



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

HOPE KOTLER,

Complainant,

v.

**DAVID FANTAU, R-PAC INTERNATIONAL
CORPORATION,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10170291

Federal Charge No. 16GB404098

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 March 4, 2016, 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, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENTS:

- Finding of Fact 25 contains a typographical error. During the investigation of

Complainant's sexual harassment complaint, Complainant was placed on paid leave, not unpaid leave. (Tr. 707)

- The final full paragraph of the analysis in the Recommended Order is not, herein, adopted.

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: **MAY 02 2016**,
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



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

Case No. **10170291**

SUMMARY

Complainant alleged that she was forced into a sexual relationship, against her will by Respondent David Fantau, her supervisor at Respondent r-pac International, her employer. Complainant's allegations lack credibility and, therefore, the case must be dismissed.

PROCEEDINGS IN THE CASE

On August 4, 2014, 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 September 21, 2015, October 1, 2015, October 2, 2015 and October 9, 2015.

Complainant and Respondents appeared at the hearing. Complainant was represented by Michael Garcia, Esq. and Kenneth B. Goodman, Esq. Respondent David Fantau was represented by Danielle C. Lesser, Esq. Respondent r-pac International Corporation was represented by Jessica Golden Cortes, Esq. and Daniel Feinstein, Esq.

FINDINGS OF FACT

1. Complainant has been employed by Respondent r-pac International Corporation (“r-pac”) as an executive assistant since 2006. She remains employed by r-pac to this day. (Tr. 21, 23)
2. R-pac sells tags and packaging products for the apparel industry. (Tr. 21)
3. Respondent David Fantau was a sales manager. He was Complainant’s direct supervisor. (Tr. 24, 27, 803)
4. Michael Teitelbaum is the chief executive officer of r-pac. (Tr. 21)
5. Teitelbaum is responsible for hiring and firing all employees at r-pac. (Tr. 312, 905)
6. Complainant’s duties included supporting the sales manager by tracking production, taking orders, making sure the orders were shipped on time and arranging meetings. (Tr. 27)
7. When Complainant first began working for r-pac, her relationship with Fantau was “fine” and “cordial.” (Tr. 27)
8. Complainant is a single parent whose son has behavioral issues. She also has financial difficulties. Complainant discussed her problems with Fantau. (Tr. 29)

9. As a result of her son's problems, Complainant often sought and received time off from work to meet with school officials. (Tr. 28-29)

10. Complainant alleges that, beginning in 2007, Fantau would make sexual comments and become "flirtatious" and "very hands-y." (Tr. 37)

11. Complainant also alleged that Fantau screamed and called her offensive names, like "bitch" and "whore." Fantau denied this. Sharon Horowitz, account executive, and Tamika Reed, sales support manager, who both had desks near Complainant, denied ever hearing those comments. (Tr. 31, 922, 1001, 1086)

12. Fantau credibly stated that it was Complainant who initiated the discussions about sex in the office. Horowitz and Reed confirmed that Complainant discussed her personal life in the workplace, often telling stories about the men she was seeing. (Tr. 957-58, 1003-04, 1010)

13. Complainant also talked about her breasts with Fantau, calling them her "pride and joy." Fantau considered the talk to be "flirtatious." (Tr. 817-19)

14. Complainant also discussed her porn and vibrator collections with Fantau. (Tr. 824-25)

15. In 2009, Complainant also began dressing more provocatively. She began wearing low cut tops that accentuated her breasts and would lean over Fantau's desk. (Tr. 822)

16. In 2009, Complainant and Fantau began a sexual relationship. They maintained a sexual relationship from 2009 until 2014. (Tr. 821, 840)

17. Complainant and Fantau would meet for sexual relations in hotels near r-pac's offices or, occasionally, would have sex in a bathroom in r-pac's offices. (Tr. 821, 844, 860)

18. Complainant also used video apps, Skype and Oovoo, to make masturbation videos for Fantau. (Tr. 73, 118, 835)

19. When Complainant and Fantau had sex at nearby hotels, Fantau would rent the hotel room and then text the room number to Complainant. Even though she claims she was forced to have sex with Fantau, Complainant never showed the text messages or the hotel room keys that were left for her to Teitelbaum or anyone at r-pac. Instead, Complainant went to the hotel room, repeatedly, to have sex with Fantau, who would be waiting for her in the hotel room. (Tr. 322-26)

20. Complainant stated that she felt it “seemed that it would be part of my job to have sex with” Fantau, and that she did it because “it seemed to make him happy and I wanted to create happiness for him.” (Tr. 76)

21. In April of 2014, when Fantau was on a business trip, Complainant supplied him with pornographic videos and sent e-mails to him asking if he was “warm and cozy in bed.” (Tr. 681)

22. Complainant did not report Fantau’s alleged harassment to anyone one at r-pac because she “would never do that to him...I wouldn’t expose him at all.” (Respondent’s Exhibit 18; Tr. 327)

23. On one occasion, while on a business trip in Secaucus, New Jersey, Complainant and Fantau took a room in a hotel and had sexual relations. Complainant stated that, although she did not want to have sex, she did so because she did not know how to get home to Manhattan from Secaucus. (Tr. 304-06)

24. On July 14, 2014, Complainant’s attorney sent a letter to r-pac, disclosing for the first time that Complainant had been engaging in a sexual relationship with Fantau and alleging that it was against her will. (Tr. 664, 675)

25. After receiving the July, 14, 2014 letter, Teitelbaum immediately placed Complainant on an unpaid leave of absence while he investigated the matter. Shortly thereafter, Teitelbaum

transferred Complainant to a different team and instructed Fantau and Complainant not to have any contact with each other. (Tr. 707)

26. Even though Teitelbaum determined that the relationship was consensual, he allowed Complainant to use the freight elevator in order to avoid Fantau. Teitelbaum also gave Complainant his personal cell phone number with instructions that she could call him any time if Fantau tried to contact her. Teitelbaum also barred Fantau from the area of the office where Complainant's new workspace was located. (Tr. 707-08)

27. Fantau resigned his position in July, 2015. (Tr. 736, 892)

28. Complainant did not complain about Fantau between the time she made her original complaint in July, 2014 and Fantau's resignation. (Tr. 736)

OPINION AND DECISION

It is an unlawful discriminatory practice for an employer to discriminate against an employee in the terms and conditions of employment on the basis of sex. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1(a).

Sex discrimination in the workplace includes sexual harassment. Sexual harassment can take the form of a hostile work environment or quid pro quo sexual harassment. *Father Belle Cmty. Ctr. v. New York State Div. of Human Rights*, 221 A.D.2d 44, 49-50, 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 order to sustain a claim of quid pro quo sexual harassment, Complainant must show that she was "subjected to unwelcome sexual conduct and that the reaction to that conduct was then used as a basis for decisions, either actual or threatened, affecting compensation, terms, conditions or privileges of employment." *Bracci v. New York State Div. of Human Rights*, 62

A.D.3d 1146, 1147, 878 N.Y.S.2d 830, 831 (3d Dept. 2009), *appeal dismissed*, 15 N.Y.3d 865, 910 N.Y.S.2d 31 (2010) (citations omitted).

To make out a case of sexual harassment based upon a hostile environment, Complainant must show that “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.”

Father Belle Community Ctr. v. State Div. of Human Rights, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 (4th Dept. 1996) (internal quotations and citations omitted), *re-argument denied*, 647 N.Y.S.2d 652 (4th Dept. 1996), *leave to appeal denied*, 89 N.Y.2d 809 (1997). “Whether a workplace may be viewed as hostile or abusive – from both a reasonable person’s standpoint as well as from the victim’s subjective perspective – can be determined only by considering the totality of the circumstances.” *Id.* at 51. “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 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 (1999).

To make out a claim of sexual harassment under either theory, complainants must show that Respondents subjected them to unwelcome sexual conduct. Complainant is unable to make such a showing. In fact, the evidence is clear that Complainant not only welcomed the sexual conduct, she encouraged and initiated it. Her protests of victimhood simply do not ring true. I have listened to Complainant’s testimony and compared it to that of Fantau as well those co-workers who support Fantau’s testimony; I have examined the demeanor of all witnesses. I can

only conclude that Complainant's assertions that she was victimized by Fantau cannot be credited.

Much of Complainant's testimony does not even pass the plausibility test. Indeed, while testifying at a hearing in which she accused Fantau of heinous acts, Complainant stated she "would never" report Fantau, because she would not "do that to him" and she feared for her job. Yet Complainant accused Fantau in a July, 2014 letter and again in her Division complaint and did not lose her job. Are we to assume, then, that "never" arrived in July 2014, when Complainant's attorney wrote to r-pac? Complainant stated that she repeatedly had sex with Fantau, against her will, yet she left the office and went to the hotel for the purpose of having sex with Fantau, and, even though she had text messages she could have taken to Teitelbaum to prove her allegations, she took no action to report the behavior—all while Fantau waited for her in a hotel room. In addition, Complainant, a grown woman, stated that she decided to have sex with Fantau, against her will, because she didn't know how to get home from New Jersey. Complainant's stories are simply too fantastic to credit. The evidence leads to only one conclusion: Complainant was a willing participant in the sexual relations she aggressively pursued with Fantau. The case, therefore, must be 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 case be dismissed.

DATED: March 4, 2016
Bronx, New York



Thomas S. Protano
Administrative Law Judge