



ANDREW M. CUOMO
GOVERNOR

NEW YORK STATE
DIVISION OF HUMAN RIGHTS

NEW YORK STATE DIVISION
OF HUMAN RIGHTS

on the Complaint of

SU HYUN PARK,

Complainant,

v.

K & K MANAGEMENT SERVICE, INC., KWANG
WUN KIM, OWNER,

Respondents.

NOTICE AND
FINAL ORDER

Case No. 10145367

PLEASE TAKE NOTICE that the attached is a true copy of the Recommended Findings of Fact, Opinion and Decision, and Order (“Recommended Order”), issued on January 13, 2012, by Thomas S. Protano, an Administrative Law Judge of the New York State Division of Human Rights (“Division”). An opportunity was given to all parties to object to the Recommended Order, and all Objections received have been reviewed.

PLEASE BE ADVISED THAT, UPON REVIEW, THE RECOMMENDED ORDER IS HEREBY ADOPTED AND ISSUED BY THE HONORABLE GALEN D. KIRKLAND, COMMISSIONER, AS THE FINAL ORDER OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS (“ORDER”), WITH THE FOLLOWING AMENDMENT:

- Pursuant to Human Rights Law § 297.4(e), “[i]n cases of employment discrimination where the employer has fewer than fifty employees, [a] civil fine or penalty may be paid in reasonable installments, in accordance with regulations promulgated by the division. Such regulations shall require the payment of reasonable interest resulting from the delay, and in no case permit installments to be made over a period longer than three years.” During the hearing in the instant matter, Respondent Kim requested to pay any civil fines or penalties imposed in installments. (Tr. 201-02). Therefore, on the condition that all other payments directed in the Recommended Order are timely made, the two remaining payments of \$25,000 each to be made by Respondents as part of the total \$75,000 civil fine and penalty shall be made within 180 days and 270 days of the date of this Final Order. Interest shall accrue at a rate of nine percent per annum on any amount paid after sixty days from the date of this Final Order until payment is made. *See* 9 NYCRR § 466.12(e). Written proof of compliance with this directive shall be simultaneously provided to General Counsel per the directive in the Recommended Order. In the event that Respondents fail to make timely payments of any of the damages, back pay, civil fines, penalties, interest or any moneys herein ordered, payment of all amounts shall be due within 60 days of the date of this Order.

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

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

ADOPTED, ISSUED, AND ORDERED.

DATED: 3/16/12
Bronx, New York



GALEN D. KIRKLAND
COMMISSIONER



ANDREW M. CUOMO
GOVERNOR

**NEW YORK STATE
DIVISION OF HUMAN RIGHTS**

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on the Complaint of

SU HYUN PARK,

Complainant,

v.

**K & K MANAGEMENT SERVICE, INC.,
KWANG WUN KIM, OWNER,**

Respondents.

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

Case No. **10145367**

SUMMARY

Complainant was sexually harassed repeatedly by Respondent Kim while she worked for Respondents. As a result, Respondents are liable to Complainant for the damages she suffered and to the State of New York for civil fines and penalties assessed.

PROCEEDINGS IN THE CASE

On November 24, 2010, Complainant filed a verified complaint with the New York State Division of Human Rights (“Division”), charging Respondents with unlawful discriminatory practices relating to employment in violation of N.Y. Exec. Law, art. 15 (“Human Rights Law”).

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

After due notice, the case came on for hearing before Thomas S. Protano, an Administrative Law Judge (“ALJ”) of the Division. Public hearing sessions were held on October 26, 2011 and October 27, 2011.

Complainant and Respondents appeared at the hearing. Complainant was represented by William Sipser, Esq and Cynthia Trinh, Esq. Respondents appeared pro se.

FINDINGS OF FACT

1. Complainant is a 30-year old woman from South Korea. She came to the United States to live in March 2005. (Tr. 16)
2. Respondent Kim is the owner of Respondent K & K Management Service, Inc. (“K & K”), which is a cleaning and contracting business. (Tr. 20, 160-61)
3. Kim served as the driver of the van owned by the Korean Christian Church, which Complainant and Kim attend. (Tr. 16-17)
4. In April of 2010, Kim drove Complainant and Complainant’s roommate, Jung Hwa Song, home from church in the church van. During that ride, Kim offered Complainant and Song a one-day job paying \$30.00 per hour. Complainant agreed to work for Kim and Kim took Complainant’s phone number. Song declined the offer. (Tr. 18)
5. Kim called Complainant. Kim picked Complainant up and drove her from her home in Queens to Manhattan. (Tr. 19)

6. When Complainant arrived at the work location, she discovered that she would be working for a friend of Kim, Han Bae. Complainant worked for Bae for two days. (Tr. 20-21)

7. After Complainant worked for Bae, Kim offered Complainant a job working for K & K, which Complainant accepted. Complainant completed her semester at Adelphi University; then, in May 2010, she began working full time for K & K. (Tr. 21-23)

8. Initially, Complainant worked 40 hours per week at \$10.00 per hour. Her duties included scheduling work for Kim and K & K and preparing invoices. (Tr. 25)

9. Complainant did much of her work at home when she first began working for Respondents. Within a month, Kim began bringing Complainant with him to the work sites and to meet clients. Kim often took Complainant out to dinner and insisted she have drinks with his friends and clients. Complainant's hours increased when Kim began this practice. (Tr. 27-28)

10. When Complainant's hours increased, Kim restructured Complainant's pay such that she was paid a flat salary of \$500 per week. Kim then gave Complainant additional duties, which included taking over for a nighttime cleaning manager. (Tr. 30-31)

11. Shortly after Complainant started working for Respondents, Kim began engaging in inappropriate behavior. While Complainant was cleaning in K & K's offices, Kim went behind Complainant and touched her buttocks. Complainant screamed and told Kim not to do that. (Tr. 31-32)

12. On another occasion, while Complainant was sitting in Kim's car, Kim gave Complainant her pay by putting it between her breasts, inside her top. Thereafter, when Kim tried to pay Complainant in that manner, Complainant crossed her hands in front of her chest in order to prevent him from reaching between her breasts. (Tr. 33-35)

13. Kim would discuss his own sex life with Complainant and propositioned Complainant “frequently.” He offered to get Complainant an apartment that he would pay for, where Kim and Complainant could engage in sexual activity. Complainant refused the offer. (Tr. 37-38)

14. Kim also tried frequently and repeatedly to persuade Complainant to sleep with Bae in order to generate business for Respondents. (Tr. 39)

15. In June of 2010, Kim took Complainant to a motel. Kim told Complainant that his firm did cleaning work at the motel and that he wanted to inspect the premises. Instead of inspecting the motel, Kim took Complainant to a room, where he pulled down her pants and tried to pull down her panties. Complainant stated “because I was holding onto my panties, he touched my vagina from the bottom.” Kim also touched Complainant’s breast and forcibly tried to kiss Complainant. (Tr. 48)

16. When Complainant tried to leave the motel, Kim pulled her back and prevented her from leaving. (Tr. 49)

17. A few weeks later, Kim again tried to bring Complainant to the motel. This time, however, Complainant refused to go into the motel with Kim, who became very angry. Kim had bought massage oil, which he threw at Complainant after he drove her home. (Tr. 50-51)

18. Kim told Complainant that if she made a mistake at work, he would take her to a hotel and she would have to sleep with him. Kim told Complainant he would “strip you down and whip you with a whip” while Complainant was naked. (Tr. 53-54)

19. Kim often questioned Complainant about whether she had sex with her then-boyfriend, Tony. Kim offered to find a job for Tony and interviewed him. Kim then recommended Tony to Bae, who tried to find Tony a job as a building superintendent. During this period, Kim told

Complainant she should sleep with Bae in order to secure the new job for Tony. Tony did not get the job. (Tr. 54-55, 62)

20. Kim denied all of the allegations of sexual harassment and alleged that Complainant made a claim of sexual harassment against him solely because Kim was unable to find a job for Tony. (Tr. 12, 163-65)

21. About three months after she began working for Respondents, Kim took Complainant to a Korean karaoke bar. (Tr. 41)

22. Kim told Complainant that they would meet up with Bae at the bar. However, when Complainant and Kim reached the bar, Bae was not present. Kim took Complainant to a private room in the back of the establishment. (Tr. 42-43)

23. In the back room, Kim told Complainant that Bae might try to take advantage of her. Kim then demonstrated what Bae might do. Kim grabbed Complainant and pulled her into the corner of the room. Kim touched Complainant's breast and tried to pull down Complainant's underwear. Complainant would not let Kim pull her underwear down and asked Kim to let her go home. (Tr. 44)

24. Thereafter, Kim forcibly took Complainant's hand and stroked his penis with her hand. Complainant tried to pull her hand away, but Kim told her he would not let her leave unless she made him ejaculate. (Tr. 44-45)

25. At first, Kim denied taking Complainant to the karaoke bar and later admitted it. Later on, he again denied taking Complainant to the karaoke bar and, once again, admitted it after further questioning. While questioning Complainant, Kim said that the karaoke bar was "only ten blocks away from" Complainant's home. (Tr. 95, 163-64, 177-78)

26. In September of 2010, Kim was driving with Complainant in the passenger seat. Kim stopped the car in a dark location and got out of the car. He grabbed Complainant and forcibly tried to kiss her. As Kim pushed his body against Complainant, she noticed that his penis was erect. Complainant resisted Kim's advances and went home. (Tr. 61-62)

27. As time went on, Kim's behavior towards Complainant "got worse and worse." Although Complainant repeatedly told Kim to stop making advances towards her, Kim persisted. (Tr. 62)

28. On October 7, 2010, Complainant quit her job in order to stop Kim from continuously demanding that she sleep with him and/or Bae. (Tr. 63)

29. After Complainant quit her job, Kim continued to call Complainant. Complainant taped a conversation during which Complainant and Kim were discussing the reason Complainant quit her job. Complainant took exception to the fact that Kim told others she quit because she "got pissed off" and Kim responded "then fuck...you want me to say that I tried to score [with] you. You want that one word?"¹ The phrase in Korean is "a derogatory term used by men towards women to signify ...[sexually] conquering a woman..." (Complainant's Exhibit 1; Tr. 90, 208)

30. Kim used similar methods with other women. Kim hired Song to work for him. While Song worked for Kim, Kim asked her about her sexual activities and propositioned her. Song quit after two days, even though she had been hired for a four-day job. (Tr. 139-40)

31. Song later became aware of the harassment Complainant suffered and woke Complainant up while Complainant was having a nightmare about being raped. (Tr. 145)

32. While Kim drove the church van during the spring of 2009, he met Moon Kyung Park. Park and her aunt, who was then 88 or 89 years of age, needed to be driven home. Kim first

¹ The recorded conversation was in Korean. The translation into English was made at hearing by an interpreter contracted by the Division.

drove Park's aunt home. Then, when he was alone with Park, Kim stopped the van and began kissing Park. He touched her breasts and continued to kiss and fondle Park for "20 to 30 minutes." Park did not welcome Kim's advances. (Tr. 123-25)

33. As a result of Kim's actions, Complainant suffered from emotional distress. While working for Kim and K & K, Complainant suffered from pink eye and gastroesophageal reflux disease. She had difficulty sleeping and suffered nightmares during which Complainant dreamt was being raped. Complainant continues to exhibit these symptoms. (Tr. 64-66, 145)

34. Complainant has not been able to find another job since leaving her employment with Respondents. (Tr. 67)

35. During 2010, when Complainant worked for Respondents, Respondents employed "about ten" individuals." Kim asserts he no longer employs anyone and has not done any work since September 2011. (Tr. 161-62)

OPINION AND DECISION

The Human Rights Law makes it an unlawful discriminatory practice for an employer to discriminate against an individual in compensation or in terms, conditions or privileges of employment because of that person's sex. Human Rights Law §§ 296.1(a).

Sexual harassment is a form of sex discrimination. Complainant alleges that Kim harassed her because of her sex and that the harassment ultimately forced her resignation. In order to sustain a claim of sexual harassment, Complainant must demonstrate that she was subjected to a work environment permeated with discriminatory intimidation, ridicule and insult that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. The Division must examine the totality of the circumstances and

the perception of both the victim and a reasonable person in making its determination. *Father Belle Community Ctr. v. N.Y. State Div. of Human Rights*, 221 A.D.2d 44, 50, 642 N.Y.S.2d 739, 744 (4th Dept. 1996), *lv. denied*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997).

Complainant in the instant case has established that she was sexually harassed. Complainant has clearly established that Kim's behavior was offensive, abusive and hostile. Kim sought out Complainant and offered her work; he then used his authority as her boss to repeatedly trick her into compromising situations during which he made unwelcome advances towards Complainant. Kim's denials and his assertion that Complainant is lying simply because Kim did not get Complainant's former boyfriend a job are not credible since they fail to explain why three women all describe similar inappropriate acts on Kim's part. Kim's ever changing and contradictory testimony further undermines his credibility. Complainant was able to identify two other witnesses who were subjected to similar advances from Kim. The eerily similar testimony of Complainant, Song and Park make it clear that Kim is a coldly calculating predator who has crafted a well-planned *modus operandi* that he will use to force himself on women as he sees fit—all under the guise of the kindly church van driver. Moreover, the taped conversation that Complainant presented at hearing contradicts Kim's claims that he never harassed Complainant. The credible testimony of the three women clearly establishes that Kim is a sexual harasser under the Human Rights Law.

Complainant also claims that she was constructively discharged from her position due to Kim's harassment. A complainant establishes a claim for constructive discharge by showing that her employer deliberately made her working conditions so intolerable that a reasonable person in her position would have felt compelled to resign. *Lambert v. Macy's East, Inc.* 84 A.D.3d 744, 922 N.Y.S.2d 210 (2d Dept. 2011) (*citing, Nelson v. HSBC Bank USA*, 41 A.D.3d 445, 447, 837

N.Y.S.2d 712). Complainant, in this case, has made such a showing. Complainant quit her job only after Kim carried out repeated assaults on her. Complainant cannot and should not be forced to tolerate any more harassment than she endured. Complainant was constructively discharged from her position by Kim.

After Complainant was constructively discharged by Respondents, she was unable to find suitable employment as of October 27, 2011. Respondents have not offered any evidence to show that Complainant has either failed to mitigate her damages or that she received income from any other source. From October 7, 2010 until October 27, 2011, Complainant was unemployed for 55 weeks. As a result of the unlawful discrimination, Complainant has lost \$27,500.00 (55 weeks multiplied by \$500 per week) in back wages. Complainant is entitled to that amount.

Complainant is entitled to pre-determination interest on the award at a rate of nine per cent per year, from April 17, 2011, a reasonable intermediate date. “An award of interest is often appropriate from the time which a party was deprived of the use of money since without the addition of interest, the aggrieved party is not made whole.” *Aurecchione v. New York State Division of Human Rights*, 98 N.Y.2d 21, 771 N.E.2d 231, 744 N.Y.S.2d 349 (2002). Under New York law, prejudgment interest is calculated on a simple interest basis. *See, Epstein v. Calvin-Miller Intern, Inc.*, 139 F.Supp.2d 469 (S.D.N.Y. 2001), *citing, Marfia v. T.C. Ziraat Bankasi*, 147 F.3d 83, 90 (2d Cir. 1998); *Donovan v. Dairy Farmers of America, Inc.*, 53 F.Supp.2d 194, 197 (N.D.N.Y. 1999).

Complainant is also entitled to an award of compensatory damages owing to the emotional distress she suffered as a result of Kim’s actions. The Human Rights Law authorizes the “awarding of compensatory damages to the person[s] aggrieved by” Respondent’s

discriminatory actions, “as in the judgment of the [D]ivision will effectuate the purposes” of the law. This includes awards for mental anguish. Human Rights Law §297.4(c)(iii); *300 Gramatan Ave. Assoc. v. State Division of Human Rights*, 45 N.Y.2d 176, 183.

“Mental injury may be proved by the complainant's own testimony, corroborated by reference to the circumstances of the alleged misconduct.” *New York City Transit Auth. v. State Div. of Human Rights (Nash)*, 78 N.Y.2d 207, 216, 573 N.Y.S.2d 49, 54 (1991). “An award of damages for mental anguish will be upheld where...it is reasonably related to the wrongdoing, is supported by substantial evidence, and is comparable to awards for similar injuries.” *Kondracke v. Blue*, 277 A.D.2d 953, 716 N.Y.S. 2d 533 (4th Dept. 2000); *State Div. of Human Rights v. Muia*, 176 A.D.2d 1142, 1144, 575 N.Y.S.2d 957, 960 (3d Dept. 1991).

As a result of Respondents’ actions, Complainant has suffered both physically and emotionally; she has suffered from gastrointestinal problems and had nightmares during which she dreams of being raped. Complainant suffers emotional anguish from both the harassment she endured and the assaults against her. She suffered the denigration of being offered as a sexual object so that Kim could maintain relationships with business associates and potential clients. Accordingly, an award of \$75,000 will effectuate the remedial purposes of the Human Rights Law and is consistent with similar cases. *MTA Trading, Inc. v. Kirkland*, 84 A.D.3d 811, 922 N.Y.S.2d 488 (2d Dept. 2011); *Bemis v. New York State Div. of Human Rights*, 26 A.D.3d 609 (3d Dept. 2006).

Because of Kim’s actions, Respondents shall be liable to the State of New York for civil fines and penalties. Human Rights Law § 297 (4)(e) requires that “any civil penalty imposed pursuant to this subdivision shall be separately stated, and shall be in addition to and not reduce or offset any other damages or payment imposed upon a respondent pursuant to this article.”

The additional factors that determine the appropriate amount of a civil fine and penalty are the goal of deterrence; the nature and circumstances of the violation; the degree of respondent's culpability; any relevant history of respondent's actions; respondent's financial resources; and other matters as justice may require. *Gostomski v. Sherwood Terr. Apts.*, SDHR Case Nos. 10107538 and 10107540, November 15, 2007, *aff'd*, *Sherwood Terrace Apartments v. N.Y. State Div. of Human Rights (Gostomski)*, 61 A.D.3d 1333, 877 N.Y.S.2d 595 (4th Dept. 2009), *119-121 East 97th Street Corp, et. al., v. New York City Commission on Human Rights, et. al.*, 220 A.D.2d 79; 642 N.Y.S.2d 638 (1st Dept.1996)

A civil fine is appropriate in this matter. Human Rights Law §297 (4)(c)(vi) directs the Division to assess civil fines and penalties, "in an amount not to exceed fifty thousand dollars, to be paid to the state by a respondent found to have committed an unlawful discriminatory act, or not to exceed one hundred thousand dollars to be paid to the state by a respondent found to have committed an unlawful discriminatory act which is found to be willful, wanton or malicious." Statutory directives require a civil fine and penalty of greater than \$50,000.00 for cases in which a respondent's actions were willful, wanton, and malicious.

The proof established that Respondents' actions met the statutory thresholds of willful, wanton, and malicious. Kim acted with deliberate indifference to Complainant's protected rights and acted in a manner considered outrageous in a civil society. Although the record shows that Kim runs a small business that has been on the wane, it has also been shown that he has repeatedly used predatory tactics to seek out and assault women. Given the above, and the Division's goal of deterrence, a civil fine of \$75,000.00 is appropriate in this case, payable in three installments. At hearing, Respondents made an application to pay any fine imposed in installments. That application is granted.

ORDER

On the basis of the foregoing Findings of Fact, Opinion and Decision, and pursuant to the provisions of the Human Rights Law and the Division's Rules of Practice, it is hereby

ORDERED, that Respondents and their agents, representatives, employees, successors, and assigns, shall cease and desist from discriminatory practices in employment; and it is further

ORDERED that Respondents shall take the following affirmative action to effectuate the purposes of the Human Rights Law, and the findings and conclusions of this Order:

1. Within 60 days of the date of the Commissioner's Final Order, Respondents shall establish policies regarding the prevention of unlawful discrimination. These policies shall include an official anti-discrimination policy and a formalized reporting mechanism for employees who believe they have been discriminated against. The policies shall also contain the development and implementation of a training program relating to the prevention of unlawful discrimination in accordance with the Human Rights Law. Training and a copy of the policies shall be provided to all employees, and the policies shall be posted prominently where they may be viewed by employees in the workplace.

2. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant \$75,000 as compensatory damages due to her emotional distress. Payment shall be made in the form of a certified check made payable to Complainant and delivered to her attorney, William J. Sipser, Esq., at 120 Broadway, 18th Floor, New York, New York, 10271, by certified mail, return receipt requested. Interest on the award shall accrue from the date of the Commissioner's Final Order until the date payment is made at a rate of nine percent per year in accordance with Division practice and C.P.L.R. §5004.

3. Within 60 days of the Commissioner's Final Order, Respondents shall pay to Complainant \$27,500.00 as back wages. Payment shall be made in the form of a certified check made payable to Complainant and delivered to her attorney, William J. Sipser, Esq., at 120 Broadway, 18th Floor, New York, New York, 10271, by certified mail, return receipt requested. Interest on the award shall accrue from April 14, 2010 until the date payment is made at a rate of nine percent per year in accordance with Division practice and C.P.L.R. §5004.

4. Within sixty days of the date of the Commissioner's Final Order, Respondents shall pay to the State of New York the sum of \$25,000.00 as a civil fine and penalty for their violations of the Human Rights Law. The payment of the civil fine and penalty shall be made in the form of a certified check, made payable to the order of the State of New York and delivered by certified mail, return receipt requested, to Caroline Downey, General Counsel of the Division, at One Fordham Plaza, 4th Floor, Bronx, New York 10458. The two remaining payments in the total amount of \$50,000.00 shall be due at a date and according to a schedule set forth by the Commissioner. Interest, if any, shall be paid at a rate determined by the Commissioner. Final payment shall be due no later than three years from the date of the Commissioner's final order.

5. Respondents shall simultaneously furnish written proof of their compliance with all of the directives contained within this Order to Caroline Downey, General Counsel of the Division, at her office address at One Fordham Plaza, 4th Floor, Bronx, New York, 10458.

6. Respondents shall cooperate with the Division during any investigation into their compliance with the directives contained in this Order.

DATED: January 12, 2012
Bronx, New York

A handwritten signature in black ink, appearing to read "Thomas S. Protano". The signature is stylized with a large, sweeping initial "T" and a long, horizontal flourish extending to the right.

Thomas S. Protano
Administrative Law Judge