

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

LYNN SCHNEIDER,

Complainant,

v.

THE LONG ISLAND FORUM TECHNOLOGY,
RICHARD CORDANI AS AIDER AND ABETTOR
AND WALTER MICKLE AS AIDER AND
ABETTOR,

Respondent.

**NOTICE OF FINAL
ORDER AFTER HEARING**

Case No. 7941012

PLEASE TAKE NOTICE that the attached is a true copy of the Alternative Proposed Order ("APO"), issued on March 21, 2007, by Sharon Field, Adjudication Counsel, after a hearing held before Robert Vespoli, an Administrative Law Judge of the New York State Division of Human Rights ("Division").

PLEASE BE ADVISED THAT, UPON REVIEW, THE ALTERNATIVE PROPOSED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE KUMIKI GIBSON, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS ("ORDER") WITH THE FOLLOWING CORRECTIONS:

- The correct pre-judgment interest accrual date is August 6, 2000, not December 22, 2001, as mentioned in Paragraph 1 on page 35 of the APO;
- Liability attaches to Respondents LIFT and Cordani, their agents, representatives, employees, successors, and assigns. Liability does not attach to Respondent

Mickle, as mentioned on page 35 of the APO; and

- Complainant's attorney, Elizabeth Mason, has notified the Division that her mailing address for purposes of payment is Elizabeth A. Mason, Esq.,
45 Rockefeller Plaza, New York, New York 10111.

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, this 26th day of April, 2007.


KUMIK GIBSON
COMMISSIONER

**STATE OF NEW YORK
DIVISION OF HUMAN RIGHTS**

STATE DIVISION OF HUMAN RIGHTS

On the Complaint of

LYNN SCHNEIDER,

Complainant,

-against-

**THE LONG ISLAND FORUM FOR
TECHNOLOGY, RICHARD CORDANI and
WALTER MICKLE as Aiders & Abettors,**

Respondents.

**ALTERNATIVE PROPOSED
ORDER**

CASE NO: 7941012

PROCEEDINGS IN THE CASE

On March 19, 1997, Complainant filed a verified complaint, thereafter amended, with the New York State Division of Human Rights (Division) charging The Long Island Forum for Technology (LIFT), and Richard Cordani and Walter Mickle as aiders and abettors (together with LIFT, hereinafter referred to as "Respondents"), with an unlawful discriminatory practice relating to employment in violation of the Human Rights Law of the State of New York.

After investigation, the Division found it had jurisdiction over the complaint and probable cause existed to believe Respondents had engaged in an unlawful discriminatory practice. The Division then referred the case to public hearing.

After due notice, the case came before Robert M. Vespoli, an Administrative Law Judge (ALJ) of the Division. A public hearing was held on May 11, 12, 13, 25, 26 and 27, June 23 and 24, October 26, 27 and 28, and November 10, 22 and 23, 2004.

Complainant and Respondents appeared at the hearing. Complainant was represented by the law of firm Mason & Breitenecker, LLP, by Elizabeth A. Mason, of Counsel. Respondents

were represented by the law firm of Portnoy, Messinger, Pearl and Associates, Inc., by Alan B. Pearl, of Counsel.

Complainant and Respondents filed timely post-hearing briefs.

On January 11, 2006, the recommended Findings of Fact, Decision and Opinion, and Order (Recommended Order) was issued in this case. Objections to the Recommended Order were filed by both parties with the Order Preparation Unit.

FINDINGS OF FACT

1. Complainant charged Respondents with unlawful discrimination in the workplace, alleging sexual harassment and retaliation at her place of employment. (ALJ Exhibits I, II).
2. Respondents deny these allegations. (ALJ Exhibits IV, V).
3. LIFT is a private, not-for-profit, economic development organization that provides engineering services to small and medium sized manufacturers on Long Island. (Tr. 1309-10). LIFT is principally funded by state and federal grants administered by the State of New York Science and Technology Foundation (Foundation). The Foundation provides LIFT with a grant of varying amounts of state and federal economic development funds, depending, in part, upon LIFT's ability to generate matching funds and service community members. (Tr. 1312-13). At the time that Complainant worked at LIFT, LIFT was located on the grounds of Farmingdale University. (Tr. 637-38).
4. Complainant was hired by LIFT on September 8, 1995. She was interviewed by an engineer, Ollie Clowe, and Acting Executive Director Patricia Howley. (Tr. 1819). Clowe left the employ of LIFT shortly thereafter. (Tr. 1817). Howley stayed on as executive director until October 2, 1995, at which time Mickle was hired by LIFT's Board of Directors (Board) to

thin and that he could almost see through it. Complainant testified that Cordani made generally offensive remarks to her. When she told Cordani that she was an aerobics instructor, he responded by telling her that he would like to be in the back of the room watching her teach. (Tr. 42). Complainant further testified that she was subjected to gestures and grunting when she passed Cordani in the hallway at LIFT. Complainant's testimony is corroborated by her witnesses, Levy and Katz. (Tr. 747-49).

9. Cordani admitted that he once complimented Complainant regarding her appearance by telling her she was wearing a "nice outfit." Cordani testified that this comment was the one and only compliment that he made to Complainant during her employment at LIFT. (Tr. 2225). Harte, a witness for Respondents, recalled Cordani's "compliment" differently. According to Harte, Cordani commented on a red dress Complainant was wearing by singing the song "Lady in Red" to her. (Tr. 2610).

10. The beginning of Cordani's employment at LIFT in February of 1996 coincides with the timing of Complainant's change in disposition from "positive", "professional" and "enthusiastic" to "frustration and withdrawal." (Tr. 1333, 1386). Respondents do not put forth a convincing argument in the alternative explaining why Complainant's attitude underwent such a drastic change in such a short time period. Mickle believed that her attitude was the result of professional jealousy towards Cordani and a declining work performance on her part. (Tr. 1430). None of the other engineers who testified, including Respondents' witness Harte, corroborated this position.

11. Complainant asked Cordani to stop making inappropriate comments on several occasions. (Tr. 44). On one occasion, in a car returning to the office from a client's place of business, Cordani told Complainant that his wife was mad at him and that they probably

assume the executive director position. As of October 2, 1995, Complainant had been hired but had not yet commenced her employment at LIFT. (Tr. 1308).

5. Complainant began working at LIFT on October 5, 1995. By January of 1996, the LIFT office consisted of five administrators and four engineers. The administrators consisted of Executive Director Mickle and his Secretary, Pat Tackill, Assistant Executive Director Howley, Administrative Assistant Barbara Cassano, and Comptroller Nancy Kubasz. (Tr. 1811-20). The four engineers were Complainant, Gil Levy, Al Venturino and Greg Harte. (Tr. 1323, 1819). Throughout Complainant's employment at LIFT, Complainant was the only female engineer. (Tr. 1819). Venturino left LIFT in February of 1996. Another engineer, Paul Katz, was hired in March of 1996. Katz was initially hired as a consultant, but was officially hired as an engineer in July of 1996. (Tr. 1325).

6. From October of 1995 until February of 1996, Complainant's employment proceeded without incident. Mickle testified that for the first three to four months Complainant was "positive," "professional", and "enthusiastic." However, after this initial three to four month period, Mickle stated that her demeanor changed to one of "frustration and withdrawal." (Tr. 1386).

7. In February of 1996, Mickle received a letter from the Provost of SUNY Farmingdale, Michael J. Vinciguerra, recommending Cordani for an engineering position with LIFT. Cordani was hired on February 20, 1996. (Respondents' Exhibit K; Tr. 1333).

8. In the beginning of March, two to three weeks after Cordani commenced employment at LIFT, Cordani began making sexually charged remarks to Complainant. (Tr. 42). Cordani made repeated comments to her about her clothing. He commented on a red dress she was wearing and told her that red was a "sexy color." He also told her that a black dress she wore made her look

wouldn't have sex that evening. Complainant responded by telling Cordani that his comments made her feel uncomfortable and to stop making such remarks. (Tr. 45).

12. On April 8, 1996, Complainant told Mickle about Cordani's conduct of a sexual nature towards her. (Tr. 49-50). Mickle told her that he was not aware of any such conduct and that he would look into it. (Tr. 53). Respondents deny the occurrence of any meeting in which Complainant brought up problems she was having with Cordani while she was working at LIFT. (Tr. 1473, 1927). However, the Division finds Respondents' position to be less than credible.

13. On April 13, 1996, several members of the LIFT office, including Complainant and Cordani, traveled to St. Louis for a company sponsored business trip. Complainant stated that during this trip, she was repeatedly asked by Cordani for her hotel room number. (Tr. 57). Complainant refused to divulge her room number to Cordani and asked a co-worker to escort her back to her room because she feared Cordani. (Tr. 57-59).

14. On April 18, 1996, Complainant again went to see Mickle concerning Cordani's behavior. This time Mickle was openly hostile. Mickle pounded his fist on his desk and told her that she and LIFT were a professional mismatch and that she should reevaluate her relationship with LIFT. Mickle also told her that the harassment she was complaining of was just her perception and that she needed psychological help. (Tr. 60-63). Respondents deny that this meeting occurred. (Tr. 1624)

15. On April 23, 1996, LIFT again sponsored a business trip, this time to Syracuse. Complainant and Cordani were in attendance. (Tr. 67). During this trip, Cordani again asked Complainant for her hotel room number. Katz, another engineer at LIFT, asked Cordani to leave Complainant alone. (Tr. 1085). During a business dinner on the Syracuse trip, Cordani, who was seated next to Complainant, made several jokes with sexual connotations and rude comments to

a waitress. Others at the table asked him to stop. Eventually, Complainant moved to the other end of the table. (Tr. 66-68).

16. Complainant testified that Cordani's conduct continued until her termination. (Tr. 541). However, there are no specific allegations of harassment occurring after the Syracuse business trip, which ended on April 29, 1996.

17. Mickle testified that, beginning in the spring of 1996, Complainant was openly disrespectful to Cordani at staff meetings. (Tr. 1367). Cordani, Howley, Cassano, and Tackill testified that Complainant would "act up" at staff meetings, turn away from Cordani when he was speaking, put her head down, write fiercely on her notepad, and sigh loudly. (Tr. 1884, 2197, 2739, 2765). Despite the testimony of Mickle, Cordani, Howley, Cassano and Tackill regarding Complainant's behavior at staff meetings, Respondents' witness Harte testified that he did not observe Complainant "act up" at staff meetings. (Tr. 2611). Mickle later testified on cross examination that the interaction between Complainant and Cordani was one of "indifference" rather than open hostility. (Tr. 1597). Despite Complainant's drastic change in attitude and her alleged behavior towards Cordani, neither Mickle nor Howley ever asked Complainant why she acted the way she did. (Tr. 1598, 1996-97, 2080). Furthermore, Mickle stated that he never discussed the deteriorating relationship between Cordani and Complainant with Cordani. (Tr. 1429). Howley stated that other people on the staff spoke to her regarding Complainant's behavior toward Cordani. (Tr. 1884). Although she never asked Complainant what was wrong, Howley stated that "Walter and I determined in discussion that [Complainant's] behavior was due to professional jealousy." (Tr. 1884). The Division finds Respondents' position on this issue, especially in light of the testimony of Mickle, Howley and Harte, to be inconsistent and not credible.

18. On May 6, 1996, Complainant met with Howley and told her that she was "being sexually harassed by Dick Cordani and that [she] had reported it to [Mickle] and nothing was done [about it]." Howley responded that she was not aware that Complainant had been experiencing problems with Cordani and told Complainant that she would speak to Mickle. (Tr. 70). Respondents deny that this meeting occurred.

19. On May 14, 1996, Complainant was called to a meeting with Mickle and Howley. Complainant again informed them how Cordani acted around her and how uncomfortable it made her feel. Mickle responded by telling Complainant that her problem was "psychological," that it "wasn't real," and that "it was in [her] head." Mickle continued by telling Complainant that she was an incompetent engineer and suggesting that she look for another job. Complainant responded that she had no intention of leaving LIFT and that she liked her job there. (Tr. 71-72). When asked if a meeting like this occurred in May of 1996, Mickle responded, "I am not denying it, I don't recall." (Tr. 1628).

20. In response to the May 14 meeting, Complainant contacted Tom Gallagher, an employee of the New York State Department of Economic Development. Gallagher often attended meetings at LIFT and reported to the State concerning LIFT projects. (Tr. 73-75, 762). Complainant went to Gallagher because, "I reported it to [Mickle], I reported it to [Howley] and the problem wasn't resolved ... we didn't have a sexual harassment policy in place ... I had no idea who to report it to so I just went to see if he could give me guidance as to where to go and how to get this rectified." (Tr. 76). Complainant told Gallagher of her efforts to notify LIFT's management of Cordani's behavior of a sexual nature toward her. Gallagher told Complainant that he would speak to Mickle. (Tr. 74). Mickle stated that Gallagher never spoke to him about this conversation. (Tr. 1579). Gallagher did not testify at the hearing.

21. During the week of May 20, 1996, Complainant attended a convention of the Institute of Industrial Engineers (IIE). (Tr. 662). At the time, Complainant served as regional vice president for the organization. (Tr. 664). Mickle had previously agreed to sponsor her trip to the IIE convention. (Tr. 662).

22. On June 3, 1996, Complainant was again called to a meeting with Mickle. At this meeting, Mickle was agitated that Complainant had attended the IIE conference. Mickle stated that a competent engineer would not have needed to attend the IIE conference. At this meeting, Complainant also mentioned that she was having computer problems and asked when they could be fixed. Mickle responded, "never." (Tr. 77). Respondents deny that this meeting occurred. (Tr. 1474).

23. The next day, June 4, 1996, Complainant received a memorandum from Mickle questioning an expense report she had submitted for the IIE convention. (Complainant's Exhibit 6; Tr. 79). Mickle disallowed \$210 from Complainant's expense report. (Tr. 85). Complainant testified that Mickle told her that her expenses were outside of LIFT's expense guidelines. (Tr. 92). However, Mickle did not reference expense guidelines in his memorandum. Complainant never received expense guidelines from anyone at LIFT prior to Mickle's June 4, 1996 memorandum because "prior to this [LIFT] didn't have any guidelines." (Tr. 77, 92). Although requested by the ALJ, expense guidelines for the relevant time period were not produced by Respondents. (Tr. 209).

24. On June 7, 1996, Complainant sent a letter to Kenneth Morrelly, Chairman of LIFT's Board of Directors. (Complainant's Exhibit 8; Tr. 113). In the letter, she stated that Cordani was sexually harassing her, that her attempts to notify Howley and Mickle had gone unanswered, and that Mickle was unfairly disallowing Complainant expenses for her trip to the IIE convention.

(Complainant's Exhibit 8). Morrelly denies having received this letter. (Tr. 2438-39). Morrelly stated that, at this time, he had knowledge of performance problems Complainant was having at LIFT. Morrelly also stated that he was aware, through conversations with Mickle, that Complainant was also part of a "clique" of negativity that was developing at LIFT. (Tr. 2420). The record shows that in June of 1996 this "clique" included every engineer but Cordani. (Tr. 1882, 2605, 2645). Mickle testified that he spoke with Morrelly on a weekly basis concerning employees. (Tr. 1583). Mickle stated that he remembers speaking to Morelly about Complainant in either June or July of 1996. (Tr. 1585). Morelly states that in either June or July of 1996 he made himself available to Complainant after a board meeting by standing in her general vicinity. He did this because he was aware, by way of conversations with Mickle and Howley, that there were some problems with Complainant. (Tr. 2475). Morelly testified that he chose not to approach Complainant at that time. (Tr. 2476).

25. Respondents created a "performance metrics" chart showing Complainant as billing the fewest number of hours per client. (Complainant's Exhibit 14). Mickle admitted that the chart cannot be used to make a conclusion regarding an engineer's work performance. (Tr. 1527, 1632-34).

26. On July 10, 1996, Mickle met with Complainant and delivered to her a documented verbal warning. (Complainant's Exhibit 10; Tr. 124, 698, 1370, 1441). The subject of the verbal warning was Complainant's "absence without notification." The warning asked that Complainant keep the receptionist at LIFT informed of her whereabouts. Complainant testified that the verbal warning took her by surprise because she had never been reprimanded before for communication problems. (Tr. 127). It is noted that the July 10 warning notice did not comment on Complainant's expenses, attitude, overall work performance or any other conduct that

Complainant would be disciplined for in the future. Mickle testified that Complainant began screaming at this meeting and had "a violent reaction." (Tr. 1637). Howley testified that the "gravamen" of the July 10, 1996, verbal warning was the Complainant's "disrespect of a colleague," referring to Cordani. (Tr. 1886). However, Mickle testified that Cordani's name was not mentioned at this meeting. (Tr. 1441). The Division finds that these serious inconsistencies cast grave doubt on the credibility of Respondents. Nonetheless, the July 10, 1996 meeting is the first one-on-one meeting between Complainant and Mickle that Respondents admit occurred. (Tr. 1441).

27. In the following months, Mickle assigned Complainant menial tasks. (Tr. 129). On one occasion, Mickle sent Complainant to a store to buy pushpins for a presentation. On another occasion, Mickle asked Complainant to call a client to urge them to pay an outstanding bill. (Tr. 130). Levy corroborated that this type of work would be considered menial for an engineer. (Tr. 785-86, 876).

28. In August of 1996, LIFT's budget increased from approximately \$400,000 to \$1,500,000 in connection with its designation as a Manufacturing Extension Partnership Center (MEP) by the Foundation. (Tr. 1311, 1315). Mickle had been hired, in part, to obtain the MEP contract. In the six months prior to August of 1996, his focus was on obtaining the MEP contract. (Tr. 1316).

29. On October 17, 1996, Mickle issued Complainant a lengthy written warning letter concerning two main points of contention, "unsatisfactory professional performance in the delivery of services to MEP clients" and "unsatisfactory professional attitude." (Complainant's Exhibit 11). It stated that Complainant had thirty (30) days to resolve the issues mentioned in the letter or else termination would follow. Complainant was asked and refused to sign the warning letter. (Tr. 1460-61). Morrelly testified that he asked Mickle to prepare the October 17, 1996,

warning letter with "HR support." (Tr. 2425). At the time, LIFT outsourced its human resources needs to The Alcott Group (Alcott). However, Mickle testified that the only other person involved in the preparation of the October 17, 1996, warning letter was Howley. (Tr. 1444). Mickle further testified that he shared the full text of the October 17 warning letter with Morrelly and that Morrelly endorsed it. (Tr. 1589).

30. On October 18, 1996, Complainant hired attorney Joseph G. Dell because she believed that LIFT was "laying a foundation" to fire her. (Tr. 222).

31. On October 22, 1996, Dell sent a letter to LIFT referencing the name "Lynn Schneider," and the dates "3/96-10/18/96." The letter stated, "please be advised that this firm has been retained by [Complainant] to prosecute a claim for personal injury as a result of an incident on the above dates." (Complainant's Exhibit 19). Mickle acknowledged receipt of this letter. Mickle stated that he was surprised by the letter and forwarded it to Alcott. (Tr. 1486).

32. On October 24, 1996, Complainant met with Barry Greenspan, acting director for the New York State Department of Economic Development. (Tr. 224). Complainant told Greenspan that Cordani was sexually harassing her and that she had received no response from LIFT management. (Tr. 225-26). Greenspan stated that Complainant never mentioned harassment, but instead, spoke to him regarding the misuse of State funds by LIFT. Greenspan, in turn, called Mickle to inquire as to Complainant's allegations. (Tr. 2102). Greenspan did not testify as to what Mickle said in response to Greenspan's inquiry. Morrelly testified that on October 24, 1996, he had a telephone conversation with Mickle concerning the termination of Complainant. (Tr. 2428).

33. During Complainant's last week of employment, she was scheduled to attend a computer class regarding a computer program that was not available at LIFT. Complainant stated that she

took the class because it was a program that could help her clients. (Tr. 705). Respondents' claim that they attempted to contact her during the week of October 28, 1996, to inform her that they did not support the class she was taking. (1465-67). Respondents maintain that Complainant willfully ignored their attempts to contact her. (Complainant's Exhibit 26; Tr. 1955). Morrelly stated that on October 24, he discussed Complainant's plan to take a Corel Draw computer class with Mickle. (Tr. 2429). However, Mickle testified that he did not learn of Complainant's plan to take the Corel Draw class until the following Monday. (Tr. 1460). Complainant gave Tacktil a schedule of her whereabouts on Friday, October 25, 1996. (Tr. 229). Howley testified that she learned of Complainant's plan to take the class at the end of the day on Friday, after Complainant had left for the day. Howley further testified that she didn't call Complainant at the time concerning the inappropriateness of the course because the weekend had begun and she had a "laissez-faire approach to work during the weekend." (Tr. 1932). Morrelly testified that he had telephone conversations with Mickle twice a day concerning Complainant from October 24, 1996, until Complainant's termination. (Tr. 2429).

34. On Friday, October 25, 1996, Howley met with Complainant to attempt to have her sign the October 17, 1996, warning letter. (Tr. 1927). Complainant again refused. Howley testified that this was the only one-on-one meeting she had with Complainant during her entire employment at LIFT. (Tr. 2092). The same day, Complainant delivered to Tacktil a schedule of her whereabouts for the week of October 28, 1996, and notes for the Monday, October 28, 1996, staff meeting. (Complainant's Exhibit 20; Tr. 1933). The schedule stated that for the week of October 28, 1996, Complainant's schedule would be as follows: Monday, Complainant would take a personal day; Tuesday, Wednesday and Friday, she would attend a computer class at CompUSA; and on Thursday, she would be at a client's office. Complainant also credibly

testified that on October 25, 1996, Tackill acknowledged receipt of Dell's October 22 letter concerning the Complainant's lawsuit. (Complainant's Exhibit 19; Tr. 224).

35. On Monday, October 28, 1996, Complainant went to see Yakov Shamash, another member of LIFT's Board and the Dean of the School of Engineering and Applied Sciences at the State University of New York at Stony Brook. (Tr. 226). At the time, Shamash was also the Vice President of Economic Development at Stony Brook and sat on LIFT's Executive Committee. (Tr. 1731, 1752). Shamash and Morrelly had interviewed Mickle for the executive director position. Shamash and Morrelly also sat on the executive board that voted to hire Mickle for the executive director position. (Tr. 1756). Complainant stated that she told Shamash the same facts that she told Greenspan. Specifically, she testified that she told Shamash that she was being sexually harassed by Cordani, had complained to LIFT management, and received no response. (Tr. 227). Although Shamash had a difficult time remembering his meeting with the Complainant, he admitted that a meeting with Complainant did occur. (Tr. 1758-59). Shamash testified that he called Morrelly after his meeting with Complainant. (Tr. 1765). Shamash denied any discussion of harassment at this meeting, and instead, claimed that Complainant discussed a general "unhappiness with the way the operation was being run." (Tr. 1759-60). Respondents insisted that Complainant's meeting with Shamash did not occur in October of 1996, as Complainant contended, but much earlier in Complainant's employment. Shamash testified that the meeting occurred sometime in the summer of 1996. (Tr. 1777). Mickle testified that the meeting occurred sometime in the "third quarter" of 1996. (Tr. 1523). Morrelly testified that the meeting occurred in "March, April or May" of 1996. (Tr. 2445).

36. The credible evidence established that Respondents' position regarding the timing of Complainant's meeting with Shamash is an attempt to distance Complainant's meeting with

Shamash from the date of her termination. Mickle stated that Morrelly spoke to him after Complainant's meeting with Shamash. (Tr. 1572). Mickle, describing the conversation with Morrelly stated, "I was hardly surprised at the content, but that she had gone outside again, which I felt was inappropriate." (Tr. 1574). Furthermore, Mickle testified in regard to Complainant's meeting with Greenspan, "I was surprised that she would go to an outside agency." (Tr. 1568). If Respondents' position that Complainant met with Shamash in the summer of 1996 is believed, then Mickle's testimony regarding Complainant going "outside again" cannot be reconciled in the record. Other than Complainant's conversation with Shamash, Complainant went "outside" only three other times: first by talking to Gallagher, second by sending a letter to Morrelly and third by speaking to Greenspan on October 24, 1996. Mickle denied that Gallagher ever spoke to him concerning Complainant. (Tr. 1579). Respondents denied that Morrelly ever received Complainant's letter. (Tr. 2473). Respondents and Complainant agree that the Greenspan meeting took place on October 24, 1996. Mickle's testimony that Complainant had "gone outside again" can be reconciled with the record only if Complainant's meeting with Shamash had taken place after her meeting with Greenspan, as Complainant testified, or after one of Complainant's other communications with outside sources, of which Respondents vehemently denied knowledge. This contradiction bolsters Complainant's credibility and impugns the credibility of Respondents.

37. During October 28, 29 and 30, 1996, Respondents claimed that they attempted to contact Complainant without success. Mickle claimed that Howley and Tackill were responsible for contacting Complainant during this time period. (Tr. 1465-67). However, Howley claimed to have called Complainant twice at home on October 28, 1996. (Tr. 1933). Howley also claimed to have prepared notes memorializing the efforts made to reach Complainant. (ALJ Exhibit VIII).

Respondents were unable to produce the original document. Also, the notes conflicted with the record. Howley stated that Tackill was responsible for contacting Complainant at CompUSA where she was taking her Corel Draw computer course on October 29 and 30, 1996. (Tr. 1934). However, Tackill testified that her only calls to Complainant during the week of October 28 were on Monday, October 28, 1996. (Tr. 2804-05). The evidence showed that Complainant was not scheduled to take a computer course on October 28, 1996, but was instead taking a personal day. (Complainant's Exhibit 20; Tr. 1933). The calls Respondents alleged making to CompUSA are not documented with phone records or original notes regarding the calls. The only call that both Complainant and Respondents agreed was made was an October 31, 1996, call by Mickle to Complainant's home, asking her to come into the office the next morning rather than attending her scheduled November 1, 1996, computer course. (Tr. 240-41, 1516).

38. On October 30, 1996, Dell, Complainant's attorney, sent two letters, one to Mickle and the other to Cordani, notifying them that they were being sued for sexual harassment. The post-marked envelope was stamped "received on October 30, 1996" by the post office where it was mailed and stamped "received" by the recipient post office on October 31, 1996. (Respondents' Exhibit M). The envelope also has an unofficial date stamp on it reading "November 5, 1996." Respondents claimed that they did not receive these letters until November 5, 1996, six days after it was sent. (Tr. 1489). The credible evidence demonstrates, yet again, that this is an attempt by Respondents to distance potentially damaging evidence from the date of the Complainant's termination.

39. On November 1, 1996, Complainant went to LIFT instead of her computer class as Mickle instructed. (Tr. 241). At or around noon, Mickle went to Complainant's office and asked her to meet him in his office. (Tr. 1517). Once in Mickle's office, Mickle read Complainant a

termination letter he had drafted. (Complainant's Exhibit 23). Complainant recorded the conversation and entered a verbatim transcript of the tape recording into evidence.

(Complainant's Exhibit 43). Mickle stated that he was firing Complainant for breach of confidentiality and insubordination. (Tr. 1512-13). Mickle stated that Complainant's failure to contact LIFT offices earlier in the week constituted insubordination and that her conversation with Greenspan concerning LIFT on October 24, 1996, amounted to a breach of confidentiality. (Tr. 1603-04). Complainant was not previously reprimanded for "going outside" despite the fact that she had "gone outside" prior to her meeting with Greenspan. (Tr. 1578). After the meeting with Mickle, Howley escorted Complainant to her office to pick up her personal items and then escorted the Complainant out of the building. (Tr. 255-56).

40. LIFT distributed a sexual harassment policy on October 28, 1996, five days before Complainant's termination. (Respondents' Exhibit H; Tr. 2066, 2705-06). At no time prior to October 28, 1996, did LIFT have a sexual harassment policy in place. (Tr. 1921, 2469). Complainant was out of the office on October 28, 1996, and did not receive a copy of the new employee handbook containing the sexual harassment policy. (Tr. 226).

41. Complainant stated that she failed to look for employment for the first eight and one half months after her termination. (Tr. 257). However, she later stated that while she failed to "aggressively" seek alternative employment during this period, she did put "some effort into it." (Tr. 512). Complainant explained that her lack of initiative was "because I was going through depression and I had trouble getting out of bed ... I had no confidence." (Tr. 257, 512). Complainant further testified that she "felt dead inside," had trouble sleeping, "went into a shell," "couldn't stand up for [herself]," had "no motivation to do anything," would "cry for no reason," had nightmares, and "felt tired all the time." (Tr. 258-60, 262, 271).

42. An acquaintance of Complainant, Carol Morton, corroborated Complainant's testimony, stating that around the time of Complainant's termination from LIFT, Complainant became "depressed," "less confident," "less enthusiastic," ceased "making eye contact," felt "scared" about returning to work, "lost her sparkle," became unhappy, gained a great deal of weight, carried herself in a "slumped manner," and was "insecure." (932-33, 961, 975). Morton worked with Complainant at Weight Watchers International from 1990 to 1993. (Tr. 921, 952). Morton further testified that after Complainant's termination from LIFT, she saw Complainant an average of two to eight times a year and spoke with her an average of four to five times a year on the telephone. (Tr. 976-77).

43. Carolyn Savacchio, a close friend of Complainant, testified that she noticed a change in Complainant after working at LIFT, from "friendly, happy, energetic [and] determined" to "depressed," and "unhappy." Savacchio further testified that Complainant "lost [her] confidence," "very easily cried," "gained a tremendous amount of weight," didn't "pay attention to how she dressed," and "couldn't handle any type of confrontation." (Tr. 979-80, 983, 986-87, 990). Savacchio testified that on one occasion Complainant told her, "they had taken part of her away and she wasn't the same person that she was prior to LIFT." (Tr. 989). Savacchio further testified that Complainant had an aversion to the color red during the time period of 1997 to 1998. (Tr. 992-93, 1032). On one occasion, Complainant went to the bathroom at a mall on Valentine's Day and vomited because "the color red was surrounding her." (Tr. 992).

44. Complainant gave several examples of the effect of her condition on her attempts to seek subsequent employment. On one occasion, Complainant vomited into a trash can at a job interview because the person interviewing her looked and talked like Mickle. (Tr. 261). On another occasion, Complainant started crying at an interview when people in an adjacent room

began arguing. On yet another occasion, Complainant became so nervous at a job interview that she couldn't draw "a simple flow chart" that she was asked to create. (Tr. 260).

45. In addition, Complainant testified to the following physical manifestations: "I gained 90 pounds" in one year, had "migraines," "muscle pain, joint pain," "inflamed nerve endings," "blurry vision," "spasms in my neck, shoulder and back," "tightening in my chest wall," and "heart palpitations." (Tr. 258, 260, 271, 276-77, 279). Complainant testified that she began to gain the weight that would ultimately result in a 90-pound gain in October of 1996. (Tr. 280). Complainant stated that she gained weight so that she "wouldn't be attractive to anyone." (Tr. 780). Complainant's weight gain after leaving LIFT is corroborated by the testimony of two of Complainant's witnesses, Morton and Savacchio. (Tr. 933, 986). Morton testified that Complainant was overweight when she worked with Complainant at Weight Watchers in 1993, but that prior to starting at LIFT, Complainant had lost "approximately 40 to 50 pounds." (Tr. 949-50). Morton further testified that Complainant gained 70 to 80 pounds in the time period of 1998 to 1999. (Tr. 958).

46. Complainant further testified that she was diagnosed with an autoimmune disease, sarcoidosis, in 1980. (Tr. 300). Complainant stated that her disease had gone into remission, but that in May of 1996, because of her problems at LIFT, she began to experience the symptoms of sarcoidosis again. (Tr. 302). Complainant testified that the symptoms she experienced that were related to sarcoidosis were feeling "tired a lot," "muscle pain and joint pain," asthma and migraines. (Tr. 299-300). Savacchio stated Complainant suffered from sarcoidosis, asthma, arthritis and migraines prior to working at LIFT. (Tr. 1033, 1035). Complainant also testified that she was diagnosed with another autoimmune disease, fibromyalgia, in 2002. (Tr. 300). Complainant failed to produce an expert witness or her doctor to present testimony concerning

causation. (Tr. 292-95). Morton testified that Complainant had sarcoidosis and asthma in the 1980's, but did not corroborate testimony regarding any other physical illnesses. (Tr. 964, 1035). Complainant attempted to submit, and subsequently withdrew, her medical records as an exhibit. (Tr. 394-99). The medical bills that Complainant produced reflected doctors visits beginning in June of 1997. (Complainant's Exhibit 30D). The tally of the visits recorded in these medical bills show that Complainant visited doctors twenty-one times in 1997, thirty-one times in 1998, seventeen times in 1999, fourteen times in 2000, twenty-one times in 2001, twenty-six times in 2002, and thirteen times in 2003. (Complainant's Exhibit 30D).

47. Complainant presented credible evidence that she was regularly treated by a psychologist, Benjamin Hirsch, Ph.D., beginning in December of 1996. Complainant saw Hirsch roughly once every week until July of 1997, for a total of 22 sessions. (Complainant's Exhibit 30D). Complainant had to stop seeing Hirsch because she ran out of money. (Tr. 295). Complainant stated that Hirsch told her that she was suffering from "major depression" and "post-traumatic stress disorder." (Tr. 285). Complainant offered into evidence a report prepared by Hirsch. However, this report was rejected by the ALJ as lacking sufficient relevance or reliability because: (1) Complainant failed to produce Hirsch or an affidavit from Hirsch authenticating the report, and (2) The report was not dated and no other information was provided as to the time period addressed in the report. (Tr. 289-95).

48. Complainant produced evidence of payments to medical insurance providers subsequent to her termination from LIFT in the form of copies of cashed checks totaling \$20,720.64. These include both COBRA payments and payments to other medical insurance providers once her COBRA allowances expired. (Complainant's Exhibits 30A, 30B, 30C).

49. In 1996, Complainant's base annual salary at LIFT was \$58,000, and she provided no evidence of expected pay raises or bonuses. (Complainant's Exhibit 26). In addition to her testimony, Complainant produced a damages statement, tax returns and Social Security statements presenting figures for lost wages as follows:

<u>Year</u>	<u>Base Salary</u>	<u>Earnings</u>	<u>Lost Wages Claimed</u>
1996	\$58,000	\$50,036	\$7,964
1997	\$58,000	\$31,661	\$26,339
1998	\$58,000	\$52,944	\$5,056
1999	\$58,000	\$31,135	\$26,865
2000	\$58,000	\$14,505	\$43,495
2001	\$58,000	\$0	\$58,000
2002	\$58,000	\$74,130	\$0
2003	\$58,000	\$0	\$58,000
2004 ¹	\$58,000	\$0	\$26,680
Total			\$252,399

(data compiled from Tr. 319; Complainant's Exhibits 26, 34-42 using the highest figure reported for each year)

50. Complainant was employed/unemployed during the following periods after her employment at LIFT ended:

11/1/1996	8 months, 17 days	unemployed
7/19/1997	1 year, 2 months, 19 Days	employed - Dynatiantic
10/9/1998	10 Months, 21 days	unemployed
8/30/1999	10 months, 15 days	employed - NYSDDED
7/15/2000	1 year, 7 months, 17 days	unemployed
3/4/2002	3 months, 3 days	employed - IAC
6/7/02 - 5/12/04	1 year, 11 months, 5 days	unemployed
*data compiled from Complainant's Exhibit 26, Tr. 309, 313-315, 317-318		

51. Complainant prepared and produced two exhibits documenting her efforts to seek alternative employment. (Tr. 332-37; Complainant's Exhibits 27, 28). The first of these exhibits

¹ The 2004 figure listed is as of May 12, 2004, the date on which the Complainant's testimony regarding her earnings in 2004 was presented. (Tr. 319). Since this is the last date on which the Complainant presents evidence regarding damages for back pay, the record with respect to this issue is closed at this point, approximately 5½ months into 2004. Thus, the calculation for back pay damages used for 2004 is 46% (5.5/12) of base salary (46% x \$58,000 = \$26,680).

includes copies of emails and letters sent to and received from prospective employers.

(Complainant's Exhibit 27). The dates of these letters and emails are as follows:

<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>
None	None	10/15	1/2	1/2	1/3	1/1	3/5
		10/23	1/4	1/19	1/7	1/3	3/8
		12/4	1/8	1/25	5/19	1/10	3/9
		12/27	1/25	2/7	6/27	1/12	3/10
		12/28	2/7	2/8	9/25	1/16	3/11
		12/28	2/8	2/11	10/2	1/23	3/14
			3/21	2/13	12/8	3/1	3/15
			4/7	2/20		3/4	3/18
			4/27	3/13		3/19	3/25
			4/29	3/14		4/14	4/1
			5/23	3/26		4/15	4/4
			5/29	4/17		4/20	4/28
			6/27	5/10		4/21	
			6/28	7/26		4/22	
			7/17	8/5		4/24	
			8/14	8/31		4/28	
			8/25	9/7		4/29	
			9/7	9/10		5/3	
			9/8	9/20		5/5	
			9/12	9/28		5/6	
			9/18	9/29		5/16	
			10/21	10/4		5/21	
			10/22	10/21		5/22	
			10/23	10/28		6/3	
			11/6	11/9		6/9	
			11/14	12/6		6/12	
			11/15	12/14		6/20	
			11/16	12/18		8/14	
			11/26	12/20			
			11/27	12/21			
			11/28	12/23			
			11/29	12/24			
			11/30				
			12/1				
			12/4				
			12/5				
			12/8				
			12/9				
			12/11				
			12/12				
			12/13				

<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>
			12/14				
			12/15				
			12/18				

The second document is a list of interviews Complainant attended on the following dates:

<u>1997</u>	<u>1998</u>	<u>1999</u>	<u>2000</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>
3/13	None	None	2/18	4/2	1/4	None	1/10
3/17			2/24				
3/27			7/14				
5/14			7/19				
6/13			10/4				
6/14			11/10				
7/1			11/27				
7/11			12/19				
7/17			12/20				
8/6							
10/17							

(Complainant's Exhibit 28)

52. For the first eight and one half months after Complainant's termination from LIFT, Complainant testified that she did not "actively" seek alternative employment. (Tr. 257). Complainant stated that she began sending out letters and emails in response to job listings in July of 1997. (Tr. 330). Complainant failed to produce any material documenting her attempts at seeking employment in the form of emails and letters prior to October of 1999. However, Complainant credibly testified to sending out letters and emails during this time period and searching the wanted ads in Sunday newspapers. (Tr. 451-58, 465). Savacchio testified that during this time period she helped Complainant "run off copies of her resume" and "saw lists of companies that [Complainant] sent her resume to." (Tr. 994).

53. In July of 1997, Savacchio helped Complainant obtain a temporary, non-engineering, job at Dynatlantic. (Tr. 318, 1012). Originally, the job was supposed to last for six months. However,

Complainant stayed on for nearly fifteen months, until October 8, 1998. (Tr. 309). Complainant left Dynatlastic because the project she was working on was completed. (Tr. 310).

54. In November of 1997, Complainant incorporated a sole shareholder S-corporation, LCS Corporate Consulting, Inc. (LCS), originally registered with New York State in 1993. (Tr. 625). Complainant removed LIFT from her resume in the beginning of 1998 and replaced it with LCS. (Tr. 323). Although Complainant submitted tax returns for the tax years 1997 through 2003, she only submitted personal income tax returns for the tax years 1997 and 1998. For the tax years 1999 through 2003, the only tax returns submitted by Complainant were corporate returns signed by Complainant on behalf of LCS. (Complainant's Exhibits 34, 34A, 35, 36, 37, 38, 39, 40).

55. From October 9, 1998 until August 30, 1999, Complainant was unemployed. (Complainant's Exhibit 26; Tr. 312). Complainant credibly testified that during this time period she had contacted colleagues, searched internet and newspaper ads and had gone on "a couple" of interviews. (Tr. 312). Savacchio testified that during this time period Complainant asked her whether Northrup Grumman, where Savacchio was working at the time, was hiring industrial engineers. (Tr. 1010). However, Complainant failed to produce any corroborating records of interviews, letters or emails during this time period.

56. On August 30, 1999, Complainant's corporation was awarded a \$30,000 contract with the New York State Department of Economic Development (NYSDED). (Tr. 313-14). The contract was extended by an additional \$10,000 in 2000. (Complainant's Exhibit 26; Tr. 314). On July 14, 2000, Complainant was informed that the funds set aside for her project had been exhausted, which effectively ended her employment with the NYSEDED. (Tr. 314).

57. From July 15, 2000 through March 3, 2002, Complainant remained unemployed. Complainant produced evidence that she attended seven interviews and sent out over forty letters

and emails during this time period. (Complainant's Exhibits 27, 28). Complainant credibly testified that she went to employment agencies, posted notices on job boards and searched internet and newspaper ads. (Tr. 315). Complainant stated that during this time period she still had problems interviewing. It was during this time period that she vomited in a prospective employer's trash can and had problems drawing "a simple flow chart." (Tr. 316).

58. On March 4, 2002, Complainant obtained a job with Industrial Acoustics Corporation (IAC) by way of a referral from the President of the Long Island Chapter of the Institute of Industrial Engineers, an organization where Complainant had previously been a member. (Tr. 317). The job ended on June 6, 2002, because the project Complainant was working on was completed. Complainant was paid \$74,130 for this project. (Tr. 318).

59. From July 8, 2002 through May 12, 2004, the date on which Complainant testified at the hearing, Complainant remained unemployed. (Tr. 319). Complainant produced evidence of one interview with a prospective employer and over thirty letters and emails sent to prospective employers during this time period. (Complainant's Exhibits 27-28). Complainant credibly testified that during this period she searched ads in the New York Times and contacted several employers. (Tr. 320).

60. Complainant alleged that she was subjected to post-termination retaliation in the form of blacklisting by LIFT. (Tr. 266-71, 1048). However, the record contains no evidence corroborating these allegations.

61. As of the time of their testimonies, Cordani and Mickle no longer work for LIFT, Morrelly was the President of LIFT, Howley was the executive director of LIFT, Shamash was a board member of LIFT, Cassano held the same position at LIFT, Greenspan held the same position at NYDED, Tackill was an investigative officer for Child Protective Services and

taught at SUNY Farmingdale, Levy and Katz no longer work for LIFT, and Harte was the Director of Program Management at EDO Aircraft Systems under the supervision of Bill Wahlig the then Chairman of LIFT's Board of Directors. (Tr. 740, 1162-63, 1751, 2094, 2362-64, 2400-01, 2481, 2558, 2658, 2689, 2748).

DECISION AND OPINION

Complainant charged Respondents with unlawful discrimination in the workplace, alleging sexual harassment and retaliation. For the reasons discussed below, the Division sustains the charges of sexual harassment and retaliation.

Sexual Harassment

Under the New York State Human Rights Law, it is unlawful for an employer to discriminate against an employee on the basis of sex. Human Rights Law §296.1(a).

In order to sustain a hostile work environment claim, a complainant must demonstrate that she was subjected to conduct that produced a work environment permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. The Division must examine the totality of the circumstances and the perception of both the victim and a reasonable person in making its determination. Father Belle Community Ctr. v. New York State Div. of Human Rights, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739 (4th Dept. 1996), lv. denied, 89 N.Y.2d 809 (1997).

In the instant case, the conduct described by Complainant is sufficiently severe or pervasive to amount to an actionable claim of sexual harassment. The record evinces numerous specific facts regarding incidents of verbal harassment by Cordani. On more than one occasion, Cordani commented on the color of her clothing. He told Complainant that he liked the color red

on her and thought that it was a "very sexy color." On one occasion, Cordani told her that a black dress she wore was almost see-through and made her look very thin. Upon learning that Complainant was an aerobics instructor, Cordani told her that he would like to stand in the back of the room and watch her teach. During a car ride with Complainant to a client's office, Cordani told her that he was having a fight with his wife and that they probably wouldn't have sex that evening. On a business trip to St. Louis in the beginning of April of 1996, Cordani asked Complainant for her hotel room number. During a dinner with other engineers, Cordani told jokes with sexual connotations and made rude comments to a waitress. During a business trip to Syracuse at the end of April of 1996, Cordani again asked Complainant for her hotel room number. Cordani also made gestures and noises toward Complainant.

The harassment described by Complainant clearly rises to the level of objective severity and pervasiveness required to constitute an actionable claim under the NYHRL. Accordingly, Complainant prevails on her sexual harassment claim.

Section 296(6) of New York's Human Rights Law states that it shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under the article, or attempt to do so. Pursuant to this section, an individual "who actually participates in the conduct giving rise to a discrimination claim may be held personally liable under the [Human Rights Law]." Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995). Here, the named aiders and abettors are Mickle and Cordani. As Cordani was the individual who actually carried out the harassment, he is personally liable as an aider and abettor. Given the facts of this case, Mickle can not be held personally liable.

Under New York law, where the complainant is harassed by a co-employee, as in this case, the complainant is required to establish only that upper-level supervisors had knowledge of

the conduct and ignored it; if so, the harassment will be imputed to the corporate employer and will result in imposition of direct liability. Father Belle Community Ctr. v. New York State Div. of Human Rights, 221 A.D.2d 44, 54, 642 N.Y.S.2d 739 (4th Dept. 1996). Complainant complained to both Mickle and Howley on numerous occasions, yet Respondent did nothing to end the hostile work environment. Therefore, liability is imputed to LIFT because it knew of the harassment but did nothing about it.

Retaliation

Complainant alleged that Respondents unlawfully retaliated against her for opposing discrimination by terminating her employment. The Division finds that Complainant was retaliated against by Respondents.

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in retaliation for opposing prohibited discriminatory practices. Human Rights Law §296.1(e); §296.3-a (c) and §296.7.

In order to establish a prima facie case of unlawful discrimination based upon retaliation, Complainant must show that she engaged in a protected activity; that Respondent knew she engaged in a protected activity; that she suffered an adverse employment action; and that there was a causal connection between the protected activity and the adverse employment action. Once Complainant has met this burden, Respondents have the burden of coming forward with legitimate, nondiscriminatory reasons in support of their actions. Complainant then must show that the reasons presented are a pretext for unlawful discrimination. Pace v. Ogden Servs. Corp., 257 A.D.2d 101, 692 N.Y.S.2d 220 (3rd Dept. 1999).

With respect to her retaliation claim, Complainant has proven all of the elements of the test. She engaged in a protected activity when she complained to management about the hostile work

environment. See Modiano v. Elliman, 262 A.D.2d 223, 693 N.Y.S.2d 24 (1st Dept. 1999). Complainant also engaged in a protected activity when she engaged her attorney, Dell, who sent letters to LIFT, Mickle and Cordani. See O'Hara v. Mem'l Sloan-Kettering Cancer Ctr., 79 Fed. Appx. 471, 475 (2d Cir. 2003). Respondents knew about her complaints as she complained directly to management. Furthermore, Respondents were made aware of the protected activity in writing by way of Complainant's letter to Morrelly and Dell's letters sent to LIFT, Mickle and Cordani. Complainant clearly suffered an adverse employment action given her termination. Complainant established causality. A causal connection may be shown indirectly in circumstances where the discrimination against a complainant is sufficiently close in time to the protected activity. Pace Univ. v. New York City Comm'n on Human Rights, 85 N.Y.2d 125, 623 N.Y.S.2d 765 (1995).

Here, the record established a temporal nexus between Complainant's protected activity and her termination. Although Respondents' October 17, 1996, warning letter to Complainant stated that Complainant had 30 days to comply with its terms, Complainant was terminated only 15 days later. Complainant's termination occurred, a week and a day after her meeting with Greenspan, four days after her meeting with Shamash, and the day after Dell's October 30 letter is postmarked as having been received by the post office servicing LIFT's zip code. Complainant established a prima facie case of retaliation by showing that her termination arrived on the heels of notification to her employer that she was bringing a suit for sexual harassment against them. Thus, Complainant met her burden of showing a causal connection between her protected activity and her termination.

Because Complainant established a prima facie case of retaliation, the burden shifted to Respondents to put forth a "legitimate, independent and nondiscriminatory reason" for the termination. Mickle stated two reasons for terminating Complainant on November 1, 1996: (1) breach of confidentiality and (2) insubordination. Mickle testified that the basis for the breach of confidentiality charge was Complainant's meeting with Greenspan on October 24, 1996. However, according to Respondents, Complainant had spoken to Shamash in the summer and had "gone outside" before, and yet, Complainant was never previously reprimanded for these actions. Despite the litany of complaints set forth in Respondents' October 17, 1996, warning letter issued to Complainant, breach of confidentiality is neither mentioned nor alluded to in the warning letter.

With regard to "insubordination," Respondents' position is that Howley and Tackill had unsuccessfully attempted to contact Complainant on October 28, 29 and 30, 1996. Respondents maintain that Complainant willfully ignored their calls and refused to communicate with them. Respondents were attempting to contact Complainant to tell her not to take a scheduled Corel Draw computer class because the program was not supported by LIFT. Complainant was scheduled to take computer classes at CompUSA in Hauppauge on Tuesday, October 30 and Wednesday, October 31, 1996. Howley and Tackill each testified that the other placed calls throughout the week. However, both Howley and Tackill testified that the only calls they personally placed were on Monday, October 28, 1996, a day when Complainant had scheduled a personal day. There is no credible evidence that calls were placed to CompUSA or to Complainant on October 29 or October 30, 1996. No one travelled to CompUSA and no phone records were proffered. Mickle, however, had no problem contacting Complainant on October

31, 1996. Mickle testified that the October 31, 1996, phone call is the only call he personally placed to Complainant during the week of October 28, 1996.

In light of these inconsistencies, the Division finds that the reasons Respondents put forth for Complainant's termination are merely a pretext for a discriminatory act in violation of the Human Rights Law. Accordingly, Complainant prevails on her retaliation claim.

Damages

The Human Rights Law provides remedies to restore victims of unlawful discrimination to the economic position they would have held had their employers not subjected them to discriminatory conduct. As the victim of discrimination, Complainant is entitled to damages. The damages available under the Human Rights Law include compensatory damages for lost wages in the form of back pay. Complainant lost pay because Respondents unlawfully terminated her employment. In the instant case, Complainant is entitled to \$252,399.00 of back pay. This figure is based upon Complainant's annual base pay rate of \$58,000 at the time of her termination from LIFT, minus any income Complainant made subsequent to her termination, including unemployment compensation. Complainant is entitled to back pay damages from her termination on November 1, 1996 through May 12, 2004, the last date for which Complainant provided evidence regarding earnings and mitigation. Respondents are also liable to Complainant for predetermination interest on the back pay award at a rate of nine percent per annum from August 6, 2000, a reasonable intermediate date, through the date of this Order. Aurrecchione v. New York State Div. of Human Rights, 98 N.Y.2d 21, 744 N.Y.S.2d 349 (2002). Furthermore, Respondents are liable to Complainant for interest on the back pay award at a rate of nine percent per annum from the date of this Order until payment is made. Complainant is therefore entitled to a total back pay award of \$252,399.00 plus interest and is hereby awarded that amount.

Complainants are under a duty to mitigate their damages. In the case of an unlawful discharge in the employment discrimination context, “mitigation of damages” requires, at a minimum, the complainant “use reasonable diligence to find ‘other suitable employment.’” Kuper v. Empire Blue Cross & Blue Shield, 2003 U.S. Dist. LEXIS 2362 (S.D.N.Y. 2003). However, once a complainant has asserted damages, the burden is upon respondent to show that complainant failed to reasonably mitigate those damages. Am. Capital Access Serv. Corp. v. Muessel, 28 A.D.3d 395, 814 N.Y.S.2d 139 (1st Dept. 2006). A respondent may satisfy this burden by showing that: (1) suitable work existed, and (2) complainant did not make reasonable efforts to obtain it. Broadnax v. City of New Haven, 415 F.3d 265 (2d Cir. 2005).

In the instant case, Respondents failed to put forth any evidence that Complainant failed to mitigate her damages. However, Respondents are not under an obligation to produce evidence that suitable work existed where the record shows that Complainant did not look for employment at all. Greenway v. Buffalo Hilton Hotel, 143 F.3d 47 (2d Cir. 1998). Complainant initially testified that during the first eight and one half months after her termination from LIFT, she did not look for a job. However, Complainant later stated that during the first eight and one half months, while she did not look for work “aggressively,” she did put “some effort into it.” Complainant’s Exhibit 28 shows that Complainant attended four interviews during the relevant time period. This is enough for Complainant to meet the minimal preliminary showing of a reasonably diligent job search. Accordingly, Respondents must show that suitable work existed and that Complainant failed to pursue it.

Respondents did not produce evidence that suitable jobs existed during this time period that Complainant failed to pursue, nor have they argued effectively that only attending four interviews over an eight and one half month period was unreasonable. In the absence of such

evidence and in light of Complainant's depressed state of mind following her termination, including visits to a psychologist, the Division finds that Complainant mitigated her damages during the first eight and one half months, before obtaining her job at Dynatlastic.

Since her termination from LIFT, Complainant only secured temporary employment. Complainant has produced sufficient evidence in the form of her testimony and copies of emails and letters to show that she continued to look for comparable employment. Moreover, the fact that Complainant activated her corporation, after failing in her attempts to obtain comparable employment following her wrongful discharge, does not preclude her from recovering lost wages on the theory that she removed herself from the employment market. Cornell v. T.V. Development Corp., 17 N.Y.2d 69, 268 N.Y.S.2d 29 (1966). Respondents did not produce any evidence to show that Complainant failed to mitigate her damages. Therefore, the Division finds that a full back pay award is appropriate.

The Complainant is additionally entitled to recover for her lost benefits. She has produced evidence of payments to medical insurance providers, subsequent to her termination from LIFT, in the form of copies of cashed checks, totaling \$20,720.64. These include both COBRA payments and payments to other medical insurance providers once her COBRA allowances expired. Complainant is hereby awarded \$20,720.64 for her lost benefits.

Making Complainant whole entails compensating her for the emotional suffering that she endured because of Respondents' unlawful conduct. Complainant is entitled to compensatory damages for the emotional distress, pain and suffering that Respondents' actions caused her. Such compensation may be based solely on Complainant's testimony. Cosmos Forms, Ltd. v. State Div. of Human Rights, 150 A.D.2d 442, 541 N.Y.S.2d 50 (2d Dept. 1989); Wantagh Union Free School Dist. v. State Div. of Human Rights, 122 A.D.2d 846, 505 N.Y.S.2d 713 (2d Dept. 1986), appeal

dismissed, 69 N.Y.2d 823 (1987). It must be reasonably related to the discriminatory conduct. New York City Transit Authority v. State Div. of Human Rights, 78 N.Y.2d 207, 573 N.Y.S.2d 49 (1991).

In the instant case, the Complainant presented testimony, corroborated by two witnesses, Savacchio and Morton, that after her termination from LIFT, she became depressed and emotionally unstable and gained a substantial amount of weight. Complainant explained that "I was going through depression and I had trouble getting out of bed ... I had no confidence." Complainant further testified that she "felt dead inside," had trouble sleeping, "went into a shell," "couldn't stand up for [herself]," had "no motivation to do anything," would "cry for no reason," had nightmares, and "felt tired all the time." In addition, Complainant testified to the following physical manifestations: "I gained 90 pounds" in one year, had "migraines," "muscle pain, joint pain," "inflamed nerve endings," "blurry vision," "spasms in my neck, shoulder and back," "tightening in my chest wall," and "heart palpitations." Complainant presented credible evidence that she began seeing a psychologist, Benjamin Hirsch, in December of 1996 and saw Hirsch for a total of 22 sessions until July of 1997, when she testified that she "ran out of money." Complainant further testified that her experience at LIFT aggravated her pre-existing sarcoidosis condition in or around May of 1996. The aggravation of this condition caused her to feel "tired a lot," have "muscle pain and joint pain," and have migraines. Complainant produced medical bills for the purpose of proving that she had visited doctors. The medical bills show that Complainant visited doctors an average of twenty times a year beginning in June of 1997. Here, Complainant has produced credible evidence that she sought both psychiatric and medical treatment. Furthermore, Complainant produced two corroborating witnesses that testified to her significant emotional downturn after her termination from LIFT. In the instant case, the Division

finds that the depression Complainant suffered, her failure to find comparable employment and her significant weight gain were causally related to the unlawful discrimination and retaliation she suffered at the hands of Respondents.

In Gleason v. Callanan Industries Inc., 203 A.D.2d 750, 610 N.Y.S.2d 671 (3d Dept. 1994), the court, interpreting the NYHRL, upheld a \$54,000 emotional distress award, absent expert witness testimony, whereby complainant's testimony established that she "suffered from irritable bowel syndrome, pains in her sides, insomnia, migraines, and depression, and, as a result thereof, sought medical attention." The Gleason court found that the complainant's "mental shock and anguish stemmed from the retaliatory discharge and was supported not only by the testimony of [complainant], but also various Callanan employees." The court stated further that, "such testimony was buttressed by [complainant's] inability to secure comparable employment for approximately one year. Id. at 752. The jury below in Gleason found against the complainant on the charge of sexual harassment but for complainant on the claim of retaliatory discharge. Id. at 750. In Gleason, the facts giving rise to the emotional distress award were found to be a result of complainant's discriminatory discharge. Gleason, 203 A.D.2d at 752 ("[w]e find that the compensation [for emotional distress] was reasonably related to the effects of the wrongful termination"). The facts giving rise to Complainant's termination in this case, in which Mickle frequently belittled Complainant to her face and issued unfounded warning letters, are more severe than the facts giving rise to the retaliation claims in Gleason. In addition, here there is additional mental anguish for the hostile work environment not substantiated in Gleason. Accordingly, the Division finds that an award of \$75,000 is sufficient to effectuate the purposes of the Human Rights Law and make the Complainant whole.

ORDER

On the basis of the foregoing Findings of Fact, Decision and Opinion and pursuant to the provisions of the Human Rights Law, it is

ORDERED that Mickle and LIFT, their agents, their representatives, their employees, their successors and their assigns, being jointly and severally liable, shall take the following affirmative actions to effectuate the purposes of the Human Rights Law:

1. Within sixty days of the date of this Order, Respondents LIFT and Mickle shall pay to Complainant the sum of \$252,399.00 as damages for back pay. Interest shall accrue on the award at the rate of nine percent per annum from December 22, 2001, a reasonable intermediate date, until the date payment is actually made by Respondents.

2. Within sixty days of the date of this Order, Respondents LIFT and Mickle shall pay to Complainant the sum of \$20,720.64 as reimbursement for out of pocket expenses she incurred in connection with continuing medical insurance coverage. Interest shall accrue on the award at the rate of nine percent per annum from the date of this Order until the date payment is actually made by Respondents.

3. Within sixty days of the date of this Order, Respondents LIFT and Mickle shall pay to Complainant the sum of \$75,000.00 without any withholdings or deductions, as compensatory damages for the mental anguish and humiliation suffered by Complainant as a result of Respondents' unlawful discrimination against her. Interest shall accrue on the award at the rate of nine percent per annum from the date of this Order until the date payment is actually made by Respondents.

4. The aforesaid payments shall be made by Respondents Mickle and LIFT in the form of three certified checks made payable to the order of Complainant Lynn Schneider and delivered to her attorney Elizabeth A. Mason, Esq., Mason & Breiteneker, LLP, 45 Rockefeller Plaza, 20th Floor, New York, New York 10111, by registered mail, return receipt requested. Respondents Mickle and LIFT shall simultaneously furnish written proof of compliance with the directives contained in this Order to Caroline Downey, Acting General Counsel, New York State Division of Human Rights, One Fordham Plaza, 4th Floor, Bronx, New York 10458.

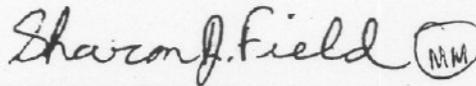
5. Respondents Mickle and LIFT shall cooperate with the Division during any investigation into compliance with the directives contained in this Order.

MAR 21 2007.

DATED:

BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS



SHARON J. FIELD
Adjudication Counsel