



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

DONNA BERTUCCIO QUINN,

Complainant,

v.

**OZ TRUCKING AND RIGGING CORP., PAUL T.
OUSEY,**

Respondents.

**NOTICE AND
FINAL ORDER**

Case No. 10172360

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order, issued on January 31, 2017, by , Adjudication Counsel, after a hearing held before Matthew Menes, 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 Alternative Proposed Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED 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”). 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: **MAR 13 2017**,
Bronx, New York


HELEN DIANE FOSTER
COMMISSIONER



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**ALTERNATIVE
PROPOSED ORDER**

Case No. **10172360**

SUMMARY

Respondents unlawfully discriminated against Complainant by creating a sexually hostile workplace environment. As such, the Complaint is sustained, and Complainant is awarded damages in the amount of \$7,500 for the emotional distress she suffered. A civil fine and penalty in the amount of \$10,000 is assessed.

PROCEEDINGS IN THE CASE

On November 10, 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 Margaret A. Jackson, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on January 11 and 12, 2016.

At the hearing, Complainant was represented by Joseph R. Bongiorno & Associates, by Joseph R. Bongiorno, Esq. Respondents were represented by Certilman, Balin, Adler & Hyman, LLP., by Douglas E. Rowe, Esq. and Desiree M. Gargano, Esq.

On August 15, 2016, ALJ Jackson issued a recommended Findings of Fact, Decision and Opinion, and Order (“Recommended Order”). Complainant filed Objections to the Recommended Order with the Commissioner’s Order Preparation Unit.

FINDINGS OF FACT

1. Respondent OZ Trucking and Rigging Corp. (“OZ”) installs bank vaults, ATM machines, safe deposit boxes, home safes and jewelry safes. (Tr. 355)
2. Respondent Paul T. Ousey (“Ousey”) is the owner and president of OZ. (Tr. 8)
3. On September 4, 2012, Ousey hired Complainant, who is female, to work as OZ’s dispatcher and office clerk. Complainant’s duties included answering telephone calls, preparing the drivers’ schedules and ensuring their certificates of insurance were obtained. (Tr. 8, 14-15)
4. During Complainant’s first few months of employment, Ousey repeatedly made crude comments about women in front of Complainant, such as, “look at the rack on that one” and, “I wouldn’t fuck her with somebody else’s dick.” Complainant told Ousey that such language was not necessary. Ousey either laughed or walked away. (Tr. 17)

5. In October 2012, Ousey told Complainant that he had lent money to a former female employee who had paid him back in sexual favors and if Complainant ever needed to borrow money she knew where to go. (Tr. 11)

6. On December 24, 2012, Ousey grabbed the top of Complainant's sweater and shoved \$500 in Christmas bonus money down the front of her sweater close to her bra. (Tr. 10, 102)

7. In January 2013, Ousey hired Kacie Mulligan¹ to be in charge of billing and payroll for OZ. (Tr. 17-18)

8. On February 15, 2013, Mulligan showed Complainant a gift that her boyfriend had given her. Ousey told Complainant that "blowjobs really do get you jewelry, just look at Kacie." Complainant told Ousey that "there was no need for that kind of talk." (Tr. 18-19)

9. In addition to making explicit sex-related comments, Ousey also made comments with implicit sexual innuendo. For instance, on one occasion when Ousey observed that Complainant was not busy, he told Complainant that "he had something for her to work on." (Tr. 20)

10. In May 2013, an advertising representative, Carrie Devino, came to the office to speak with Ousey. After she left, Ousey went to Complainant's office and said Devino "was one worn out broad" who "had been rode hard and put away wet." Complainant told Ousey that he was disgusting. Ousey laughed. (Tr. 21)

11. On June 17, 2013, Ousey and Complainant took a business trip to Provo, Utah. Ousey picked up Complainant in his car to go to the airport. When she told him that it was a pretty car, he reached over, touched Complainant's leg and said, "If you do the right thing, it could be yours." Upon arriving in Utah, Ousey and Complainant went to an airport hotel. Ousey told

¹ Kacie Mulligan is referred to as Casey in the transcript.

Complainant, “here’s your big chance, let’s get one room.” Complainant said, “no, we’ll get two.” Complainant and Ousey stayed in separate rooms. (Tr. 23-25)

12. On June 18, 2013, while browsing at a store together, Ousey saw a rack of provocative women’s clothing and commented, “why don’t you buy something off of that rack and you can model it for me later tonight.” Upon arriving at the hotel, Ousey walked Complainant to her room and asked, “aren’t you going to ask me in?” Complainant said no and closed the door. During the trip, Ousey asked Complainant to come to his room to “have a little fun.” (Tr. 27)

13. During Complainant’s employment, Ousey thrust his pelvis at her numerous times. On one occasion, he grabbed his genitals and told her, “look what you can have.” Complainant often told Ousey he was being inappropriate. Complainant described the work environment as “constant sexual badgering.” She asked Ousey to stop “a million different ways.” Although the behavior continued, Complainant remained because she needed to work. Complainant felt trapped. (Tr. 31-33)

14. On December 24, 2013, Ousey told Complainant he was giving a bonus only to her that year, walked her over to a dimly lit area of the office, grabbed her, shoved money down her pants into her underwear and walked away. (Tr. 34-35)

15. Ousey told Complainant’s co-workers she had performed oral sex on him. (Tr. 41-42)

16. In June 2014, Complainant was squatting down in front of a safe in the showroom when Ousey walked up behind her and said, “you’re the perfect height for a blowjob.” Complainant was horrified by his behavior. (Tr. 39)

17. In July 2014, Teresa Fox, an outside consultant, was brought in by Ousey to help restructure OZ. When Fox went to her car, Ousey told Complainant that he would like to bend Fox over his desk and “give it to her hard.” In response, Complainant asked Ousey why he

always had to say sexually degrading things to women. The next day, in front of other employees, Ousey told Complainant that she needed a man and really needed to get laid. In response, Complainant told Ousey that her personal life was none of his business and that he was out of line. (Tr. 43-46)

18. On August 27, 2014, Ousey met with Complainant and another employee, Mark Adde². After the meeting, Complainant mentioned that she wished to discuss a raise. Ousey stood up, grabbed his genitals and said “here’s your raise and you’re going to like it.” Complainant yelled at Ousey that he was completely inappropriate. Complainant was mortified and felt like she was going to cry. (Tr. 47-48)

19. Complainant admittedly told jokes with adult content approximately once per week to her co-workers. Complainant also sent off-color text messages to colleagues. A co-worker, Matthew Nissen, testified that Complainant told jokes with explicit words every day and that Complainant was comfortable with the drivers using explicit language. (Tr. 88-89, 110-12, 214-15, 246-48, 311-13)

20. On September 28, 2014, Complainant received a text message from Ousey telling her that she should not come into the office the next day. In a subsequent telephone conversation, Ousey told Complainant he needed to revamp the company and he had to terminate her employment. Ousey felt he needed to cut costs. (Tr. 55-56, 386)

21. After her employment was terminated, Complainant did not see a psychiatrist or psychologist. She described her own mental state as fine, good and normal. (Tr. 241)

² Mark Adde is identified as Mark O’Dell in the transcript.

OPINION AND DECISION

Complaints filed pursuant to the Human Rights Law must be filed within one year of the alleged unlawful discriminatory practice. *See* Human Rights Law § 297.5. Therefore, in this case, any claim which had its origin prior to November 10, 2013, is time-barred unless Complainant can demonstrate a continuing violation. A continuing violation exists when there is proof of specific ongoing discriminatory practices, or when specific and related instances of discrimination are permitted by the employer to continue unremedied for so long as to amount to a discriminatory practice. *See Clark v. State of New York*, 302 A.D.2d 942 (4th Dept. 2003); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). As long as the conduct is sufficiently similar, it can be considered part of a single discriminatory practice. *See Clark*, 302 A.D.2d at 944. Once a continuing violation is established, “if an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered . . . for the purposes of determining liability.” *Morgan*, 536 U.S. at 117.

Here, Complainant has proven that Paul Ousey, owner and President of OZ, engaged in repeated and related sexually offensive behavior. All of the conduct has been shown to be sufficiently similar as to constitute a continuing violation. Accordingly, all acts, both within and outside the statute of limitations, can be considered.

Human Rights Law § 296.1(a) prohibits an employer from discriminating against an employee because of that employee’s sex. Sex-based discrimination includes sexual harassment. Sexual harassment can take two forms: hostile work environment and *quid pro quo*. *See Father Belle Cmty. Ctr. v. State Div. of Human Rights*, 221 A.D.2d 44 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809 (1997).

A sexually hostile work environment exists “[w]hen 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 and create an abusive working environment Whether an environment is hostile or abusive can be determined only by looking at all the circumstances, including ‘the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.’” *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295 (2004).

Alternatively, “the issue in a *quid pro quo* case is whether the supervisor has expressly or tacitly linked tangible job benefits to the acceptance or rejection of sexual advances.” *Father Belle Cmty. Ctr.*, 221 A.D.2d at 50.

Although in this case, Respondent Ousey made constant and numerous sexual advances toward Complainant, the evidence shows that no tangible job benefits were tacitly linked to the acceptance or rejection of those advances. The record demonstrates that Complainant turned down Ousey’s advances on every occasion and experienced no loss of work-related benefits. Complainant has not shown that the termination of her employment was related to anything other than Respondents’ need to revamp and restructure the company and to cut costs.

However, Complainant has proven that she was subjected to a sexually hostile workplace environment. Respondents’ workplace was permeated with sexual language, banter, jokes, advances, commentary and touching that was sufficiently pervasive enough to create an abusive working environment. The discriminatory conduct was constant and unrelenting. However, even without the constant barrage of sexual degrading commentary, the two instances when

Ousey physically shoved money into Complainant's clothing were sufficiently severe in nature to rise to the level of a hostile work environment.

Respondents contend that Complainant's own behavior established that she did not find this conduct unwelcome. Although Complainant often told jokes with adult content and sent off-color and inappropriate text messages, her behavior does not justify or exonerate the harassing and abusive behavior directed at her because of her gender. Ousey's comments and conduct were unsolicited and uninvited. Complainant made clear to Ousey that his language and jokes were undesirable and that she found them disgusting. Complainant rebuffed all of Ousey's advances. It is apparent by Complainant's numerous reactions that she found Ousey's behavior unwelcome. Accordingly, Complainant has proven that a hostile work environment existed. *See Overbeck v. Alpha Animal Health, P.C.*, 124 A.D.3d 852 (2d Dept. 2015) ("the correct inquiry is whether [Complainant] by her conduct indicated that the alleged sexual advances were unwelcome"); *see also McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795 (N.Y. Sup. Ct. 1997) ("plaintiff's use of profanity is irrelevant to the issue of whether she was subjected to a hostile work environment"); *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007 (7th Cir. 1994) ("plaintiff's alleged 'unladylike' conduct, done in an attempt to be 'one of the boys,' cannot be compared to those of the men and used to justify their conduct and exonerate their employer").

An award of compensatory damages to a person aggrieved by an unlawful discriminatory practice may include compensation for mental anguish, which may be based solely on the complainant's testimony. *See Cosmos Forms, Ltd. v. State Div. of Human Rights*, 150 A.D.2d 442 (2d Dept. 1989). Here, Complainant credibly testified that she was subjected to constant sexual badgering and inappropriate behavior in the office. She further credibly testified that Ousey's

acts made her uncomfortable and disgusted and, on one occasion, left her mortified and close to tears. Complainant was horrified and felt trapped. However, Complainant also described her current mental state as good, fine and normal. Considering this, and that Complainant did not seek psychological or psychiatric help, \$7,500 is appropriate for the mental anguish Complainant suffered as a result of Respondent's discriminatory actions. *See Mohawk Valley Orthopedics, LLP v. Carcone*, 66 A.D.3d 1350 (4th Dept. 2009) (\$7,500 award supported by Complainant's testimony she felt humiliated and attacked); *see also, State Div. of Human Right v. Caprarella*, 82 A.D.3d 773 (2d Dept. 2011) (\$7,500 supported by Complainant's testimony she was upset, hurt, disappointed and felt violated).

Human Rights Law § 297.4(c)(vi) permits the Division to assess civil fines and penalties "in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious."

Ousey's discriminatory words and actions were outrageous and deliberate and resulted in humiliation to Complainant. Given the circumstances in this case and considering the goal of deterrence, the nature and circumstances of the violation, the degree of Respondents' culpability, and Respondents' size and financial resources, \$10,000 is an appropriate civil fine and penalty. *See Noe v. Kirkland*, 101 A.D.3d 1756 (4th Dept. 2012) (\$20,000 civil fine and penalty confirmed); *Div. of Human Rights v. Stennett*, 98 A.D.3d 512, 514 (2d Dept. 2012) (\$25,000 civil fine and penalty confirmed).

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

ORDERED, that Respondents shall take the following affirmative action to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of this Order, Respondents shall pay to Complainant the sum of \$7,500 as compensatory damages for the mental anguish Complainant suffered as a result of Respondents' unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per annum, from the date of this Order until payment is actually made by Respondents.

2. Within sixty days of the date of this Order, Respondents shall pay to the State of New York the sum of \$10,000 as a civil fine and penalty as a result of Respondents' unlawful discrimination. Interest shall accrue on this award at the rate of nine percent per annum, from the date of this Order until payment is actually made by Respondents.

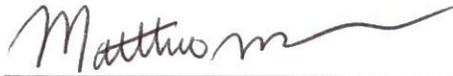
3. Payment of the compensatory damages shall be made by Respondents in the form of a certified check, made payable to Complainant and delivered by certified mail, return receipt requested, to Complainant's attorney at his office address. A copy of the certified check shall be simultaneously provided to Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

4. Payment of the civil fine and penalty shall be made by Respondents in the form of a certified check, made payable to the State of New York and delivered by certified mail, return

receipt requested, to Caroline Downey, Esq., General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458.

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

DATED: January 31, 2017
Bronx, New York

A handwritten signature in black ink, appearing to read "Matthew Menes", with a long, sweeping flourish extending to the right.

Matthew Menes
Adjudication Counsel