (4) that it altered a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take any remedial action. *See Pace v. Ogden Servs. Corp.* 257 A.D. 2d 101 (3rd Dept. 1999). Sexual harassment can take the form of quid pro quo harassment or a hostile work environment. *Father Belle Community Ctr. v. New York State Div. of Human Rights*, 221 A.D. 44, 642 N. Y. S. 2d 739 (4th Dept. 1996) To constitute a hostile work environment, the workplace must be permeated with intimidation and insult that is severe or pervasive enough to alter the terms or conditions of employment. *Id.* “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 mere offensive utterance and whether it unreasonably interfered with the plaintiff’s work performance.” *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.* 175 Misc.2d 795, 803, 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 (1991).

In this case, Complainant was subjected to a hostile work environment. Her direct supervisor, Martinez, made unwelcome, sexually abusive, and repeated sexual advances toward her. Complainant felt uncomfortable enough to request a transfer to another division.

Under New York law, for Respondent employer to be held liable for an employee’s acts, it must have acquiesced in the discriminatory conduct or subsequently condoned it. *Father Belle*. Condonation can be demonstrated by a knowing, after-the-fact forgiveness or acceptance of an offense. In this case, Respondent’s failure to have any sexual harassment policy or manual implies condonation. *E.E.O.C. v. Rotary Corp.*, 297 F. Supp. 2d 643, 666 (N.D.N.Y. 2003)

O'Grady's "open door" policy was insufficient as a means to handle sexual harassment. Further evidence that Respondent employer implicitly acquiesced in the harassment is that after he received formal notice of the allegations of sexual harassment, in September of 2006, the only action that O'Grady took was to talk to Martinez, whose denial was taken at face value. The lack of any investigation by Respondent demonstrated that it did not appreciate its obligations as an employer to safeguard the rights of its employees to work in an environment free from discrimination. *See McIntyre*. Respondent, thus acquiesced in the sexual harassment.

Martinez as aider and abettor.

The Human Rights Law makes it an unlawful discriminatory practice for any person to aid or abet the doing of any of the acts forbidden under the Human Rights Law or to attempt to do so. Executive Law §296.6. This has been construed to impose liability on anyone who actually participates in the conduct giving rise to the discrimination claim. *See Tomka v. Seiler Corp.*, 66 F.3d 1295 (2nd Cir. 1995). In the instant case, Frank Martinez was the individual who actually created the hostile work environment and is liable as an aider and abettor.

Retaliation

Complainant alleges that Respondents retaliated against her after she initially wrote the letter to Frank Martinez complaining of his treatment of her and, again, after she filed her claim with the Division of Human Rights by terminating her employment. Complainant has failed to prove either claim. To make out a prima facie case of retaliation, Complainant must first show that she engaged in protected activity; that Respondent knew of the activity; that Respondent took an adverse employment action against Complainant; and that there was a causal connection between the protected activity and the adverse action. *Pace* at 104. Until Complainant filed the

within complaint with the Division, she did not engage in any protected activity. Although she was terminated after she filed this complaint, the evidence showed that Complainant was terminated for walking away from her ambulance in the middle of her shift. Thus, she has not established retaliation.

Damages

At the time Complainant walked away from her employment, she was no longer under the supervision of Martinez. She was working in the ambulance division under the supervision of Collins. Her decrease in income was, in large part, due to her return to school. Therefore, there is no back pay award. Nevertheless, Complainant is entitled to compensatory damages for mental anguish. An award for mental anguish must be reasonably related to the wrongdoing, supported in the record, and comparable to awards for similar injuries. *See State Div. of Human Rights v. Muia*, 176 A. D 2d 1142, 575 N.Y. S. 2d 957 (3rd Dept. 1991). Additionally, because of the strong anti-discrimination policy of the Human Rights Law, Complainant need not produce the quantum and quality of evidence to prove damages for pain and suffering that she would have had to produce under other provisions. *Batavia Lodge No. 196 v. New York State Div. of Human Rights*, 35 N.Y. 2d 143, 359 N. Y. S. 2d 25 (1974) Complainant's mental anguish may be proved by her own testimony corroborated by the circumstance of the misconduct. *New York City Transit Auth. v. State Div. of Human Rights*, 78 N.Y. 2d 207, 573 N.Y. S. 2d 49 (1991) In fact, in this case, the expert witness testimony of Dr. Goldstein did not provide any more information with regard to Complainant's mental state than her own testimony. Complainant was made to feel like a hostage to Martinez's advances. She withdrew socially, was depressed and traumatized. She had been unable to work from the termination of her employment until January

of 2008. Therefore, an award of \$80,000 for mental anguish is appropriate in this matter and will effectuate the remedial purposes of the Human Rights Law.

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, successor, and assigns, shall cease and desist from discriminatory practices in employment; and it further

ORDERED that the Respondent 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 days of the date of the Commissioner's Order, Respondent shall pay to Complainant the sum of \$80,000 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 Respondent.
2. The aforesaid payment shall be made by Respondent in the form of a certified check made payable to the order of Complainant, Beverly Johnson, and delivered by certified mail, return receipt requested, to her attorney, Joshua Friedman, Esq, 25 Senate Place, Larchmont, New York 10538. Respondent shall simultaneously furnish written proof to Caroline J. Downey, General Counsel of the State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458, of its compliance with the directives contained within this Order.

3. Within sixty days of the date of the Commissioner's Order, Respondent also 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, with the sixty day timeframe, to Caroline J. Downey, General Counsel of the New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458.
4. Respondent shall cooperate with the representatives of the Division during any investigation into compliance with the directives contained within the Order.

DATED: June 17, 2008
Bronx, New York


Rosalie Wohlstatter
Administrative Law Judge