



**Division of
Human Rights**

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

**NEW YORK STATE DIVISION
OF HUMAN RIGHTS**

on the Complaint of

NORMA NOHEMY SANDOVAL,

Complainant,

v.

ABRAHAM ADLER,

Respondent.

**NOTICE AND
FINAL ORDER**

Case No. 10166190

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 October 25, 2016, by Robert J. Tuosto, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE HELEN DIANE FOSTER, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”) WITH THE FOLLOWING AMENDMENTS:

- Due to a typographical error, the hostile work environment standard in the Recommended Order reads “severe and pervasive.” The correct standard is

“severe or pervasive.” See *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 310 (2004) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). This is particularly relevant in the instant case, where the conduct Respondent engaged in was quite severe, but not pervasive.

- Because the *McDonnell Douglas* burden shifting analysis is not applicable to this case, the second paragraph of the “Opinion and Decision” section is not hereby adopted.

In accordance with the Division's Rules of Practice, a copy of this Order has been filed in the offices maintained by the Division at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice that is the subject of the Order occurred, or wherein any person required in the Order to cease and desist from an unlawful discriminatory practice, or to take other affirmative action, resides or transacts business, by filing with such Supreme Court of the State a Petition and Notice of Petition, within sixty (60) days after service of this Order. A copy of the Petition and Notice of Petition must also be served on all parties, including the General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Please do not file the original Notice or Petition with the Division.

ADOPTED, ISSUED, AND ORDERED.

DATED: JUN 29 2017
Bronx, New York



HELEN DIANE FOSTER
COMMISSIONER



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on the Complaint of

NORMA NOHEMY SANDOVAL,
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v.

ABRAHAM ADLER,
Respondent.

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

Case No. **10166190**

SUMMARY

Complainant alleged that she was exposed to unlawful discrimination in the form of a hostile work environment by Respondent, and that this discrimination resulted in her constructive discharge from employment. Complainant has proven her case and damages for back pay and emotional distress are hereby awarded. A civil fine payable to the State of New York is also imposed.

PROCEEDINGS IN THE CASE

On December 18, 2013, 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 Robert J. Tuosto, an Administrative Law Judge ("ALJ") of the Division. Public hearing sessions were held on March 30-31, 2016.

Complainant and Respondent appeared at the hearing. Complainant was represented by Karen L. Zdanis, Esq., of the Zdanis Law Firm, P.L.L.C. Respondent was represented by Kevin M. Dunlap, Esq., of the Law Offices of Gribetz & Loewenberg.

At the conclusion of the public hearing the parties were given fifteen days from the last day of the public hearing in which to submit a transcript of Respondent's police interrogation. That time period, as per the application of Complainant's counsel, was subsequently enlarged and said exhibit was timely submitted and considered as ALJ Exh. 2.

In a letter dated October 2, 2016, Complainant's attorney sought to disqualify the presiding ALJ. That request was subsequently considered by the Chief Administrative Law Judge and denied after both sides had been given an opportunity to respond. On October 11, 2016 a letter was transmitted to the parties informing them of this decision. The October 2, 2016 letter of Complainant's attorney is hereby admitted as ALJ Exh. 3. The October 7, 2016 letter of Respondent's attorney is hereby admitted as ALJ Exhibit 4. The October 10, 2016 letter of Complainant's attorney is hereby admitted as ALJ Exhibit 5. The October 11, 2016 letter of the Chief Administrative Law Judge is hereby admitted as ALJ Exh. 6.

FINDINGS OF FACT

Background

1. Commencing in August, 2013 Complainant worked as a housekeeper for Respondent at his home. Complainant was so employed for approximately three weeks. (Tr. 14, 36, 155)
2. Respondent's home was located at 198 Saddle River Rd., Airmont, New York. (Tr. 116)
3. Complainant does not speak English. (Tr. 142)
4. Complainant's work hours were from 9:00 a.m. to 6:00 p.m. on Mondays and Thursdays. (Tr. 17, 132)

The Events of September 16, 2013

5. On Monday, September 16, 2013, Complainant was working in Respondent's home. (Tr. 17)
6. Complainant had been told on the prior Thursday by Respondent's wife that she would not be at home during the following week. (Tr. 51-52, 87, 119, 126)
7. Complainant and Respondent were alone in Respondent's home. (Tr. 22, 156)
8. At about 1:00 p.m. on September 16, 2013, Respondent asked Complainant to change the sheets in the bedroom which he shared with his wife. (Tr. 19, 53, 79)
9. Complainant thought his request was "weird" as she only changed the bedroom sheets on Thursdays. (Tr. 19, 88-89)
10. Respondent's wife testified that Respondent asking Complainant to do something around the house was "highly unusual" given that she had a list of chores for Complainant to perform which was already posted on the refrigerator. (Tr. 122)

11. While Respondent was alone in the bedroom with Complainant he exposed himself to her by pulling down his pants and his underwear, and attempted to grab her from behind. In the process of doing so, Respondent's penis came in contact with Complainant's body. (Tr. 20-23, 53-64, 75-76, 81, 90-94, 99-100, 208-09)

12. Complainant immediately ran from Respondent's house. (Tr. 244)

13. Complainant was crying and called her friend, Erica Palacios. Complainant told Palacios that someone had tried to rape her. (Tr. 197, 200, 236, 243)

14. Palacios immediately called the police. (Tr. 201, 222)

15. Respondent, who had left his home by car and returned after about 45 minutes, was met by the police upon his return. (Tr. 23, 158, 177)

16. Respondent was arrested after yelling at the police officers. (Tr. 159, 169, 173, 176)

17. Respondent was then taken to the police station where he was interrogated. (ALJ Exh. 2; Tr. 160, 174)

18. Respondent conceded during his interrogation that earlier in the day he had been alone with Complainant in his bedroom. (ALJ Exh. 2)

19. On September 16, 2013, Respondent was charged with the crime of Sexual Abuse in the Third Degree ("the criminal charge"). (Complainant's Exhs. 1, 4, Tr. 95, 163)

20. On September 16, 2013, Complainant, as a result of the criminal charge, received a Temporary Order of Protection ("TOP") requiring Respondent to stay away from her at all times. (Complainant's Exh. 5; Tr. 29-30, 69, 96)

Events Subsequent to September 16, 2013

21. On October 2, 2014, Complainant's TOP was converted to a one year Order of Protection against Respondent. (Complainant's Exh. 5; Tr. 73)

22. On June 1, 2015, Respondent disposed of the criminal charge by pleading guilty to the violation of Disorderly Conduct and, as a result, was assessed a fine. (Complainant's Exh. 2; Tr. 134, 161, 166)

23. Complainant, after this incident, was unable to work as a housekeeper in other households because she was afraid of what the males in those other houses might do to her. Complainant also credibly testified that she would dream every night of Respondent abusing her, would wake up "very scared," would have trouble resuming sleep, and that her work has been affected because she is "always scared." (Tr. 32-34)

24. Complainant told Palacios that she had stopped working as a housekeeper because she was afraid that a similar assault would again happen to her. (Tr. 211-12)

25. Complainant had been earning a total of \$500 per week cleaning Respondent's home and other homes in the neighborhood, and was subsequently unable to work for 12 weeks for a total back pay loss of \$6,000. (Tr. 18, 33)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to "engage in unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature to a domestic worker when...such harassment has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile or offensive work environment." Human Rights Law Section 296-b, 2 (a) (iii).

In discrimination cases a complainant has the burden of proof and must initially establish a prima facie case of unlawful discrimination. Once a complainant establishes a prima facie case

of unlawful discrimination, a respondent must articulate, via admissible evidence, that its action was legitimate and nondiscriminatory. Should a respondent articulate a legitimate and nondiscriminatory reason for its action, a complainant must then show that the proffered reason is pretextual. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993). The burden of proof always remains with a complainant and conclusory allegations of discrimination are insufficient to meet this burden. *Pace v. Ogden Services Corp.*, 257 A.D.2d 101, 692 N.Y.S.2d 220 (3d Dep't., 1999).

In order to establish a prima facie case of hostile work environment, a complainant must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe and pervasive to alter the conditions of the victim's employment and create an abusive work environment. *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 786 N.Y.S.2d 382 (2004), quoting *Harris v. Forklift Sys., Inc.* 510 U.S. 17 (1993). Whether an environment is hostile or abusive can be determined only by looking at all of 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. The effect of the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive." *Harris*, at 23. Moreover, the conduct must both have altered the conditions of the victim's employment by being subjectively perceived as abusive by the plaintiff, and have created an objectively hostile or abusive environment--one that a reasonable person would find to be so. *See id.* at 21.

A constructive discharge occurs when an employer engages in discriminatory conduct which compels an employee to quit his or her employment. *Imperial Diner v. State Human*

Rights Appeal Bd., 52 N.Y.2d 72 (1980); *Lambert v. Macy's East, Inc.* 84 A.D.3d 744, 922 N.Y.S.2d 210 (2d Dept. 2011) (citing, *Nelson v. HSBC Bank USA*, 41 A.D.3d 445, 447, 837 N.Y.S.2d 712).

Hostile Work Environment

The record shows that Complainant established both that she was exposed to a sexually hostile work environment, and that she was constructively discharged from her housekeeper position. Here, Complainant showed that Respondent first waited for an opportunity when both could be alone in the house. Respondent then exhibited conduct which Complainant described as “weird” when he asked her to do a housekeeping chore which Respondent’s own wife described as “highly unusual,” namely, having her change the sheets in the bedroom on a day other than when this normally occurred. Once in the bedroom, Respondent exposed himself to Complainant and attempted to grab her from behind, thereby causing his penis to come in contact with her body. Complainant ran crying from Respondent’s home and eventually had a friend call the police which resulted that same day in Respondent’s arrest. Respondent’s self-serving denial as to the sexual attack which took place is unworthy of belief. Respondent’s suggestion that Complainant was motivated to falsely make this claim is belied by the fact that Complainant made a contemporaneous complaint to her friend (Palacios) via telephone which precipitated an immediate police investigation. The aforementioned resulted in Respondent’s initial arrest for a sex crime and, ultimately, his having pled guilty to the violation of Disorderly Conduct in satisfaction of the initial criminal charge made against him. Parallel with these proceedings was the fact that Respondent was also the subject of several Orders of Protection which mandated that he stay away from Complainant at all times. Further, a constructive discharge was also established. Complainant’s humiliation at being sexually attacked by her employer, as well as

the genuine fear of future attacks, led to her immediate decision to logically flee the premises and not return. It is patently obvious that an employee should never, under any circumstances, be made to endure something as intolerable as a sexual attack in the workplace. Thus, Complainant established that she was exposed to a sexually hostile work environment which necessitated her constructive discharge. Note that this conclusion is not undermined by the fact that this was one time incident. *See Imperial Diner*, 52 N.Y. 72 (1980) (Isolated incident enough to justify the constructive discharge of an employee exposed to discriminatory conduct by her employer).

Damages

The Human Rights Law provides various remedies to restore victims of unlawful discrimination to the economic position that they would have held had their employers not subjected them to unlawful conduct. *See* Human Rights Law § 297.4.c (i)-(iv); *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982). Awards of back pay compensate a complainant for any loss of earnings and benefits sustained from the date of the adverse employment action until the date of the verdict. *Iannone v. Frederic R. Harris, Inc.*, 941 F. Supp. 403 (S.D.N.Y. 1996).

A complainant is also 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 (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 (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).

Here, the record showed that Complainant has a total back pay loss of \$6,000 and she is awarded this amount.

As to emotional distress damages, Complainant’s counsel cites several cases which she believed justified an enhanced emotional distress award of \$50,000. Counsel relies primarily on *Matter of New York State Div. of Human Rights v. Team Taco Mexico, Corp.* 140 A.D.3d 965, 33 N.Y.S.3d 452 (2d Dept. 2016) in which the Appellate Division affirmed an emotional distress award in that amount for a plaintiff who was also subjected to a sexually hostile work environment and constructively discharged from employment. However, that case is distinguishable from this one insofar as the complainant there suffered multiple incidents of sexual harassment, was repeatedly verbally belittled by her employer, and was paid less than other comparable employees with whom she worked. Here, Complainant credibly testified that she was unable to work as a housekeeper in other households for a limited time thereafter (12 weeks) because she was afraid of what the males in other those houses might do to her. Complainant also credibly testified that she would dream every night of Respondent abusing her, would wake up “very scared,” would have trouble resuming sleep, and that her work has been affected because she is “always scared.” As a result, Complainant is awarded \$25,000 as compensatory damages for emotional distress. *See Gold Coast Restaurant Corp. v. Gibson*, 67

A.D.3d 798, 888 N.Y.S.2d 186 (2d Dept. 2009) (Appellate Division reduces \$50,000 emotional distress award to \$25,000 to plaintiff exposed to a hostile work environment). Such an award is reasonably related to the wrongdoing, supported by substantial evidence, and similar to comparable awards for similar injuries.

In her closing argument, Complainant's counsel requested attorney's fees. However, I decline to award same given that the statutory changes allowing for attorney's fees for successful complainants in employment discrimination cases took effect on January 19, 2016, which is more than two years after the date (December 18, 2013) that this complaint was filed.

Civil Fines and Penalties

Human Rights Law § 297.4 (e) requires that "any civil penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article." The additional factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence; the nature and circumstances of the violation; the degree of respondent's culpability; any relevant history of respondent's actions; respondent's financial resources; and other matters as justice may require. *See Gostomski v. Sherwood Terr. Apts.*, SDHR Case Nos. 10107538 and 10107540, November 15, 2007, *aff'd*, *Sherwood Terrace Apartments v. N.Y. State Div. of Human Rights (Gostomski)*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009); *119-121 East 97th Street Corp. et. al., v. New York City Commission on Human Rights, et. al.*, 220 A.D.2d 79; 642 N.Y.S.2d 638 (1st Dept. 1996).

A civil fine is appropriate in this matter. Human Rights Law §297.4 (c) (vi) allows 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.” Statutory directives allow for the imposition of a civil fine and penalty of greater than \$50,000 for cases in which a respondent’s actions were found to be willful, wanton, and malicious.

Here, the record showed that Respondent preyed on a woman who could not speak the language and who was working as his housekeeper. Respondent waited for the two of them to be alone in the house and then, once in his bedroom, sexually attacked her. In sum, Respondent’s actions towards Complainant were both egregious and repulsive, and evinced an attitude of deliberate indifference as to their consequences. Given the above, and the Division’s goal of deterrence, a civil fine of \$25,000 is appropriate in this case. *See Wilson-Shell v. Stennett*, SDHR Case No. 10113269, November 30, 2007 (respondent assessed \$25,000 civil fine and penalty in case which involved, among other things, physical threats to complainant’s safety).

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 shall cease and desist from discriminatory practices in employment; and

IT IS FURTHER ORDERED, that Respondent 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 (60) days of the date of the Commissioner’s Order, Respondent shall pay Complainant, Norma Nohemy Sandoval, an award of lost wages in the amount of \$6,000. Respondent shall pay prejudgment interest on said award at the rate of nine (9) per cent

per annum;

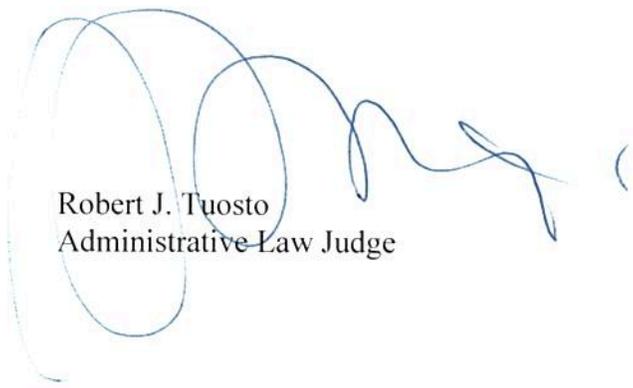
2. Within sixty (60) days of the date of the Commissioner's Order, Respondent shall pay Complainant, Norma Nohemy Sandoval, as an award of compensatory damages for mental pain and suffering the amount of \$25,000. Respondents shall pay interest on said award at the rate of nine (9) percent per annum from the date of the Commissioner's Order;

3. Respondent shall pay a civil fine and penalty to the State of New York in the amount of \$25,000 for having violated the Human Rights Law. Payment of the civil fine and penalty shall be made in the form of certified checks, made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, Esq., General Counsel, N.Y.S Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458. Interest shall accrue on this award at the rate of nine (9) percent per annum, from the date of the Commissioner's Final Order until payment is fully made by Respondent.

4. The aforesaid payments to Complainant, Norma Nohemy Sandoval, shall be made by Respondent in the form of a certified check made payable to her order and delivered by certified mail, return receipt requested, to her attorney, Karen L. Zdanis, Esq., The Zdanis Law Firm, P.L.L.C., 55 Old Turnpike Rd., Ste. 304, Nanuet, New York 10954. Respondent shall furnish written proof to Caroline Downey, Esq., General Counsel, N.Y.S Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York, of its compliance with the directives contained in this Order; and

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

DATED: October 21, 2016
Bronx, New York



Robert J. Tuosto
Administrative Law Judge