

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

RAJNI KURICHH,

Complainant,

v.

COMSYS INFORMATION TECHNOLOGY
SERVICES, INC., FRANCIS R. FLEURY AS
AIDER AND ABETTOR,

Respondents.

and NEW YORK STATE, OFFICE OF THE STATE
COMPTROLLER, DEPARTMENT OF
TRANSPORTATION, KEANE INC., KMQ
ENTERPRISES, INC. D/B/A TAILWIND
ASSOCIATES, Necessary Parties.

NOTICE AND
FINAL ORDER

Case No. 10104568

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 31, 2009, 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.

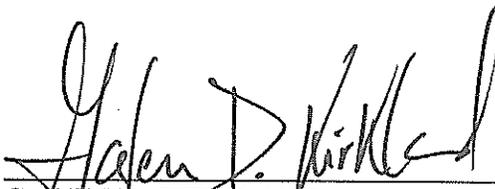
PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER"). In accordance with the Division's Rules of Practice, a copy of this Order has been filed 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
Enforcement Unit
Sharon J. Field, Director of Prosecutions
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ASSOCIATES, DEPARTMENT OF
TRANSPORTATION, KEANE INC.,**
Necessary Parties.

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

Case No. **10104568**

SUMMARY

Complainant charged Respondents with unlawful discrimination in the workplace, alleging sexual harassment and constructive discharge. Since the record does not support Complainant's allegations, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On March 14, 2005, 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 Christine Marbach-Kellett, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on August 21-22, 2007. The case was subsequently reassigned to Robert M. Vespoli, ALJ.

Complainant, Respondents and Necessary Parties appeared at the hearing. Complainant was represented by Ravinder Sawhney, Esq. Respondents were represented by John M. Bagyi, Esq. and Alexander Powhida, Esq. Necessary Parties were represented by Robert J. Koshgarian, Esq., Robert A. Rybak, Esq., and Josiah M. Black, Esq.

FINDINGS OF FACT

1. COMSYS Information Technology Services, Inc. (“COMSYS”) is a staff recruiting firm that provided staffing services to KMQ Enterprises, Inc., d/b/a Tailwind Associates (“Tailwind”) pursuant to a subcontractor agreement. (Tr. 666; COMSYS Exhibits 22, 23)

2. Tailwind provided services related to the CARCERT project to the New York State Department of Transportation (“DOT”) pursuant to a separate agreement between the DOT and Tailwind. (Tr. 311-12; DOT Exh. 4)

3. Keane, Inc. (“Keane”) is a staffing agency that provided the DOT with information technology staff for software development projects, including the CARCERT project, pursuant to a separate contract between the DOT and Keane. (Tr. 306; DOT Exh. 3)

4. Complainant was employed by COMSYS from August 25, 2004, to February 28, 2005, as a consultant providing services to Tailwind pursuant to the agreement between COMSYS and Tailwind. (Tr. 175, 510, 615-16; COMSYS Exhibits 22, 23)

5. Francis Fleury was employed by Keane as the project manager on two DOT projects, including the CARCERT project. (Tr. 306-07, 384-85) He was responsible for the project scheduling, budgeting, identifying and resolving project-related problems, evaluating employees with regard to project goals, delivering services to the client, and assigning tasks to team members. (Tr. 317-18, 385-86, 439-40, 481-83)

6. The CARCERT project was a three-phase software development project. (Tr. 307) Complainant worked on the third phase of the CARCERT project during the term of her employment with COMSYS. (Tr. 293, 312-13)

7. COMSYS maintains an established equal employment opportunity (“EEO”) and harassment policy that prohibits, inter alia, employees and non-employees from sexually harassing COMSYS employees in the workplace. In relevant part, this policy requires a COMSYS employee who believes that he/she has been sexually harassed to report the incident as soon as possible to the local human resources representative, senior management or human resources official. Complainant acknowledged that she received and reviewed a copy of this policy at the commencement of her employment with COMSYS. (Tr. 214-15; COMSYS Exh. 9)

8. Complainant alleged that in or about August 25, 2004, until September 23, 2004, Fleury gave her “leery” looks and made unspecified suggestive comments. (Tr. 116-17, 120-21, 283-88; ALJ’s Exh. 1)

9. In or about mid-September 2004, Complainant asked to meet with Fleury after work and they engaged in a conversation about work and Complainant's personal life. (Tr. 123-27)

10. Around this time, Fleury told Complainant that his wife and stepchildren would be out of town and that she should come over to his house to "play." (Tr. 69-70, 81, 116, 283-85)

11. During this time period, while waiting for the elevator, Fleury asked Complainant whether she was "going down." When Complainant responded in the affirmative, Fleury told her not to tease him. (Tr. 121-22)

12. On or about September 21, 2004, Fleury presented Complainant with a handwritten map which showed directions to his house. On the same paper, Fleury wrote, "[a]re we really going to play?" On the same paper, Complainant wrote, "never." (Tr. 76, 81, 83-85)

13. Complainant never told Fleury that she found his conduct offensive or demanded that he cease such conduct. (Tr. 258-60, 285-86)

14. After Complainant wrote "never," Fleury did not ask her to go out, to "play", or to be alone with him again. (Tr. 286)

15. Complainant admitted that Fleury made no other remarks to her beyond the ones she reported, all of which occurred on or before September 21, 2004. (Tr. 252, 293)

16. On or about September 23, 2004, Complainant met with Tina Markle, Complainant's COMSYS recruiter who is based in their Albany office. Complainant presented Markle with Fleury's map and explained what had happened. (Tr. 85-87, 219, 590-92, 594)

17. Markle was supportive during this conversation. (Tr. 85-88) Complainant told Markle that she did not want to pursue a complaint at that time and advised Markle to “let matters rest for the moment.” (Tr. 85, 219)

18. Despite Complainant’s request, Markle informed Lois Kent, a branch administrator for COMSYS, and Kathleen LaRose, a senior account manager for COMSYS. (Tr. 590-91)

19. LaRose testified that in October, shortly after Complainant complained to Markle, she met with Don Wells, Director of IT at the DOT. (Tr. 594-95, 647) LaRose informed him of Complainant’s complaint and her request that no action be taken. LaRose also inquired whether Wells was aware of any other misconduct by Fleury. (Tr. 594) Wells denied knowing about any other behavioral issues with Fleury but said he would speak with Keane about the complaint. (Tr. 594)

20. Sometime in late October or November, LaRose stopped by Wells’ office again and followed up about Complainant’s situation. Wells told her that he had spoken to a Keane representative who informed Wells that “it had been taken care of.” (Tr. 595, 647)

21. Debra Strayer, a representative of Keane, contacted Wells sometime in November 2004, after Wells spoke to one of Keane’s managers about the incident Complainant reported regarding Fleury. (Tr. 387-88)

22. In their conversation, Wells informed Strayer about an unspecified complaint that a female employee had made about Fleury. (Tr. 390) Wells did not provide any specific information regarding Complainant or the nature of the complaint. (Tr. 389-90) Strayer then met with Fleury, informed him about the anonymous complaint, and admonished him to modify his workplace behaviors. (Tr. 392-94)

23. On or about November 19, 2004, during a meeting with Renee Roth-O'Neil, a Tailwind employee, Complainant mentioned the incident regarding Fleury's map and instructed O'Neil to keep their discussion confidential. (Tr. 260-61, 672-75)

24. Sometime after LaRose had spoken to Wells about this incident, Roth-O'Neil contacted LaRose to report what Complainant had told her about Fleury's map. LaRose informed Roth-O'Neil that Complainant had previously reported this situation to COMSYS and that COMSYS was handling the situation. (Tr. 649-50, 674, 680) Tailwind received no further information from Complainant about alleged sexual harassment until after Complainant filed the instant complaint. (Tr. 674-76)

25. Complainant alleged that after her September 23 complaint, she experienced increased stress, tension and discomfort in the workplace and that she was excluded from team meetings, distanced from Anna O'Connell, a DOT employee, and her workload diminished. (Tr. 129-38, 150) She also alleged that Michelle Esposito was brought into the CARCERT project to waste Complainant's time. (Tr. 136, 148-50, 153)

26. Complainant was unable to clearly articulate any relation between these allegations and her allegations of sexual harassment. (Tr. 135-36, 150-58) The record shows that Complainant's work load actually increased toward the end of November 2004. (Tr. 161, 266, 484-86) Complainant's salary and title remained the same throughout her employment, and she never received a poor performance review. (Tr. 150, 267) In late September 2004, Fleury chose Complainant and a male co-worker to serve as project leaders. (Tr. 68, 84-85, 95, 246, 344-45)

27. Complainant admitted that she was not afraid to be alone with Fleury. (Tr. 287) For example, in October or November 2004, Complainant met with Fleury individually to discuss her complaints about a co-worker's performance. (Tr. 478-80)

28. On or about January 17, 2005, Complainant ceased arriving for work at the DOT. She produced a medical note indicating that she would be out of work until February 1, 2005.

(Complainant's Exh. 9)

29. On January 31, 2005, Complainant completed COMSYS's leave of absence form requesting personal leave from January 31, 2005, to February 28, 2005. Complainant forwarded this form to LaRose and stated only that she would be "going home for a while." (Tr. 273, 605-06; COMSYS Exh. 19)

30. COMSYS denied Complainant's request for leave on February 4, 2005. (Tr. 607)

31. After COMSYS denied her request for leave, Complainant reported to COMSYS unspecified allegations of ongoing sexual harassment by Fleury. This was the first time Complainant reported to COMSYS regarding continuing sexual harassment by Fleury since September 23, 2004. (Tr. 163-66, 220-23, 607-08)

32. In response to these new allegations, COMSYS granted Complainant a thirty-day leave of absence. (Tr. 184, 607-08)

33. COMSYS was unable to perform any meaningful investigation of Complainant's new, unspecified allegations of sexual harassment because Complainant remained out of work, and she refused to speak to COMSYS representatives. (Tr. 608-09; COMSYS Exhibits 2, 3, 5)

34. COMSYS representatives attempted to communicate with Complainant regarding alternative positions for which Complainant was qualified. (Tr. 609-13, 616-17; COMSYS Exh. 4) Complainant's attorney informed COMSYS that Complainant elected to "proceed with her remedies and does not wish [COMSYS] to contact her." (COMSYS Exh. 5)

35. Complainant's employment with COMSYS ended on or about February 28, 2005, after the expiration of her thirty-day leave of absence. (Tr. 615-16)

OPINION AND DECISION

Complainant cannot sustain her claim of sexual harassment against Respondents.

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 order to sustain a claim of sexual harassment based on a hostile work environment, Complainant must demonstrate that she was subjected to conduct that produced a work environment permeated with discriminatory intimidation, ridicule and insult that is 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 Complainant 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, 50-51, 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).

The standards for judging a hostile work environment claim are designed to ensure that the Human Rights Law does not become a code of general civility. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 309, 786 N.Y.S.2d 382, 394 (2004). Complainant alleged that Fleury gave her "leery" looks, made unspecified suggestive comments to her, made a comment

to her at the elevator about “going down”, and invited her to “play” at his house. Complainant alleged that this misconduct occurred between August 25, 2004, and September 23, 2004, when Complainant discussed Fleury’s invitation to “play” with Markle.

Fleury’s alleged misconduct did not affect Complainant’s ability to perform her job and was not sufficiently severe or pervasive to amount to an actionable claim. Complainant did not show that Fleury’s behavior affected her work environment, and she specifically told Markle not to pursue the matter. Although Complainant alleged that her work environment grew increasingly tense and that her work declined as a result of Fleury’s alleged misconduct, the record supports a contrary conclusion. Complainant never received negative criticism about her work, a reduction in her pay, a demotion in title, or a decrease in responsibilities. Furthermore, in late September 2004, Fleury chose Complainant and a male co-worker to become project leaders. The record is devoid of evidence showing a causal relationship between Complainant’s position as a project leader and Fleury’s alleged misconduct.

The record also establishes that Complainant never told Fleury that she found his conduct offensive or demanded that he cease such conduct. After Complainant wrote “never” in response to Fleury’s invitation to “play”, Fleury’s flirtatious behavior ended. In view of the totality of the circumstances, Fleury’s conduct was neither sufficiently severe nor pervasive to alter the terms and conditions of Complainant’s employment.

Even if Complainant established that Fleury sexually harassed her, there could be no finding of employer liability because Complainant has not established that COMSYS encouraged, condoned or approved the alleged harassment. *See State Div. Human Rights v. St. Elizabeth’s Hosp.*, 66 N.Y.2d 684, 687, 496 N.Y.S.2d 411, 412 (1985). COMSYS had an established sexual harassment policy that provided a reasonable complaint procedure.

Complainant availed herself of this procedure after she declined Fleury's invitation to "play" on September 21, 2004, and COMSYS took effective remedial action despite Complainant's wishes that the matter be left alone. Complainant admitted that Fleury made no other remarks to her beyond the ones she reported, all of which occurred on or before September 21, 2004.

It was not until February 4, 2005, when COMSYS denied her request for personal leave, that Complainant reported to COMSYS unspecified allegations of ongoing sexual harassment by Fleury. Prior to February 4 2005, Complainant did not report to COMSYS that the alleged harassment was continuing, and she did not request that COMSYS take remedial action.

Accordingly, Complainant's claim of sexual harassment must be dismissed.

Finally, the facts in the case at bar do not support a claim of constructive discharge. An employee is constructively discharged when an employer deliberately makes working conditions so intolerable that a reasonable person would feel compelled to resign. *See Polidori v. Societe Generale Groupe*, 39 A.D.3d 404, 405, 835 N.Y.S.2d 80, 82 (1st Dept. 2007). The record does not establish that Fleury, or anyone associated with COMSYS, intended to cause Complainant to resign, and a reasonable person in Complainant's shoes would not feel that she had no choice but to resign. *See Martinez v. State Univ. of New York*, 294 A.D.2d 650, 651, 741 N.Y.S.2d 602, 604 (3rd Dept. 2002).

The alleged sexual harassment by Fleury ended on or about September 21, 2004, over four months before Complainant requested her leave of absence. Complainant failed to cooperate with any investigation by COMSYS of her unspecified February 2005 allegations of continuing sexual harassment by Fleury. She also failed to respond to COMSYS's inquiries about alternative positions for which she was qualified. The record shows that Complainant

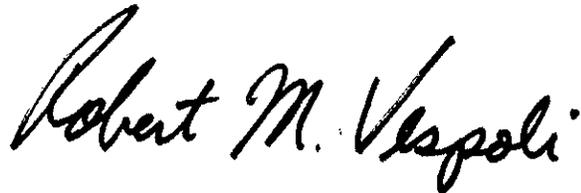
abandoned her position and that neither Fleury nor Complainant's allegations of sexual harassment played any role in her separation from employment with COMSYS.

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 instant complaint be, and the same hereby is, dismissed.

DATED: March 31, 2009
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