

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

**STATE DIVISION OF HUMAN RIGHTS**

**On the complaint of**

**PUNGPUN SROKA,**

Complainant,

-against-

**ROSE INN OF ITHACA, INC., and TRACY  
LEON WILLIAMS, as Aider and Abettor,**

Respondents.

**NOTICE OF ORDER AFTER  
HEARING**

**CASE NO: 6872804**

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by the Hon. Edward A. Friedland, Executive Deputy Commissioner of the State Division of Human Rights, after a hearing held before Administrative Law Judge Lillian-Castillo. 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, Bronx, New York 10458. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE ALSO TAKE NOTICE that any party to this proceeding may appeal this Order to the Supreme Court in the County wherein the unlawful discriminatory practice which 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 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 days after service of this Order. The Petition and Notice of Petition must also be served on all parties, including the Division of Human Rights.

DATED: MAR 20 2007

BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

A handwritten signature in cursive script, appearing to read "Edward A. Friedland", written over a horizontal line.

EDWARD A. FRIEDLAND  
Executive Deputy Commissioner

STATE OF NEW YORK  
DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS

On the complaint of

PUNGPUN SROKA,

Complainant,

-against-

CASE NO: 6872804

ROSE INN OF ITHACA, INC., and TRACY  
LEON WILLIAMS, as Aider and Abettor,

Respondents.

Complainant alleged that Respondent Rose Inn of Ithaca, Inc. subjected her to a hostile work environment when she was allegedly sexually harassed by Respondent Leon Williams. Because the record demonstrates that Respondent Rose Inn of Ithaca, Inc. was not made aware of Williams' alleged harassment until Complainant quit her employment, the instant complaint is dismissed.

PROCEEDINGS IN THE CASE

On March 26, 2003, Complainant filed a verified complaint, thereafter amended, with the State Division of Human Rights ("Division") charging Respondents with an unlawful employment discriminatory practice in violation of the Human Rights Law of the State of New York.

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

After due notice, the case came on for hearing before Lilliana Estrella-Castillo, an Administrative Law Judge ("A.L.J.") of the Division. A hearing was held from October 25 through 27, 2005.

Complainant and Respondents appeared at the hearing. Complainant was represented by the law firm, of Levene, Gouldin & Thompson, LLP, by David M. Gouldin, and Maria E. Lisi-Murray, of Counsel. Respondent Rose Inn of Ithaca, Inc. was represented by the law firm of True, Walsh & Miller, LLP, by Laurie M. Johnson, of Counsel. Respondent Tracy Leon Williams was represented by the law firm of Lama Law Firm, LLP, by Luciano L. Lama and Mari K. Cania, of Counsel.

On the first day of the hearing the complaint was amended to correctly name the parties as reflected in the caption above. (Tr. 8).

The parties filed timely post-hearing briefs.

On January 30, 2007, A.L.J. Estrella-Castillo issued a recommended Findings of Fact, Opinion, Decision and Order ("Recommended Order") for the Commissioner's consideration. Objections to the Recommended Order were filed with the Commissioner's Order Preparation Unit by Respondent's counsel dated February 16, 2007, and by Complainant's counsel dated February 19, 2007.

#### FINDINGS OF FACT

1. Complainant alleged that Respondent Rose Inn of Ithaca, Inc. subjected her to a hostile work environment when she was allegedly sexually harassed by Respondent Leon Williams. Respondents Rose Inn of Ithaca, Inc. and Leon Williams deny any violation of the Human Rights Law. (ALJ's Exhibits I, IV, V).

2. Respondent Rose Inn of Ithaca, Inc., which was destroyed by a fire on March 12, 2004, was a full service country inn specializing in fine dining and fine accommodations. (Tr. 386-388). It was owned and operated by Charles and Sheryl Rosemann, who lived on the premises. (Tr. 385-386, 411-412). It was a seasonal business, busy in the summer months and quiet in the winter. (Tr. 355-356). Respondent had an employee handbook which informed its employees of Respondent's sexual harassment policy. (Tr. 404, 410; Respondent's Exhibit F). The sexual harassment policy directed that complaints of sexual harassment be directed to the employee's supervisor, but if the supervisor was the offending party, the complaint could be made to a manager. (Respondent's Exhibit F).

2. Complainant is a female. (ALJ's Exhibit I). Complainant was aware of Respondent's sexual harassment policy. Complainant received a copy of the employee handbook which contained the policy upon being hired. (Tr. 92, 174-175; Respondent's Exhibit F).

3. Williams was employed by Respondent as its executive chef. (Tr. 272-274, 282). As executive chef, Williams was in charge of the entire kitchen staff and reported directly to the owners. (Tr. 276, 281). Williams did not have the power to hire and fire, without consulting with the owners. (Tr. 279, 397).

4. On August 30, 2001, Williams interviewed and hired Complainant for the position of "prep" cook beginning on August 31, 2001. (Tr. 26-28, 213).

5. Complainant started to keep a journal immediately upon being hired. Her motivation for starting a journal was not clear. (Tr. 58, 253-254). Complainant's entries start on the day of her interview and by, September 1, 2001, her second day on the job, she wrote that Williams did not have the "quality of a leader or any professionalism." (Tr. 215). By September 12, 2001, she wrote that she had decided to look for other employment because she was not happy with

Williams' leadership skills. (Tr. 216-217; Complainant's Exhibit 2). She did not attribute looking for other employment to sexual harassment. (Tr. 217). On October 1, 2001, she wrote that she was still looking for work, and felt exploited by Respondent because of the number of hours that she worked; again, there is no mention of sexual harassment. (Tr. 218-220; Complainant Exhibit 2).

6. Complainant alleged that she was subjected to a hostile work environment beginning October 11, 2001. (ALJ's Exhibit I). On that date, Williams allegedly walked into the kitchen and told her that at one point he had a girlfriend who was ten years older than him, that he was good at having sex and had sex four times a day and he helped his girlfriend reach climax seven or eight times during lovemaking. Then, just as suddenly as he walked in, he walked out again and did not afford her an opportunity to protest. (Tr. 34-35, 221-223; Complainant's Exhibit 2).

7. On October 29, 2001, Williams purportedly walked up behind Complainant and placed a wet finger in her ear. She wrote, "I hate this man. He's *low* and disgusting!" (Emphasis in original.) (Complainant's Exhibit 2). In November of 2001, Williams again allegedly walked into the kitchen and told Complainant that he was good at having sex. (Tr. 35).

8. Williams did not make any other comments until three months later, when in February of 2002, he again allegedly mentioned his girlfriend Cynthia, and how good he was at having sex. (Tr. 36). Then three months later, in May of 2002, Williams allegedly confided to Complainant that when he was younger he was a prostitute who provided sex to older women in exchange for drugs and limousine rides. (Tr. 69; Complainant's Exhibit 2). Complainant responded that she did not want to hear it and that "his world was totally different world from my world, that I knew because my world is clean and I live a decent life." (Tr. 70; Complainant's Exhibit 2).

Complainant wrote in her journal, "I feel dirty and need a shower because I have to work so closely with the worse [sic] kind of scum." (Tr. 70-71; Complainant's Exhibit 2).

9. Two months later, July 5, 2002, when Respondent's staff was preparing for a big outdoor wedding, Complainant commented that it was going to be very late by the time the wedding finished, and she would have to return very early the following morning to prepare breakfast. In response, Williams purportedly told her, "don't go home, sleep at my house, sleep with me." (Tr. 71-72; Complainant's Exhibit 2). Two months after that comment, on September of 2002, Williams allegedly told Complainant that he wanted an Asian wife. (Tr. 73; Complainant's Exhibit 2). Complainant, who is Asian, responded that she was happily married for twenty-two years, and that he had no chance with her. (Tr. 74). Then on September 15, 2002, Williams entered the kitchen wearing a new pair of pants and allegedly told Complainant that he, "could not zip it because his genitals were too big, and so big that it would blind her." (Tr. 74-75, 191-192; Complainant's Exhibit 2). Complainant responded by telling Williams that he should brag about his intelligence and talents, and not his body. (Tr. 75).

10. In October of 2002, Williams again allegedly commented on the size of his genitals. (Tr. 75). Complainant responded that she did not want to hear it; that she did not care. (Tr. 75).

11. The final and tenth incident allegedly occurred on December 21, 2002. While Complainant was helping Williams prepare food and candy for the employee's Christmas party, Williams told her, "I want to have a wife just like you." (Tr. 76). She responded, "I'm taken." (Tr. 76).

12. Complainant repeatedly told Williams that she was not interested in his sex life and as a result he would stop, and there would be periods of time where Williams would not make any inappropriate comments. (Tr. 36, 187-188, 256). Complainant did not testify to suffering any

repercussions for rebuffing Williams. Although, as the hearing progressed, Complainant alleged that once, after she told Williams that she was not interested in his sex life, he asked her to carry some heavy kitchen items. Complainant for the first time mentioned that Williams attempted to touch her inappropriately on redirect examination. She testified that one day as she was carrying a lot of items in her arms, Williams grabbed the items so close that it was like he was intending to touch her. (Tr. 256). The ALJ did not find this testimony credible. This testimony came only as the result of an allegation made during the hearing that Complainant had not alleged any inappropriate physical contact by Williams.

13. While still employed by Respondent, Complainant started to work in another restaurant on December 24, 2002. (Tr. 199). This restaurant was closer to Complainant's home and also offered more hours than Respondent. (Tr. 199). Complainant resigned her position with Respondent on January 14, 2003, while Respondent was closed for business. (Tr. 199-200). In her resignation letter complainant advised Respondent of the many reasons why she was resigning. (Respondent Exhibit I). She advised Respondent, for the first time, that Williams had been sexually harassing her since October 2001. She also advised Respondent of her feelings that Williams harassed her "because he made mistakes and wanted to blame me for his failures." (Tr. 245-248; Respondent's Exhibit I). She also pointed out that she resigned because of the notes that were in her personnel folder which she felt were designed to prevent her from getting a pay increase because they criticized her performance. (Tr. 250-253). The memoranda in her personnel file were written by Williams and Charles Rosemann and discussed complainant's work performance and issues regarding time and attendance.

14. Complainant's discovery of the internal memoranda caused her to become very upset with Respondent and Williams. When Complainant reviewed her personnel file on December

21, 2002, she felt betrayed by Williams who would tell her, "oh you are so wonderful, you're a good cook, you - you're, you know, a hard work [sic]. And then, for example, Mr. Williams when I did a wedding once all by myself, he called me at home and he left a message how good I was, how proud - - how he was so proud of me and he went to my personnel folder and put all these notes in." (Tr. 196-197).

15. Williams denied all of Complainant's allegations. (Tr. 343-348, 365). He reported that it was Complainant who would ask him questions about his sexuality; showing curiosity about Williams and Randall Richardson, with whom Leon Williams has had "a monogamous committed relationship" for over eight years. (Tr. 305-308, 331, 344, 565, 572, 576-578). Williams recalled an incident in which Complainant acted inappropriately in the spring of 2002, when complainant said to him "Oh my God, you're Mr. Bulge. You're bulging" alluding to his genitals. (Tr. 309). He was very embarrassed by this incident and went back to his apartment and changed his pants. (Tr. 310, 350, 591).

16. Williams credibly denied that he asked Complainant to sleep with him. He explained that he told her to "sleep here tonight" because there were rooms available and Complainant could stay over. (Tr. 345). It became clear during the hearing that it was not unusual for Respondent's staff to sleep over if there were rooms available and they had to work early the next day. (Tr. 345). Indeed, Complainant agreed that she had taken naps in the lounge area between her shifts. (Tr. 111-112). Williams had no desire to sleep with Complainant, and made it clear that he was not asking Complainant to sleep in his bed with him. (Tr. 346). Williams also credibly denied that he ever told Complainant that he wanted an Asian wife. (Tr. 347). He testified that he said: "Oh, boy, I need me a wife like that." after Complainant told him how she took care of her family, and cooked, cleaned, baked cookies, made their clothes "and just did everything." (Tr.

346-347). He thought that the things that she did for her family were nice, not that he wanted a wife, finding the inference "ridiculous" because he is homosexual. (Tr. 348). Even Complainant agreed that she did not believe that Williams was proposing marriage to her, or that he wanted her to be his wife. (Tr. 225).

17. Complainant never complained to any of the managers or to the owners that Williams was sexually harassing her. (Tr. 394, 402, 414, 418-419). Complainant's testimony that on two separate occasions she tried to complain to Charles Rosemann is not credible. (Tr. 92, 94, 174-175; Respondent's Exhibit F). She alleged that the first time she tried to talk to Rosemann was on May 7, 2002, while Williams was away, and the second time was when Williams kept blaming her for everything that went wrong. (Tr. 94-96). According to Complainant, on both occasions, Rosemann told her that he did not have time to speak to her. It is important to note that, although Complainant made entries in her journal on those two dates, she did not mention that she tried to report the alleged sexual harassment. (Complainant's Exhibit 2). Complainant testified that she did not complain to any of the other managers because she was afraid that Williams would terminate her employment for complaining. (Tr. 176). This does not explain why she did not then follow Respondent's grievance procedure, which would have allowed her to put her grievance in writing directly to Respondent. (Tr. 177).

18. Complainant's testimony became more incredible as the hearing progressed. Complainant testified that she felt sexually harassed by Williams, and yet was not afraid to go into Williams' apartment alone. (Tr. 228-229; Complainant's Exhibit 2). More importantly, she described Williams in her journal as a "monster" and the "worst scum" and yet she took her young daughter and her daughter's young friends to Williams' home to see his apartment one evening after 10 p.m. (Tr. 152; Complainant's Exhibit 2).

19. It also did not help that Complainant attempted to introduce what purported to be a copy of her journal, as evidence of a contemporaneous writing of the alleged sexual harassment. The journal was offered to bolster Complainant's testimony regarding the allegations of sexual harassment. The document offered was not the same document that had previously been provided to the Division during the investigation of the complaint. (Tr. 40-44). The document had entries that were clearly made after it was provided to the Division. (Tr. 46; Respondent's Exhibit A, Complainant's Exhibit 2). The entries document fourteen incidents that were never shared with the Division, or its investigator. (Tr. 40). The explanations offered by Complainant as to the discrepancies in the document are not credible. On one hand she explained that she gave everything to the Division and the Division only made copies of a couple of pages; on the other hand she explained that she did not provide the entire journal to the Division because she did not want to overwhelm the Division with papers. (Tr. 47-50).

#### DECISION AND OPINION

Complainant alleged that Respondent Rose Inn of Ithaca, Inc. subjected her to a hostile work environment when she was allegedly sexually harassed by Respondent Leon Williams. Because the record demonstrates that Respondent Rose Inn of Ithaca, Inc. was not made aware of Williams' alleged harassment until Complainant quit her employment, the instant complaint is dismissed.

Human Rights Law § 296.1(a), in pertinent part, makes it a violation for an employer, because of the sex of any individual, to discriminate against such individual in compensation or in terms, conditions or privileges of employment. Unlawful discrimination may include the creation of a hostile work environment.

Sexual harassment constitutes discrimination when an employee is subjected to a hostile work environment because of her gender. "A hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment." (internal quotations omitted). *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) (citing *Harris v. Forklift Sys, Inc.*, 510 U.S. 17 (1993)); see also *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 175 Misc.2d 795, 802, 669 N.Y.S.2d 122 (N.Y. Sup. Ct. 1997), *appeal dismissed*, 256 A.D.2d 269 (1st Dept. 1998), *appeal dismissed*, 93 N.Y.2d 919 (1999), *leave to appeal denied*, 94 N.Y.2d 753 (1999).

"Whether conduct or words are unwelcome and whether a workplace should be viewed as hostile or abusive can only be determined by considering the totality of the circumstances. In determining whether a plaintiff was subjected to a hostile work environment a court may consider the frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating or a mere offensive utterance and whether it unreasonably interfered with the plaintiff's work performance." *McIntyre* at 803.

If accepted as true, Complainants allegation that Williams made ten inappropriate comments within an eighteen month period which caused her upset and eventually contributed to the reasons she quit would be sufficiently pervasive to create a hostile work environment.

Respondent, however, is not liable for a hostile work environment because it had a sexual harassment policy in place and Complainant failed to avail herself of it. Respondent was not made aware of the alleged harassment until Complainant quit her employment. In order to hold an employer liable for the act of its employees under the Human Rights Law, Complainant must prove that the employer, "became a party of [the discrimination] by encouraging, condoning, or

approving it.” *Totem Taxi, Inc. v. New York Human Rights Appeal Board*, 491 N.Y.S.2d 293, 295 (1985); *See also State Division of Human Rights v. St. Elizabeth Hospital*, 496 N.Y.S.2d 411 (1985). The employer will not be liable unless “the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.” *Kotcher*, 957 F.2d at 63.

Respondent had a reasonable avenue of complaint. It is clear from the record that Respondent had a sexual harassment policy. The record also indicates that Respondent provided all employees with a copy of the employee handbook which contained the policy. The policy made clear that harassment would not be tolerated and explained how to complain and Respondent’s grievance procedure. Complainant was aware of the policy, but testified that the policy required that she complain to her supervisor and her supervisor was the alleged harasser. And, while this is true, the handbook also directed that the complaint be made to another manager if the supervisor was the offending party. But, Complainant only wanted to complain to Charles Rosemann and no other manager and did not want to follow the grievance procedure.

Complainant then testified that she tried to complain to Rosemann on two separate occasions. The ALJ did not find Complainant’s testimony credible regarding those attempts. Complainant testified that she did not complain about Williams’ actions because she was afraid of losing her job. This testimony was inconsistent with her other testimony that she attempted to complain to Rosemann. But, even if her reason for not complaining was that she was afraid of losing her job, the Division finds that such fear was not reasonable. *See Paulette B. Hylton v. Norrell Health Care of New York*, 53 F.Supp.2d 613, 618-619 (S.D.N.Y. 1999), wherein the court held that generalized fears of repercussions “do not constitute reasonable grounds for an

v. *Saks Fifth Avenue*, 13 F.Supp.2d 481, 492 (S.D.N.Y. 1988), wherein the court concluded:

At some point, employees must be required to accept responsibility for alerting their employers to the possibility of harassment. Without such a requirement, it is difficult to see how Title VII's deterrent purposes are to be serviced, or how employers can possibly avoid liability in Title VII cases. Put simply, an employer cannot combat harassment of which it is unaware.

Accordingly, because Respondent had an avenue for redress of which Complainant did not avail herself and because Respondent was not made aware of the alleged harassment until Complainant quit her employment, Complainant's claim for hostile work environment is dismissed.

Complainant also alleged a claim for constructive discharge. In order to establish a constructive discharge, Complainant must show that the employer "deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign." *Mascola v. City University of New York*, 14 A.D.3d 409; 787 N.Y.S.2d 655 (1st Dept. 2005) (citing *Stetson v. NYNEX Services Co.*, 995 F.2d 355 (2d Cir. 1993)).

Where an employer provides an opportunity for an employee to air her grievances, she must give the employer the chance to respond to them before she resigns. See *Stembridge v. City of New York*, 88 F. Supp. 2d 276, 284-285 (S.D.N.Y. 2000), wherein the court held that the employee's failure to take advantage of the employer's complaint procedure rendered his resignation unreasonable. Here, Complainant knew about Respondent's complaint procedure and failed to complain about the alleged harassment. The Division is not able to conclude from the facts presented that Complainant's resignation was reasonable, especially since the last comment of a sexual nature occurred in October of 2002, and she resigned in January of 2003,

after she had found other employment. See *Mary Grace Breeding v. Cendant Corporation*, 2003 U.S. Dist. LEXIS 6558; 91 Fair Empl. Prac. Cas. (BNA) 1353.

Williams has no liability as an aider and abettor under the Human Rights Law. Executive Law section 296(6) makes it an unlawful discriminatory practice "for any person to aid, abet incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so." Under this theory, liability against the employer is a requisite for finding liability of an aider and abettor. Where the case against the employer is dismissed, the case against an aider and abettor must also be dismissed. *Wynn v. National Broadcasting Co., Inc., et al.*, 251 A.D.2d 469, 471-472, 674 N.Y.S.2d 415, 417 (2d Dept. 1998).

Complainant's and Respondent's Objections have been considered and are unavailing. Accordingly the complaint is dismissed.

#### ORDER

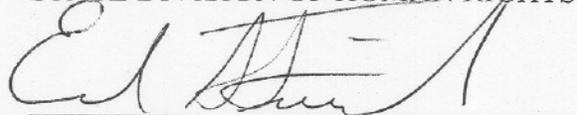
Based on the foregoing Findings of Fact, Decision and Opinion, and pursuant to the provisions of the Human Rights Law, it is

ORDERED that the complaint be, and the same hereby is, dismissed.

DATED: MAR 20 2007

BRONX, NEW YORK

STATE DIVISION OF HUMAN RIGHTS



EDWARD A. FRIEDLAND  
Executive Deputy Commissioner