

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION  
OF HUMAN RIGHTS

on the Complaint of

CARMINE MARTINO,

Complainant,

v.

EASTPORT ASSOCIATES, INC., T.J.  
MISKOVSKY,

Respondents.

NOTICE AND  
FINAL ORDER

Case No. 10111675

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 April 10, 2008, by Margaret A. Jackson, 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:**

- Interest shall accrue on the lost wage award at nine percent per annum from May 8, 2006, a reasonable intermediate date, until the date payment is made.

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: **AUG 04 2008**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

NEW YORK STATE  
DIVISION OF HUMAN RIGHTS

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MISKOVSKY,

Respondents.

RECOMMENDED FINDINGS OF  
FACT, OPINION AND DECISION,  
AND ORDER

Case No. 10111675

SUMMARY

Complainant alleged that he was subjected to a hostile work environment and was constructively discharged because he could not tolerate the abuse that was directed toward him. Respondent denied all allegations related to the complaint. However, I find that Complainant successfully established his claim of sexual harassment. Complainant should receive an award for compensatory damages and mental anguish.

PROCEEDINGS IN THE CASE

On June 2, 2006, 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 Margaret A. Jackson, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on October 1, 2007 and October 3, 2007.

Complainant and Respondents appeared at the hearing. The Division was represented by Sandra S. Thomas. Respondents were represented by Peter L. Contini, Esq.

Permission to file post-hearing briefs was granted.

### **FINDINGS OF FACT**

1. Respondent Eastport Associates (Eastport) specializes in the business of life safety systems and acts as a consultant providing drafting and design services to the New York City fire alarm market. (Tr. 136)

2. Between 2002 and 2006, the owners of Eastport were Respondent Terry James Miskovsky (Miskovsky), President and Donald Bellandro (Bellandro), Vice President. (Tr. 137)

3. In January of 2004, Complainant began working for Eastport as a draftsman. (Tr. 6)

4. Bellandro was seldom in the office. Thus, Complainant was directly supervised by Miskovsky. (Tr.7)

5. Complainant was a very good draftsman but he complained a lot. He complained to Bellandro, Miskovsky, and the Administrative Assistant. His complaints were mainly that Bellandro and other employees were not performing their jobs the way he thought they should. (Tr. 141-43, 173, 243)

6. Whenever he complained about something Bellandro and Miskovsky would say “Carmine needs a diaper change, you need a diaper change. Did you make in your diaper?” (Tr.48, 50, 54, 246-47)

7. Throughout 2004, Complainant continued complaining and Miskovsky's taunts escalated. He began telling Complainant "come here little buddy and sit on my lap!" Sometimes Miskovsky would tap his leg while he made the comments. (Tr. 10, 46, 97, 104-5, 113-14, 116, 163, 167)

8. The unsolicited comments were repeatedly made in the office loud enough for the other employees to hear. (Tr.45)

9. In response, Complainant giggled and walked away. He did not tell Respondent that the comments made him feel uncomfortable. (Tr. 11, 47)

10. Miskovsky's comments became relentless. (Tr. 210)

11. On days that Complainant wore a goatee, Miskovsky would call him a "head gasket" which Complainant interpreted to mean that "it would form a gasket if he gave Miskovsky a blow job." (Tr. 26)

12. After hearing those comments, Complainant silently walked away and went to his cubicle. (Tr. 27)

13. On the days that Complainant shaved, Miskovsky would tell him that he wanted "a big wet kiss." These comments would be told to Complainant all day long. (Tr. 12)

14. Again, Complainant would walk away and try to laugh it off sometimes rolling his eyes as he walked away. (Tr. 165)

15. In addition to the other comments, Miskovsky called Complainant "Carmiwinks." (Tr.15, 70)

16. The name "Carmiwinks" referred to an episode of a South Park television series. In the episode there were two homosexuals who would take a hamster named Lemiwinks and stick it up their anus. (Tr. 16)

17. In the beginning, the nickname did not bother Complainant because he did not know what it meant until he saw the episode. Then, Complainant again began to feel degraded. But he did not complain to anyone because the taunters were his supervisors and he “needed his paycheck.” (Tr. 17, 124 - 25)

18. Miskovsky thought it was funny because the name on Complainant’s fire Department jacket was ferret. (Tr. 182)

19. Miskovsky called Complainant “Carmiwinks” on a weekly basis. (181)

20. In the winter of 2005, Miskovsky and Complainant went on a business trip. It was then that Miskovsky told Complainant that he was so short that he could give Sunshine, the head of security at Gurney’s Inn, a blowjob. (Tr. 55)

21. In early 2006, Miskovsky began sending Complainant e-mail images of scantily clad women. Complainant would open the e-mails then delete them. Complainant was uncomfortable, but again, he did not complain to anyone because he “needed the paycheck” and was afraid of being fired. (Tr. 30-2, 68, 168)

22. A few months later, Miskovsky began telling Complainant that he wanted to “cork his ass.” (Tr. 13)

23. At the beginning of 2006, business in Eastport began to slow down and Miskovsky offered Complainant a fifteen to twenty percent pay increase as an hourly rate employee rather than have him leave the company. Complainant began working a 35 hour week at \$31 per hour but agreed to be paid for a 42.5 hour work week in addition to 2.5 hours of overtime. (Tr. 38, 203)

24. Complainant continued to be harassed and taunted daily for two and one half years. (Tr.60)

25. Respondents' sexual harassment policy states that an aggrieved individual should contact their supervisor and if the supervisor is not available the employee should contact the president or any other member of management. (Tr. 92)

26. Complainant began to feel that he was a coward because he did not complain. He would go home and yell at his family but he said nothing about what he was experiencing at work. (Tr. 42-3)

27. One day in April of 2006, Complainant found himself in Stony Brook Hospital talking about the depression that he attributed to Respondents. (Tr. 147-48, 980)

28. A few weeks later, on May 6, 2006, Complainant left a resignation letter on Miskovsky's desk. (Tr. 36, 154, 156-57)

29. Complainant was unemployed for one week. (Tr. 38)

30. Complainant found a similar position with Respondent's competitor; Fire Systems, Inc. Complainant was working a 40 hour week earning the same hourly wage of \$31 per hour. (Tr.38)

31. Complainant alleged that he incurred a substantial financial loss when he left Respondents' employ. However, Complainant also owned his own company, CES Home Inspections that performed home inspections and also worked for CES Designs during and after his employment with Respondent. (Tr. 149, 152)

### **OPINION AND DECISION**

The record establishes that Complainant was subjected to ridicule and insults that permeated his work environment for two and one half years. It is further established that Respondents' discriminatory actions resulted in Complainant constructive discharge.

It is unlawful for an employer to discriminate against an employer on the basis of sex. N.Y. Exec. Law, art. 15 ("Human Rights Law") § 296.1 (a). " The law forbids not only opposite-

sex sexual harassment in the workplace, but same-sex sexual harassment as well.” *State Division of Human Rights v. Stoute*, 36 A.D. 3d 257, 263, 826 N.Y.S.2d 126 (2d Dept. 2006) (citations omitted).

In order to sustain a claim of sexual harassment based on hostile work environment, a complainant must demonstrate that he or 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 his or her employment and create an abusive work 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 Division of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 (4<sup>th</sup> Dept. 1996) lv. denied, 647 N.Y.S.2d 652(4<sup>th</sup> Dept. 1996), lv. denied, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

In the instant case, the conduct described by Complainant is sufficiently severe and pervasive to sustain his claim of sexual harassment. There were numerous incidents of verbal abuse and harassment directed at Complainant by his supervisor.

The regular and relentless offensive behavior that was directed at Complainant was unwelcome. It began shortly after Complainant began working for Respondents in January of 2004 and it continued until Complainant left Respondents’ employ on May 6, 2006. The harassment described by Complainant created an abusive work environment and clearly rises to the level of objective severity and pervasiveness required to constitute an actionable claim under the Human Rights Law. Accordingly, Complainant prevails on his sexual harassment claim.

I also find that Complainant was constructively discharged by Respondent when he left Respondents’ employ on May 6, 2006. In order to establish a claim of constructive discharge, a

complainant must show that a reasonable person under similar circumstances would feel compelled to resign in order to avoid continuing discrimination. *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 79, 436 N.Y.S.2d 231, 234 (1980).

The hostile work environment that Respondents imposed upon Complainant would lead a reasonable person to feel compelled to resign. Complainant was verbally abused on a daily basis for two and a half years. Although Complainant did not complain it was clear that the unsolicited comments were unwelcome. Complainant credibly testified that he felt compelled to tolerate the work place humiliation because the harasser was his supervisor and he “needed his paycheck.” After suffering from severe depression that resulted in him going to the hospital, Complainant left his place of employment. I therefore find that Complainant was constructively discharged by Respondents.

In the instant case, Respondents must be held liable for the acts of its employees because its managers and owners knew about the harassment, participated in the harassment and failed to take corrective action. *See Father Belle* at 53, 642 N.Y.S.2d at 746. *Father Belle* stands for the rule that a “corporate employer may be held directly liable for acts of discrimination perpetrated by a high-level managerial employee.” *Id.* at 54, 642 N.Y.S.2d at 747. Liability must be imputed to Respondent’s because it participated in the harassing conduct and did nothing to end the hostile work environment.

### **Damages**

In the instant case, the Complainant is entitled to compensation for back pay. He earned approximately \$2,192.50 per week working for Respondent when he was constructively discharged on May 6, 2006. Approximately one week later, Complainant began working for Fire Systems, Inc. earning approximately \$1,085.00 per week. Fortunately, Complainant continued

operating his own business and was able to find employment after one week. Therefore, Complainant is entitled to compensation of \$2,192.50 for his lost wages during that week.

In order to effectuate the purpose of the Human Rights Law, the Division finds that an award of pre-determination interest in the instant case is warranted in order to make the Complainant whole. Respondents are therefore liable to Complainant for pre-determination interest on the back pay amount at a rate of nine percent per annum from May 6, 2007, a reasonable intermediate date, through the date of this Order. *Aurecchione v. N.Y. State Div. of Human Rights*, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002).

Complainant is also entitled to recover compensatory damages for mental anguish and humiliation caused by Respondents' discriminatory conduct. When 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). 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). The severity, frequency and duration of the conduct may be considered in fashioning an appropriate award. *N.Y. State Dep't of Correctional Servs. v. N.Y. State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

In the case at bar, Complainant credibly testified that he was harassed by his supervisor on an almost daily basis for almost two and one half years. The harassment caused him to be intimidated, demeaned and humiliated during this time period. Complainant felt like a "coward." He was also humiliated and depressed. Complainant is a man of small stature and his sometimes

emotional testimony is sincere and credible. Accordingly, an award of \$15,000 for mental anguish is consistent with similar cases 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, 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 days of the date of the Commissioner's Order, Respondents shall pay to Complainant the sum of \$2,192.50 as compensatory damages for back pay. Interest shall accrue on the award at the rate of nine percent per annum from May 6, 2007, a reasonable intermediate date, until the date payment is actually made by Respondents.

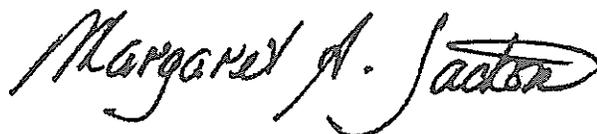
2. Within sixty days of the date of the Commissioner's Order, Respondents shall pay to Complainant the sum of \$15,000 without any withholdings or deductions, as compensatory damages for the humiliation suffered by Complainant as a result of Respondents' unlawful discrimination against him. Interest 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 a certified check made payable to the Complainant Carmine Martino and delivered to his address of 42 Meadow

Court, Manorville, NY 11949, by registered mail, return receipt requested. Respondents shall furnish written proof to the New York State Division of Human Rights, Office of the General Counsel, One Fordham Plaza, 4<sup>th</sup> floor, Bronx, New York 10458, of its compliance with the directives contained in this Order.

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

DATED: April 10, 2008  
Bronx, New York

A handwritten signature in black ink that reads "Margaret A. Jackson". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

Margaret A. Jackson  
Administrative Law Judge