STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)		
	)		
LARRY POULOS,	)		
	)		
	)		
Complainant,	)	CHARGE NO(S):	2004SF1599
	)	EEOC NO(S):	21BA40620
and	)	ALS NO(S):	S05-152
	)		
OLSON RC, INC., AN ILLINOIS CORPORATION,	)		
	)		
	)		
	)		
Respondent.	)		

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION) Entered this 17th day of March 2009

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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LARRY POULOS,	)	
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and	)	CHARGE NO: 2004SF1599 EEOC NO: 21BA40620 ALS NO: S05-152
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Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing was held before me in Galesburg, Illinois on July 11, 2006 in which Complainant appeared *pro se*. Both parties have filed initial and reply briefs. Accordingly, this matter is ready for a decision.

Contentions of the Parties

In the instant Complaint, Complainant asserts that he was harassed on account of his Greek ancestry when his supervisor and others uttered anti-Greek epithets in the workplace. He also maintains that he was constructively discharged due to the harassment based on his Greek ancestry. Respondent insists that any anti-Greek utterances in the workplace were collectively insufficient to constitute actionable harassment or a constructive discharge. Moreover, it claims that Complainant invited certain anti-Greek comments and maintains that other reasons motivated Complainant to leave the workplace.

Findings of Fact

Based on the record in this matter, I make the following findings of fact:

1. At all times pertinent to the instant Complaint, Respondent had a business that, among other things, served as a repair center for Maytag appliances.

2. In February of 2002, Complainant began working at Respondent through a temporary placement agency as a "boxer," which required Complainant to load and unload Maytag appliances for repair In July of 2002, Complainant became a full-time employee of Respondent.

3 At some point in June of 2002, Complainant had an encounter with Gregory Toland, an employee of Maytag who periodically brought a trailer full of Maytag parts and equipment to Respondent, and Richard Brown, who served as Respondent's manager of the warehouse where Complainant was working. During the encounter, Complainant heard Toland and Brown refer to each other as his "No. 1 bitch" when greeting each other. At all times pertinent to this complaint, Toland and Brown viewed the term "No. 1 bitch" as a term of endearment arising out of their friendship since their school days. At some point during the encounter, Complainant asked if he too could be referred to as a "No. 1 bitch," but both Brown and Toland initially refused because they wanted the term to be used only between themselves. Eventually, Toland suggested that Complainant could be his "No. 1 Greek bitch," to which Complainant agreed

4. From June of 2002 to November 2003, Complainant would periodically hear either Brown or Toland call him a "Greek bitch" or their "No. 1 Greek bitch." Moreover, during this period, Complainant would refer to himself as a "Greek bitch." At no time during these encounters did Complainant subjectively find the use of the terms "Greek bitch" or "No. 1 Greek bitch" to be unwelcome

5. Beginning in July of 2002, a co-worker of Complainant brought into work some beef jerky At that time, Brown suggested to the co-worker that Complainant would not care to eat meat because Complainant is "Greek. You know, they like to fuck

sheep." Complainant did not view positively this statement, but made no contemporaneous oral protest of Brown's use of the phrase at this time or at any other time when Brown uttered the phrase.

6. From July of 2002 to November of 2003, Brown referred to Greeks having sex with sheep in which the term "fuck" was used between 30 to 50 times. Typically, Brown would utter to the phrase when introducing Complainant to temporary workers used by Respondent in the warehouse. Sometimes during these encounters, Brown would not specifically use the term "fuck," but would instead use a pumping motion to suggest the term. At no time during these encounters did Complainant verbally object to Brown's use of the sex with sheep comment.

7. In December of 2002, Complainant became a lead person in charge of the shipping and receiving department. In that capacity, Complainant was in charge of all incoming and outgoing trucks and for the storage of Maytag parts and equipment once they were unloaded from the truck. In this role, Complainant also directed temporary employees to load and unload trucks.

8. In April of 2003, Complainant and Brown had a dispute about an incident in which Complainant had called Brown a "liar" concerning an alleged statement Brown had made regarding the difference in pay between boxers and repairmen.

9. In June of 2003, Brown had a conversation with Complainant regarding Complainant's previously filed a workers' compensation claim. Prior to the conversation, Brown had become aware that Complainant had become upset and frustrated over the fact that some of his medical bills associated with the workers' compensation claim had not been paid, and that Complainant was being contacted by creditors.

10. At some point during the first week of July, 2003, Complainant told Brown that he did not like the fact that Brown was suggesting that he (Complainant) liked "to

fuck" sheep. This conversation was the first time that Complainant had registered any oral opposition regarding Brown's use of the sex with sheep comment. After this conversation with Brown, Complainant reduced his contact with Brown, and Brown's sex with sheep comments subsided

11. Around the first week of October, 2003, Complainant contacted Eric Olson via a voice mail about a problem he was experiencing with a co-worker named Gary Hardy. In the voice mail, Complainant indicated that Hardy was acting "crazy" and throwing parts around the warehouse. After receiving the voice mail, Olson contacted Brown about the problem, and Brown indicated that the problem would be taken care of. Three days after the voice mail, Olson asked Complainant in the workplace whether the problem had been resolved, and Complainant indicated that the matter had been resolved. Complainant did not bring up any issue regarding Brown's utterance of anti-Greek statements at this time.

12. At some point later in October of 2003, Olson encountered Complainant in the warehouse parking lot. At that time Olson asked Complainant how things were going, and Complainant said things were "fine." Complainant did not inform Olson during this encounter about any problems that Complainant was having with Brown.

13. On November 13, 2003, Brown made his last anti-Greek heritage comment. The record is unclear as to the exact nature of the comment.

14. At some point in November of 2003, Respondent assigned David Southwell to assist Complainant in the shipping and receiving department to help with a backlog of trailers that needed to be unloaded at the warehouse. At some point before December 1, 2003, Complainant complained to John Davis, Respondent's assistant manager, that he did not want the assistance of Southwell.

15. In November of 2003, Complainant met with Department of Human Rights personnel to file a Charge of Discrimination. Complainant's decision to file a charge was motivated in part by a September, 2003 conversation he had with an unknown third-party, who, according to Complainant, made him realize how wrong the anti-Greek statements were and advised him to contact the state.

16. On December 2, 2003, Complainant filed his verified Charge of Discrimination against Respondent. In the Charge, Complainant mentions only the repetitive "Greeks having sex with sheep" remarks as the form of harassment.

17. Complainant took December 2 and 3, 2003 off as vacation days and took December 4, 2003 off as a sick day. During this time, Complainant did not orally inform Olson that he was filing a Human Rights Act claim against Respondent for anti-Greek comments made by Brown in the workplace, or that he would be willing to discuss the details of the matter with him.

18. On December 8, 2003, Complainant came to work and told Brown that he wanted his checks, and that he was "fucking out of here." Complainant also told Brown that he had filed a lawsuit against Respondent, and that Respondent would be receiving notice of such a lawsuit within ten days.

19. On December 15, 2003, Complainant wrote the follow letter to Olson:

> Having not received a return call from you within the last week, I am writing this short letter to clarify a couple of things that you may or may not be aware of, and to convey to you the possibility that you or you and your attorney may both call me at anytime to clarify any information that you now have or to ask any questions that either would feel necessary to ask.
>
> On the morning of December 8th, 2003, I informed Rich Brown that I would no longer be coming into work until the discriminatory practices that were being practiced against me were stopped. I also informed Rich that I had filed suit against [Respondent,] and that you would be receiving notice of such suit within the next 10 days.
>
> Later that morning, I called your office and left you a message to call me if you would like to know any of the details. I called you specifically because an

investigator with the State of Illinois, Department of Human Rights, suggested that I do precisely that. As of this writing, I have not received your return call.

By the time you are or should be fully aware of the nature and seriousness of the allegations that I have leveled against my boss and your employee, Rich Brown. Therefore, I will not reiterate any of those allegations here.

In closing, I would invite you to call me first for any clarification that you or your attorney so desires.

21. Olson did not call Complainant in response to his December 15, 2003 letter.

22. At all times pertinent to the instant Complaint, Complainant averaged 30 encounters with Brown per day during his shift.

23. On October 14, 2005, Complainant filed a Chapter 7 bankruptcy petition.

24. On May 24, 2006, Complainant's Bankruptcy Trustee filed a partial abandonment of certain assets, but excluded from said abandonment, the instant discrimination claim against Respondent.

25. On August 11, 2006, the Bankruptcy Trustee filed a letter with the Commission indicating that he had filed a "no asset" report with the Bankruptcy Court which had abandoned the instant discrimination claim. The letter, however, did not indicate when the Trustee had filed the no asset report.

Conclusions of Law

1. Section 1900(A) of the Unemployment Insurance Act (820 ILCS sec. 405/1900(A)) precludes a party from introducing into evidence the transcript of a hearing conducted in front of the Illinois Department of Employment Security for any purpose, including impeachment. The proscription contained in section 1900(A) is not subject to waiver by the parties.

2. Complainant is an "employee" as that term is defined under the Human Rights Act.

3. Respondent is an "employer" as that term is used under the Human Rights Act and was subject to the provisions of the Human Rights Act.

4. Complainant failed to establish a *prima facie* case of harassment based on his Greek ancestry where the record showed that certain anti-Greek comments were either invited or encouraged by Complainant, and where other offensive comments were insufficient to constitute an alteration of a term or condition of Complainant's work environment.

Discussion

Two preliminary matters must be addressed before turning to the merits of the case. During the public hearing, Complainant mentioned for the first time during his case that he had previously filed a bankruptcy petition at some point in 2005, and that the Bankruptcy Trustee had reserved a claim for any recovery that Complainant might obtain in the instant action. Subsequent to the public hearing, Respondent filed a motion to dismiss the Complaint based on a claim that Complainant had lost his standing to proceed based on the filing of his bankruptcy petition. This is so, according to Respondent, because title to the cause of action transfers to the Trustee upon filing of the bankruptcy petition. See, for example, *Barger v City of Carterville*, 348 F3d 1249 (11th Cir 2003).

One of the complications in this case, though, is the fact that Complainant initially had standing to pursue the instant action since the Complaint had been filed prior to the time that Complainant had filed his bankruptcy petition on October 14, 2005. While the Commission's procedural rules do not contain a provision that covers the situation of a substitution of parties if a complainant files for bankruptcy during the pendency of a claim before the Commission, section 2-1008 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1008) provides that a change in interest in causes of action that occurs after

the filing of the cause of action due to bankruptcy does not abate the cause of action, such that the matter is permitted to proceed after the real party in interest has been substituted as a party. Additionally, because Respondent had not served a copy of the motion to dismiss on the Trustee (i.e., the individual Respondent claims to be the real party in interest), an Order was entered, which directed the Trustee to file a response to the pending motion to dismiss that clarified his position with respect to the Complainant's *pro se* prosecution of the instant case. In his August 26, 2006 response, the Trustee stated that he had filed a "no asset" report with the Bankruptcy Court which had abandoned the instant claim in favor of Complainant. While the Trustee did not indicate a date as to when the abandonment had occurred so as to re-vest Complainant with standing to prosecute this case[1], I find that there is enough evidence of Complainant's ownership in his claim to defeat a motion to dismiss based on a lack of standing.

The second preliminary matter concerns the use by both parties of a transcript from a hearing before the Illinois Department of Employment Security (IDES) regarding Complainant's unemployment claim against Respondent. In *Borling v. Wildwood Industries, Inc.*, IHRC, 4461(M), January 6, 1995, the Commission addressed an identical issue regarding the admissibility of an IDES transcript to impeach certain witnesses at the public hearing. In finding that said transcript was inadmissible pursuant to section 1900(A) of the Unemployment Insurance Act (820 ILCS 405/1900(A)), the Commission observed that the IDES transcript could not be used, even for purposes of establishing credibility. (*Borling*, slip op at 6.) Indeed, the terms of section 1900(A) clearly state that "information obtained from any individual or employing unit during the administration of this Act shall ...not be admissible in evidence in any action or proceeding other than one arising out of this Act," and the last page of the IDES

[1] Moreover, I doubt whether the Trustee could "permit" Complainant to proceed at the

transcript that Respondent's counsel submitted for admission into the record essentially says the same thing.

During the public hearing both parties were directed to provide any legal support for their contention that the IDES transcript was admissible in a Human Rights Act proceeding. Neither party has done so. Accordingly, I will strike from the record any questions/testimony propounded by either Respondent or Complainant that refers to testimony contained in the IDES transcript. Needless to say, I did not consult the IDES transcript when making any credibility findings below.

The merits.

In the instant Complaint, Complainant asserts that he was the victim of harassment based on his Greek ancestry when his supervisor (Richard Brown) subjected him to a series of anti-Greek epithets in the workplace. Specifically, Complainant testified to two separate categories of remarks that were uttered by Brown and others between 30 to 50 times over an 18-month period of Complainant's employment. The first category of comments concerned the calling of Complainant a "Greek bitch," or a "No. 1 Greek bitch." The second category of comments concerned Brown's reference to Greeks having sex with sheep that Complainant asserts generally occurred when Brown was introducing Complainant to the temporary work staff.

According to Commission and court precedence, harassment "because of" an employee's ancestry under section 2-102(A) of the Human Rights Act (775 ILCS 5/2-102(A)) requires that the employee establish that the harassing behavior was sufficiently severe so as to create a different term or condition of employment that formed the basis of a hostile working environment. (See, for example, *Village of Bellwood v Human Rights Commission*, 184 IllApp3d 339, 541 NE2d 1248, 1255, 133 IllDec 810, 817 (1st

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public hearing on his behalf since Complainant is not an attorney.

Dist 3rd Div. 1989). Thus, offensive conduct that concerns casual conversation, is accidental, or sporadic is insufficient to create a cause of action under the Human Rights Act (*Id*), and the Commission and the courts have generally required that the employee show the existence of a "steady barrage" of offensive comments in order to establish that the harassing conduct constituted an alteration of a term or condition of employment. See, for example, *Hill and Peabody Coal Co.*, IHRC, S6895, June 26, 1996, and *Village of Bellwood,* 541 NE2d at 1255, 133 IllDec at 817

Implicit with the legal standards mentioned above is the requirement that the conduct in question be "unwelcome" in the sense that the Complainant did not encourage or invite the conduct. (See, for example, *Gelbach v. State of Illinois*, IHRC, S9283, April 23, 1999.) In this regard, Respondent submits that the "Greek bitch" and the "No. 1 Greek bitch" comments cannot form a part of Complainant's harassment claim since the record shows that Complainant essentially requested that he be called such names given the "No. 1 bitch" greetings that Brown and Toland gave to each other when Toland arrived at the worksite. While Complainant denied that he ever requested to be called these names, I found more credible the testimonies of Complainant's now unemployed co-workers, who supported Toland's testimony that Complainant was insistent on being called either a "Greek bitch" or a "No. 1 Greek bitch" since he wanted to be "included" in the friendship that Toland and Brown had forged. Indeed, while the Commission might view the use of the terms "Greek bitch" and "No. 1 Greek bitch" as offensive comments in the workplace, the testimonies of Complainant's co-workers that they heard Complainant refer to himself as a "Greek bitch" only reinforce the notion that Brown's use of these terms was invited by Complainant, and thus cannot qualify as a basis of Complainant's harassment claim

Brown's reference to Greeks having sex with sheep, though, is a closer question since: (1) there is nothing in this record to indicate that Complainant invited or encouraged Brown to make such a statement; (2) Complainant was credible in his assertion that the phrase was subjectively offensive to him; and (3) Complainant's contention that Brown uttered the offensive phrase 30 to 50 times during his tenure at Respondent could potentially support the claim that Complainant's work environment was altered due to the shear number of times that the offensive phrase was uttered. See, *Village of Bellwood*, 541 NE2d at 1255, 133 IllDec at 817.

Respondent, though, submits that Complainant cannot establish an alteration of a term or condition of his employment caused by Brown's utterance of the sex with sheep comment since: (1) during Complainant's eighteen-month tenure at Respondent, Brown uttered the offensive remark, on average, three times per month, assuming that Complainant was correct that he heard the offensive phrase 50 times during his tenure; (2) Complainant indicated that he was in contact with Brown perhaps thirty times a day, which translated into 600 contacts per month, or 10800 contacts (600 times 18 months) throughout his tenure; and (3) when comparing the times that Complainant came into contact with Brown and the times Brown uttered the offensive comment, Complainant experienced the sex with sheep comment less than one half of one percent of the time, i.e., .0046 per cent (50 out of 10800 contacts). In short, Respondent submits that Brown's comments could not have affected Complainant's work environment where Brown and Complainant are communicating about an overwhelming percentage of matters that did not pertain to Complainant's ancestry.

Complainant's own testimony also supports the notion that Brown's conduct did not actually affect a term or condition of Complainant's work environment. Specifically, when asked at the public hearing how often Brown would utter the offensive sex with

sheep comment, Complainant first response was: "Not—I wouldn't say extremely often " (Tr at p 30.) Moreover, Complainant never explained either in his testimony or in his brief how Brown's utterance of the sex with sheep phrase affected Complainant's job performance in any way, including those times when Respondent's shipping and receiving department experienced a backlog of Maytag appliances and parts that needed repair. In this regard, the most that Complainant ever said about the effect of the sex with sheep comment was that he would give a hand gesture and walk away whenever he heard the offensive comment, (Tr at p 38), and Complainant otherwise noted that a third-party had to tell him in September of 2003, or 14 months after the comments were first uttered, that such statements were wrong. (Tr at p 70.)

Too, one of the complicating wrinkles in Complainant's harassment claim is the fact that sex with sheep comment was uttered in a workplace where Complainant had already tacitly approved and/or invited the use of "Greek bitch" and/or "No.1 Greek bitch" comments. In this respect, Complainant is intellectually in the same position as the complainant in *Gelbach and State of Illinois, Department of Corrections*, IHRC, S9283, April 23, 1999, who asserted a sexual harassment claimed based, in part, on a complainant-requested observation by a supervisor as to the size of complainant's breasts. There, the Commission in *Gelbach*, found that the complainant could not base a harassment claim on her supervisor's observation since complainant could have avoided the subject by not bringing up the matter in the first place. (*Gelbach*, slip op at p 9.) Here, it would seem that the same ruling should apply since our Complainant bases in part his harassment claim on the "Greek bitch" and "No. 1 Greek bitch" comments that he played a role in initiating and inviting, and since the "Greek bitch" and "No. 1 Greek bitch" comments took place at a time prior to Brown's first use of the sex with sheep

phrase. In short, if Complainant did not want a workplace with co-workers uttering anti-Greek epithets, he should not have initiated the use of such epithets in the first place

True enough, the Commission, in *Cunningham and Wal-Mart Stores, Inc.*, IHRC, 9048, April 16, 1998, found that a complainant who had participated in some way in the sexual harassment in the workplace could still proceed on her sexual harassment claim if the complainant sufficiently registered an objection to the conduct, and if the subject conduct was sufficiently different in nature than the conduct attributed to the complainant. (See also, *Graves and Lancaster*, IHRC, S11404, June 1, 2004.) For example, the sexual "hunching" experienced by the complainant in *Cunningham* in the form of rubbing covered male genitalia on the side of the complainant was deemed different in nature than the flashing and "mooning" conduct attributed to the complainant. In the instant case, though, there is no clear distinction with respect to the "form" of harassment in that both the "Greek bitch" or a "No. 1 Greek bitch" comments that Complainant uttered and invited, as well as Brown's sex with sheep comments that Complainant claims were offensive, concerned offensive oral depictions of individuals with Greek ancestry As such, I find that at least up to July 2003, when Complainant told first told Brown that he did not like him saying the sex with sheep comments, Brown and Complainant were equal participants in any anti-Greek atmosphere in the workplace.

However, even if I am wrong on this comparison and our Complainant can plausibly argue that Brown's sex with sheep comments were different in nature than the "Greek bitch" and "No 1 Greek bitch" comments that Complainant had invited, the instant record displays very little evidence that Complainant registered a consistent and clear opposition to the sex with sheep comments made by Brown so as to distinguish his own conduct from that of Brown claim. Indeed, unlike the consistent opposition voiced by the complainant in *Cunningham*, which took the form of consistent verbal comments

to stop the hunching activities and a physical grabbing of the harasser's genitals, Complainant in the instant case concedes that he never told Brown to stop making the sex with sheep comments (Tr at p 76) and never voiced any opposition at the time the sex with sheep comments were uttered. (Tr at p 79.) In fact, outside of Complainant's ambiguous hand gestures mentioned above, the closest that Complainant ever came to registering an opposition to said comments occurred in a July 2003 conversation in which Complainant told Brown that he did not like Brown making the reference between Greeks and having sex with sheep. Yet, it is difficult to find that this conversation qualified as the clear and consistent opposition to harassment seemingly required by the Commission in *Cunningham* when the conversation came nearly a year after Brown originated the sex with sheep comments.

Additionally, I note that the record is unclear as to whether Brown persisted in the use of the offensive sex with sheep comments after the July 2003 conversation. Indeed, when asked how many times Brown used the phrase after the July, 2003 conversation, Complainant replied that he did not know (Tr at p 42) and further testified that he generally kept to himself after the July, 2003 conversation. (Tr at p 41.) Thus, unlike the circumstances in *Cunningham*, where the offensive conduct persisted after the initial protest and where the complainant registered an opposition at subsequent occurrences, there is no similar evidence that Brown persisted in his comments to any real degree after Complainant had finally registered any sort of opposition to the comments.

Complainant gamely insists, though, that he made a second protest to Brown about his comments. However, I did not credit Complainant's testimony in this regard since he could not give any details as to the alleged second protest and could not recall even if it was in response to Brown making any anti-Greek comment. (Tr at p 46.) Moreover, Complainant's lack of protest, if indeed Brown continued his sex with sheep

comments after the July 2003 conversation, is all the more puzzling where Complainant demonstrated throughout his tenure at Respondent an ability to timely verbalize objections to Brown and Olson as to issues that truly did upset him with respect to his workers' compensation claim, his salary, his co-worker's conduct and assignments of co-workers to the shipping and receiving area. Thus, for all of the above reasons, I find that the sheep references made by Brown did not constitute an alteration of Complainant's work environment where: (1) the number of offensive utterances was relatively insignificant when compared to the overwhelming number of overall contacts that Complainant had with Brown in which no offensive comments were uttered; (2) Complainant also participated in the use of arguably similar anti-Greek epithets during the same time frame as the sex with sheep comments; (3) Complainant waited until one year after the initiation of the comments to register any sort of opposition to the sex with sheep comments; and (4) Complainant failed to show how the Brown's comments had any effect on his job performance or the way in which he performed his job duties.

Finally, I would note that Complainant's failure to establish an actionable harassment claim effectively serves to defeat his constructive discharge claim. (See, *Borling and Wildwood Industries, Inc.*, IHRC, 4461(M), January 6, 1995). Moreover, for the sake of completeness, I did not find Complainant credible in his assertion that he decided to quit Respondent after Olson had failed to correct any anti-Greek hostile environment. Specifically, I doubt whether Complainant ever spoke to Olson about any anti-Greek atmosphere in the workplace in the days prior to Complainant's December 8, 2003 departure, since Complainant would have mentioned the conversation in his December 15, 2003 letter to Olson. Moreover, the record suggests that other matters, including Complainant's anger about the non-payment of medical bills associated with his workers' compensation claim, led Complainant to tell Brown that he was "fucking out

of here" on December 8, 2003. In any event, Complainant failed to explain why he was forced to quit his job on December 8, 2003, when, according to Complainant, there had not been an anti-Greek comment since November 13, 2003.

Recommendation

For all of the above reasons, it is recommended that the instant Complaint and the underlying Charge of Discrimination of Larry Poulos be dismissed with prejudice

HUMAN RIGHTS COMMISSION

BY:
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 7TH DAY OF MAY, 2008