

**NEW YORK STATE  
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION  
OF HUMAN RIGHTS**

on the Complaint of

**LAURA L. PIZZO,**

Complainant,

v.

**FERGUSON ENTERPRISES, INC.,**

Respondent.

**NOTICE AND  
FINAL ORDER**

Case No. 10113125

**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 29, 2009, by Martin Erazo, Jr., 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: **SEP 17 2009**  
Bronx, New York

  
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GALEN D. KIRKLAND  
COMMISSIONER

**NEW YORK STATE  
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on the Complaint of

**LAURA L. PIZZO,**

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v.

**FERGUSON ENTERPRISES, INC.,**

Respondent.

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

Case No. 10113125

**SUMMARY**

Complainant alleged that she was the victim of sexual harassment during her employment. Complainant also alleged that she was dismissed because she is female. The Division finds that Respondent discriminated against Complainant by subjecting her to a sexually hostile environment. However, Complainant did not meet her burden of proof that she was dismissed because of her gender. Complainant is entitled to an award of \$20,000 for mental anguish.

**PROCEEDINGS IN THE CASE**

On August 30, 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 Martin Erazo, Jr., an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on April 1 - 2, 2009.

Complainant and Respondent appeared at the hearing. Complainant was represented by the Law Offices of Lindy Korn, Lindy Korn, Esq., and Charles Miller II, Esq., of Counsel. Respondent was represented by the Law Offices of Goldberg, Segalla LLP, Richard A. Braden, Esq., of Counsel.

Permission to file post-hearing briefs was granted. Attorneys for Complainant and Respondent filed timely submissions.

### **FINDINGS OF FACT**

#### **Parties**

1. Complainant is female. (Tr. ALJ Exhibit 2, p.6)
2. Complainant alleges that Respondent subjected her to a sexually hostile environment. Complainant also alleges that she was fired because of her gender. (ALJ Exhibit 2, pp.6-7)
3. Complainant worked for Respondent as an administrative assistant, in the Buffalo office, from October 2003 to December 2005. (Tr. 16, 298, 300) Complainant’s duties were to answer phones and direct calls to the appropriate sales associate. Complainant also performed invoicing, faxing, and mailing functions. (Tr. 16, 21)
4. Respondent is “the world’s leading plumbing, building products, pipe, valve and fitting distributor in the world.” Respondent sells “products to retail customers” and is also “a global company.” (Tr. 205) Respondent has approximately 19,000 employees. (Tr. 330-31) In the New York upstate area, Respondent sells “pipe[s], valves...fittings, plumbing products, industrial valve applications.” In the Buffalo area, in particular, Respondent’s sales are “primarily wholesale.” (205-6)

5. Respondent denied discriminating against Complainant. Respondent claims that it “exercised reasonable care to prevent, address, and promptly correct discriminatory behavior in the workplace, including sexual harassment and Complainant unreasonably failed to take advantage of the preventative and/or corrective measures provided by Respondent...” (ALJ Exhibit 1, p.2) Respondent also claims it “terminated Complainant’s employment for legitimate business reasons on December 6, 2005.” (ALJ Exhibit 1, p.1)

6. Scott Peggs (“Peggs”) has been Respondent’s general manager for all of upstate New York since April of 2002. (Tr. 198, 201) Peggs “just completed [his] sixth full year.” (Tr. 199) Peggs is responsible for the Rochester, Buffalo, and Syracuse offices. (Tr. 198, 208) Peggs received management training that included “the whole gamut of responsibilities,” human resources issues, sexual harassment, equal opportunity employment, and employment discrimination. (Tr. 202, 205)

7. Peggs reports to Andy Ciesla (“Ciesla”), a district manager located in Lakewood, New Jersey. (Tr. 208)

8. William McClure (“McClure”) was a Respondent Buffalo branch manager from September 1996 to January 2005. (Tr. 133) McClure was the highest-ranking Respondent manager in Buffalo. McClure reported to Respondent’s general manager, Scott Peggs. (Tr. 134)

9. Tom DeAngelo (“DeAngelo”) replaced William McClure as the Buffalo branch manager. (Tr. 138) DeAngelo had been Respondent’s Buffalo branch manager for “about ten months” prior to Complainant’s termination in December of 2005. (Tr. 221)

10. Joseph Michael Caparco II (“Caparco”) worked for Respondent as a sales associate in the Buffalo office. (Tr. 145-7)

11. Brian Hasse (“Hasse”) worked for Respondent as a sales associate in the Buffalo office. (Tr. 18, 32-3)

12. Curtice Penoyer (“Penoyer”) worked for Respondent as a sales associate. Penoyer was a “trainer” in the Buffalo office during the course of Complainant’s employment. His job was to train new hires on sales and computers. (Tr. 38) Penoyer’s official job function was “commercial quotations.” (Respondent’s Exhibit 7)

13. Mark Coccia, Jr., (“Coccia”) worked for Respondent as a sales associate in the Buffalo office. (Tr. 18, 32-3)

14. Karen Thompson (“Thompson”), who is female, has worked for Respondent, over a period of 19 years, in the capacity of an administrative assistant. (Tr. 292-5) Thompson was Complainant’s co-worker in the Buffalo office. Thompson trained Complainant as an administrative assistant. Thompson currently works for Respondent. (Tr. 298, 300)

15. Sandra Pierce (“Pierce”) has been Respondent’s manager of employment practices, for a period of 15 years. Pierce is located in Newport News, Virginia. Pierce handles a variety of human resource issues including “unemployment claims...affirmative action plans...compliance with federal, state and local employment laws...complaints of harassment or discrimination...employment litigation...” (Tr. 327-30)

#### Sexual Harassment Policy

16. Respondent’s current “equal opportunity policy” (“EEOC”) and “harassment prevention policy” were implemented in 2005. Respondent does not have a specific sexual harassment policy but a broader “harassment prevention policy.” (Tr. 350) The policies are “published on [Respondent’s] internet...associates are given a copy of the policy either at the time of hire, or if they were already employed, they are given a copy of the policy in 2005 when the current policy

went into effect...and [Respondent] also [has] EEO notices posted in [its] locations.” (Tr. 332-33, 354)

17. Respondent’s harassment prevention policy states, in part, that “any associate who believes, in good faith, that the actions of an associate, customer or vendor constitute a violation of this Policy has the responsibility to report the conduct immediately to his or her Manager of the Employment Practices Group, even if the associate who observes the conduct is not the subject of the harassment. The Employment Practices Group can be reached at the Company’s Corporate Office (757) 874-7795...Complaints of harassment shall be investigated thoroughly in a prompt, impartial, and, to the extent possible, confidential manner. The Company, in its sole discretion, will determine the manner and the method of any investigation, as well as what action, if any, should be taken during and at the conclusion of the investigation.” (Respondent’s Exhibit 5)

18. On April 20, 2005, Complainant signed a written acknowledgement, “Certificate of Receipt,” confirming receipt of Respondent’s “harassment prevention policy.” (Respondent’s Exhibit 6; Tr. 337) Prior to March or April of 2005, Complainant “would not have signed off on [Respondent’s] harassment prevention policy.” (Tr. 357)

19. Prior to March or April of 2005, Respondent claims Complainant was aware of its policies because they are published in “company’s internet site...” Respondent also claims that, prior to March or April of 2005, Complainant would have known where to find the internet site “given her position as an administrative assistant...” (Tr. 356-7)

20. Peggs understands Respondent’s “harassment policy” as placing on an associate “the responsibility to advise their manager if they are being subjected to sexual harassment, or contact the Employment Practices group at headquarters, and the phone number is stated in

[Respondent's harassment policy] document." (Tr. 275) Peggs believes that it was the responsibility of local branch managers, under his purview, to report to him any sexual harassment claim. (Tr. 279-80) Peggs explained that "if a claim is made it's my duty to talk to the people the claim is made against, as well as the people the claim is made by. Deal with the direct manager, talk to the associates involved, have a discussion or written counseling session with the individual, if it's determined the claim is valid." (Tr. 248-50)

### Harassment Training

21. DeAngelo, as well as some other Respondent managers, received anti-harassment and policy training. (Tr. 338-40) McClure never received copy of Respondent's sexual harassment policy. However, McClure understood that "if something was not right [he] would report it to [his] general manager." McClure's general manager was Peggs. (Tr. 121) McClure testified that he did not "know what the [sexual harassment] policy was...[he] assume[d] if it's reported you...it's only right to report it, pass it on." (Tr. 132)

22. There is no general anti-harassment training program for all Respondent's employees "across the board." (Tr. 363) Anti-harassment training for "associates" has only occurred "in circumstances where [Respondent] had situations where [Respondent] needed to address conduct." Respondent has not found any instances in which anti-harassment training of associates in its Buffalo office was required. (Tr. 340-1, 349-50)

### Respondent Posters

23. Respondent created two posters for its employees. One poster contains Respondent's reporting procedure on sexual harassment. The sexual harassment poster informs the reader that an individual has "the right to a harassment-free workplace." The poster states that "if you have been harassed or another's conduct creates an intimidating, hostile, or offensive work

environment, please notify one of the people listed below immediately.” However, the poster received in evidence, at public hearing, contains a blank area with no name or address of any contact person. (Respondent’s Exhibit 8)

24. The second Respondent poster received in evidence states that “Ferguson is committed to the highest standard of business conduct. Call the company’s ethics program administrator. For consultation on questions concerning Ferguson’s code of ethics policy or to report an impropriety 1(800) 893-6508 Calls may be anonymous.” (Respondent’s Exhibit 9)

25. McClure testified that the two Respondent posters were not posted in the Buffalo office. There was only one poster “in our cafeteria...” “We had the minimum wage poster...but that’s it.” (Tr. 143-44)

#### General Office Environment

26. McClure testified as to the office atmosphere during the Complainant’s tenure. McClure stated there was “always horseplay and joking around...a very sarcastic atmosphere” where sexual jokes were told. McClure described the office as “a guys’ atmosphere...” (Tr. 131) Complainant described the “environment in that office...like an animal house.” (Tr. 38, 44)

#### Hasse Disciplined

27. McClure observed the interactions between Hasse and Complainant. Hasse tended to be “harsh with his words...” Hasse yelled and used profanity on a regular basis. Hasse often stated “fuck that. I don’t have time for this. Tell him I’m fuckin’ busy.” (Tr. 122-23) Hasse “would drop ‘F’ bombs” and “shit.” (Tr. 149) ‘F bomb’ is a common vernacular for the use of the word “fuck.” Complainant complained to McClure of Hasse’s frequent use of the word “fuck.” In response to Complainant’s complaint, McClure wrote up Hasse “once, maybe twice,”

at Peggs' direction. McClure testified that disciplining Hasse did not correct Hasse's behavior. McClure testified that there was no further action that he took against Hasse." (Tr. 140)

#### Coccia Not Disciplined

28. Coccia used profanity when speaking with Complainant, such as "fuck" and "shit". (Tr. 150) In one specific situation Coccia told Complainant, "I'm not fucking taking [the phone call], stick it up your ass." (Tr. 71) Coccia made a gesture to Complainant with his hand which meant "fuck you." Coccia also told Complainant "I'm telling you shut up beatch," which Complainant understood to be "slang" for "bitch." (Tr. 34-6) Complainant informed the Buffalo branch manager, McClure, about the incident. No action was taken. (Tr. 37)

#### 2004 Penoyer Incident

29. In 2004 Complainant informed McClure that Penoyer made a sexually offensive comment. McClure reported to Peggs that Penoyer asked Complainant "if she would like to have phone sex with him." (Tr. 122)

30. Peggs spoke with Penoyer. Penoyer "tried to make light of it and claimed he said something in jest and it was taken out of context." Peggs informed Penoyer "if that type of behavior happens again it will result in termination, or counseling form and then termination." (Tr. 211-12)

#### 2005 Penoyer Incident

31. In 2005 Peggs received a second sexual harassment complaint against Penoyer from another female employee Mary Popadick ("Popadick"). Popadick complained to DeAngelo. DeAngelo informed Peggs. (Tr. 215-19)

32. On December 1, 2005, Peggs issued a written counseling that found Penoyer "made a sexually explicit comment to Mary Popadick in our Buffalo office. Mary went to Tom

DeAngelo (branch manager) and told him about the incident...this is not the first time [Penoyer] made sexual comments to other associates...There was an incident some time ago with Laura Pizzo in Buffalo where [Penoyer] made a comment that Laura took offense to...I am writing this counseling form to put [Penoyer] on notice that I do not want to have any more reports of this...This is [Penoyer's] final warning with regard to this..." (Respondent's Exhibit 7)

#### Sexual Office Conversation

33. McClure observed that Hasse discussed his sexual exploits at work, "in a loud voice." Hasse boasted when he "was out with a girl." Hasse commented that he "...did this and this girl, stuff that he was doing with girls...and what he would do if the girls let him, that kind of stuff." Hasse stated how he "would let her suck my dick..." (Tr. 123)

34. Complainant testified that she would "hear from Brian Hasse and Mark Coccia, Jr., on a daily basis of their sexual exploits they had over the weekend." (Tr. 32) Hasse repeatedly described his sexual activity in the office. "When he had a girlfriend he would come in and say 'I slapped her ass and pulled her hair and she loved it...she likes it rough.'" (Tr. 34) Coccia "laugh[ed] along with him." (Tr. 34-5, 150-51)

#### Computer Pornography and E-Mails

35. McClure testified that two women, Thompson and Complainant, complained to him about the presence of pornography in the office. Thompson and Complainant complained of "pictures, e-mails, that kind of thing." McClure testified that he took no action in response to the complaints. (Tr. 141) McClure testified that he did not report these complaints to anyone because "[he] was getting them also" from other employees, including persons in management. McClure received pornographic material from "a bunch of people throughout the company."

(Tr. 129) McClure “got some e-mails” from Coccia, Peggs, and Mike Previtte, operations manager. (Tr. 128-30)

36. DeAngelo forwarded pornographic images to other males in the office. Complainant observed Hasse “look over in Tom DeAngelo’s office and start laughing. At one point there was a comment made about the Louisville Slugger up the woman’s vagina, and I overheard it...they used to laugh and joke...” This activity occurred “many times” during “the two years I was there...” (ALJ Exhibit 2, p.6; Tr. 88-9) Hasse would “discuss the pornographic images in his computer out loud” on a weekly basis. Hasse would make comments such as “did you check out the tits on this one? Check out the good boobs on this one. Look at this one, it’s a girl doing seven men blow jobs.” (Tr. 33)

#### Strip Clubs

37. McClure observed how sales associates often took clients to strip clubs and recounted their experiences at work, “in the open office.” (Tr. 123-24) McClure stated that the sales associates “would talk about lap dances in the back, what the girls offered to do, what they have done for them.” The sales associates described how “her ass was in my face. Her tits were in my face...that kind of thing.” (Tr. 125-26) Complainant testified that sales associates took customers to strip clubs on a “continuous” basis. (Tr. 86-7)

38. Peggs vacillated at hearing whether or not he or any associates entertained customers at strip clubs. Peggs first testified that he has been to strip clubs with Respondent’s customers. Peggs admitted that DeAngelo accompanied him, on one occasion, to a strip club with Respondent’s customers. (Tr. 255-56) Peggs then “took it back” and denied attending strip clubs with Respondent’s customers. (Tr. 255) Peggs again changed his position at public

hearing. Peggs admitted that any trips that he made to a strip club with a customer had been at the suggestion of the customer. (Tr. 282)

39. DeAngelo, became aware that Complainant was born in Canada. DeAngelo frequently told Complainant, “the best thing that comes out of Canada, your strippers, they take everything off and in New York State they only take off their tops.” DeAngelo made these comments on a daily basis. Complainant testified that “this was going on, I don’t know, it was constant. It was on a daily—pretty much daily basis...” (Tr. 40)

#### Dismissal from Employment

40. In November 2005, Thompson, Complainant’s female co-worker, told Complainant that she was making excessive personal calls and making excessive use of the internet. (Tr. 307-9)

41. DeAngelo “...repeatedly counseled [Complainant] about performance and told her she needed to stop taking personal phone calls during the day on cell phone, stop looking at the internet, and buckle down and get her job done.” (Tr. 222, 269-70, 309-10)

42. On December 7, 2005, DeAngelo called Peggs and informed him that Complainant and Thompson had “an altercation.” Peggs testified that the altercation arose from Complainant’s comments to Thompson “about needing to stay after work for a few minutes to get things done.” Thompson responded “if you weren’t on the internet or cell phone taking personal calls, you could have gotten your job done before 5:00 o’clock.” Complainant called Thompson, “a fucking cow...” Complainant refused DeAngelo’s directives to discuss the situation. As Complainant left the office she sarcastically stated that Thompson and DeAngelo could proceed to talk about her. Complainant’s employment was then terminated. (Tr. 226, 309-14)

43. Complainant’s testimony agreed with key portions of the Respondent’s position surrounding her employment termination. Complainant testified that co-worker Thompson had

taken “invoices from [her] tray” and Complainant was not able to complete her own assignment related to those invoices. Complainant testified that she had earlier been called into DeAngelo’s office and was “told to step it up because I wasn’t doing what he had asked me to do.

[Complainant] went back to [her] desk and at the end of the day when [Complainant] was leaving [Complainant] went into [Thompson’s] office and said, ‘Karen, its 5:00 o’clock. You can go talk to Tom [DeAngelo] about me now.’” DeAngelo told Complainant to come into his office. Complainant replied that she also wanted Thompson in the conversation. Complainant refused to go into DeAngelo’s office, alleging that he stated “you sit down and shut up.” When she refused, DeAngelo terminated her employment. (Tr. 42-3)

#### Human Resources Department

44. On December 7, 2005, Complainant called Respondent’s human resource department and spoke with Pierce about the sexually hostile work environment after her employment had been terminated. (Tr. 75, 268, 279) Complainant informed Pierce that she had been dismissed. Complainant explained that “she was fine with that decision and she just wanted to move on.” Complainant stated that “she wanted to be gone. She stated she had no interest in coming back to work for [Repondent] again.” (Tr. 343, 359) Complainant reported that “there was the use of profanity in the location. She said that some of the associates would review pornographic material...some of the associates would talk about their personal lives to include their sexual activity...” (Tr. 344-45)

45. Pierce contacted Peggs and informed him of Complainant’s allegations of sexually inappropriate activity in the Buffalo office. In consultation with Pierce, Peggs conducted an investigation “regarding allegations raised by [Complainant].” Peggs immediately went to “the

Buffalo location and conducted his investigation and contacted [Pierce] to report that he had been unable to substantiate the allegations that [Complainant] had raised..." (Tr. 345-46)

### Damages

46. Hasse's actions made Complainant feel "that it was distracting" her from her work. Complainant felt that she was "on her own...like I was reporting it [to Thompson] and nothing was done. It fell on deaf ears. I had anxiety going into work. I felt nervous going into work on a daily basis." (Tr. 35)

47. Timothy Hudspith ("Hudspith"), Complainant's husband, observed changes in her personality during the time that she worked for Respondent. At first, he noticed that "[Complainant] was always very happy and energetic and happy-go-lucky. The longer she worked at Ferguson she became—she was unhappy." "[Complainant] was always making comments about the work environment and the hostility..." (Tr. 177) Hudspith noticed that "the longer this went on the worse it got for her." (Tr. 178)

48. Hudspith testified that "our relationship was strained. She was just wasn't herself. She slept a lot. She didn't want to do anything. She cried very often and was always talking about work and how it was affecting her." Hudspith worried about her health. Hudspith "didn't know what was happening. Why is she was being so different? Her whole personality was changing." "It took awhile" for Complainant's personality to return to normal after she separated from Respondent's employment. (Tr. 178-79)

## **OPINION AND DECISION**

### Hostile Work Environment

Under Human Rights Law §296.1(a), it is an unlawful discriminatory practice for an employer "because of the ... sex ... of any individual to discriminate against such individual in

compensation or in terms, conditions or privileges of employment." A sexually hostile environment is a form of sexual harassment.

In order to sustain a claim of sexual harassment, Complainant must demonstrate that she was subjected to 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 the victim and a reasonable person in making its determination. *Father Belle Community Ctr. v. N.Y. State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4<sup>th</sup> Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant described offensive conduct that was sufficiently severe and pervasive to sustain her claim of harassment because of her gender. The environment in Respondent's Buffalo office created an abusive working environment for Complainant that altered the working conditions of her employment. Respondent argued that the lack of civility and use of profanity alone, in a working environment, does not violate the Human Rights Law. However, the weight of evidence established that the crude and uncivil tone in the Buffalo office went beyond a tough sales business environment. The evidence supports Complainant's position that male managers and male associates subjected her to an outrageous, offensive, sexually charged work environment during the two year period she worked in the Buffalo office.

#### Sexual Office Conversation

Some of the male sales associates used profanity when speaking with each other or to Complainant. The use of profanity clearly crossed into the area of sexually charged meaning. There was an instance where a male associate, Coccia, called Complainant a bitch. The context in which Coccia used the word "bitch" is consistent with its reference to a woman in a derogatory

and extremely offensive manner. In response to an incoming phone call, Coccia told Complainant "I'm not fucking taking it, stick it up your ass." Complainant reported the behavior to McClure. McClure did not correct it.

McClure personally observed male associates loudly and openly discuss details of their sexual activity at work. In particular, male associates Hasse and Coccia openly and graphically discussed their sexual exploits "on a daily basis." These conversations were held in the presence of the Complainant. McClure did not correct or report this sexual office conversation.

At another point in time, McClure informed Peggs about Hasse's use of the word "fuck." Peggs was the Respondent's upstate New York general manager who had control over the Buffalo, Rochester, and Syracuse offices. At Peggs direction, McClure disciplined Hasse, "once, maybe twice." McClure testified that disciplining Hasse did not correct Hasse's behavior.

Peggs personally disciplined Penoyer in 2004 for the use of sexually offensive language directed at Complainant. The discipline did not correct Penoyer's behavior. Peggs again disciplined Penoyer in 2005 for the use of sexually offensive language against another female.

#### Office Pornography

McClure testified that two women, including Complainant, complained to him about the presence of pornography in the office in the form of computer pictures and e-mails. McClure testified that he took no action in response to these complaints. McClure sent and received pornographic material from other employees, including individuals in management. McClure testified that he received pornographic material from "a bunch of people throughout the company" including Peggs.

DeAngelo succeeded McClure as Respondent's Buffalo office manager. DeAngelo also forwarded pornographic images to other males in the office. DeAngelo and other male associates

openly joked and engaged in graphic sexual discussions concerning the electronic pornographic images.

### Strip Clubs

Management and sales associates, including Peggs, took clients to strip clubs on a continuous basis. McClure observed how salespersons told graphic stories at work, “in the open office,” about their experiences in the strip clubs. After DeAngelo became aware that Complainant was born in Canada he began making offensive sexual commentary to Complainant, on a “daily basis,” comparing Canadian and New York State strippers.

### Notice and Liability

Respondent claims that it has an effective harassment policy that Complainant failed to use. Respondent claims there were two instances where Peggs responded to sexual harassment complainants made against Penoyer. Complainant made one of those claims. Complainant received Respondent’s written harassment policy. However, a respondent cannot escape liability merely by claiming that it had harassment policies in place. *Polodori v. Societe Generale Groupe*, 39 A.D.3d 404, 835 N.Y.S.2d 80 (1st Dept. 2007)

An effective policy provides an employer adequate notice to correct the harassment. In this particular matter, Respondent’s management already had actual notice of the sexually hostile environment in the Buffalo office. Respondent’s failure to stop the sexually hostile environment is the issue. The Buffalo branch managers were the highest ranking Respondent managers at that location. Two successive Buffalo office managers, McClure and DeAngelo, were aware of the sexually hostile environment in that office. Both managers personally participated in the offensive activity and did not correct it. Respondent is liable for the actions of these high level

managers. *Faragher v. Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)

Peggs was general manager for all of upstate New York. Peggs was aware of the work atmosphere in Buffalo. Peggs was aware that Hasse used profanity in the workplace. Hasse was disciplined but did not change his behavior. Peggs personally disciplined Penoyer twice in successive years. McClure testified that Peggs was personally involved in the transmission of office pornography. Peggs contributed to an office culture where associates took customers to strip clubs.

Pierce was in charge of Respondent's human resource department. Pierce relied on Peggs' assessment of Respondent's Buffalo office to determine if there was sexually hostile environment. Pierce found no circumstance in which an anti-harassment training program was necessary for the Buffalo office associates.

Respondent's highest management in the upstate New York area had actual notice of a sexually hostile environment. Respondent's human resource department asked the same management to investigate the sexual harassment claims in the Buffalo office. Human resources relied on a self-serving assessment of the Buffalo office to determine if there had been a sexually hostile environment. In short, there is no credible reason to believe that any additional efforts by Complainant to use Respondent's complaint procedure would have corrected the sexually hostile environment in the Buffalo office.

### Dismissal

Complainant alleged that Respondent terminated her employment because of her gender. To make out a prima facie case of unlawful discrimination under the Human Rights Law, a complainant must show (1) she is a member of a protected class; (2) she was qualified for the

position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Ferrante v. American Lung Ass'n*, 90 N.Y.2d 623, 629, 665 N.Y.S.2d 25, 29 (1997); *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305, 786 N.Y.S.2d 382, 390 (2004).

If a complainant can establish a prima facie case of discrimination, the respondent must then articulate a legitimate, non-discriminatory business reason for its actions. If the respondent does so, then the complainant must show that the proffered reason is a pretext for discrimination. *Pace University v. N.Y. City Comm. on Human Rights*, 85 N.Y.2d 125, 128, 623 N.Y.S.2d 765 (1995); *Pace v. Ogden Svcs. Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dept. 1999)

Complainant did not establish a prima facie case that Respondent terminated her employment because of her gender. Complainant established that she is a member of a protected class. Complainant is female. Complainant established that she was qualified for the administrative assistant position she held with Respondent. Respondent hired Complainant. Complainant successfully held the position for two years. Complainant established that she suffered an adverse employment action. Respondent terminated her employment in December of 2005.

Complainant did not establish that the dismissal occurred under circumstances giving rise to an inference of unlawful discrimination. Complainant's own version of events indicates that her dismissal arose from a dispute with a female co-worker, Thompson, over a work assignment. Complainant dared Thompson, in a contemptuous manner, to gossip with manager DeAngelo about her work. Respondent fired Complainant over the incident.

#### Damages

A complainant is entitled to recover compensatory damages for mental anguish caused by

a respondent's 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 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 (Nash)*, 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. *New York State Dep't of Corr. Servs. v. New York State Div. of Human Rights*, 225 A.D.2d 856, 859, 638 N.Y.S.2d 827, 830 (3d Dept. 1996).

The Human Rights Law attempts to restore Complainants to a situation comparable to the one they would have occupied, had no unlawful discrimination occurred. Given the severity of Respondent's conduct, the degree of Complainant's suffering and the length of time she endured the suffering, an award of \$20,000 for emotional distress is appropriate and would effectuate the purposes of the Human Rights Law of making Complainant whole. This amount is reasonably related to the discriminatory conduct and is neither excessive nor punitive. *See Gleason v. Callahan Industries, Inc.*, 203 A.D.2d 750, 610 N.Y.S.2d 671 (3rd Dept. 1994) (compensation must have a reasonable relationship to the effects of the wrongful act).

Respondent's actions had a negative effect on Complainant. Respondent's actions made her feel anxious on a daily basis. Complainant's personality changed during her employment tenure. Complainant went from a happy and energetic "happy-go-lucky" person to an unhappy person. Complainant's husband corroborated Complainant's testimony. He testified that during Complainant's employment, she was not herself. Complainant "didn't want to do anything. She cried very often and was always talking about work and how it was affecting her." According to Complainant's husband, it took sometime for Complainant's personality to return to normal after she separated from Respondent's employment.

### **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 Respondent, its agents, representatives, employees, successors, and assigns, shall cease and desist from discriminating against any employee in the terms and conditions of employment; and it is further

ORDERED, that Respondent, its agents, representatives, employees, successors and assigns shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of the Commissioner's Final Order, Respondent shall pay to Complainant the sum of \$20,000 as compensatory damages for mental anguish and humiliation Complainant suffered as a result of Respondent's unlawful discrimination against her. Interest shall accrue on this award at the rate of nine percent per annum, from the date of the Commissioner's Final Order until payment is actually made by Respondent.
2. The payment shall be made by Respondent in the form of a certified check, made

payable to the order of Laura L. Pizzo and delivered by certified mail, return receipt requested, to Complainant's attorney, Lindy Korn, Esq., 424 Main Street, Suite 1904, Buffalo, New York 14202. A copy of the certified check shall be provided to Caroline Downey, General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

3. Within sixty days of the Final Order, Respondent shall establish effective policies regarding the prevention of unlawful discrimination. These policies shall include the formalization of a reporting mechanism for all employees in the event of discriminatory behavior or treatment. The policies shall also contain the development and implementation of a training program in the prevention of unlawful discrimination, and sexual harassment in particular, in accordance with the Human Rights Law. Training shall be provided to all Respondent employees in New York State. A copy of the policy shall be provided to Caroline Downey, General Counsel of the New York State Division of Human Rights, at 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 in this Order.

DATED: June 29, 2009  
Buffalo, New York

A handwritten signature in cursive script that reads "Martin Erazo, Jr." The signature is written in black ink and is positioned above the printed name and title.

Martin Erazo, Jr.  
Administrative Law Judge