This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 4/15/03.

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
LINDA K. BURELL,	)	
	)	
Complainant,	)	
	)	
and	)	CHARGE NO: 1998SF0565
WARREN E. DANZ,	)	EEOC NO: 21B981445
ATTORNEY AT LAW,	)	ALS NO: S 11014
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter is ready for a decision after the conclusion of a public hearing. The record closed on November 19, 2002. The issue in this case is whether Complainant Linda Burrell (Burrell) was sexually harassed by an employee of Respondent Warren E. Danz Attorney at Law (Danz), as defined by the Illinois Human Rights Act.

Contentions of the Parties

Burrell contends that Brian Staggs (Staggs) was an employee of Danz' s rental business who repeatedly harassed her by giving her two sexually explicit letters, by making repeated calls to Danz's law office where Burrell was employed as a receptionist, and by coming into the office to stare at her. Burrell further alleges that the conduct created a hostile work environment, and that she was constructively discharged as a result.

Danz counters that Staggs was not his employee but that he was a client of the law firm who sometimes performed odd jobs for him. Danz contends he was not aware of the harassment until ten days before Burrell voluntarily quit her job. Further, Danz states that he attempted to correct the problem, but that Burrell left before an investigation and permanent solution could be implemented.

Findings of Fact

The following facts were proved by a preponderance of the evidence:

1. Linda K. Burrell was employed full-time by Warren Danz, Attorney at Law as a receptionist at the law firm from July 28, 1997 to January 16, 1998.

2. Warren E. Danz, Attorney at Law, is a law office doing business in Peoria, Illinois.

3. Danz also accepted payment at the law office of rent monies from his various rental properties. Additionally, Danz's rental property manager, Mike Baughman, reported to the law office to receive his daily assignments.

4. Brian Staggs occasionally performed odd jobs for Danz and was also a client of the law office.

5. Shortly before Christmas of 1997, Staggs gave Burrell two sexually explicit letters that described sexual acts in which he would like to engage with her if she would consent. Burrell rebuffed Staggs after she received the second letter and told him to leave her alone.

6. Burrell told Baughman that she received the letters from Staggs. Baughman told Burrell that he would make Danz aware of the letters and then took the letters to Danz the day after Burrell gave them to him.

7. Becky Mansfield was the law office manager and Burrell's supervisor. She met with Burrell on December 22, 1997 and on January 2, 1998, but Burrell never mentioned the letters she received from Staggs.

8. Danz received the letters from Baughman and spoke with Mansfield about the letters on January 9, 1998. Mansfield approached Burrell to discuss the letters on that same day.

9. When Burrell and Mansfield met on January 9, 1998 to discuss the letters, Burrell told Mansfield that she was uncomfortable when Staggs came into or called the office. As a result, Mansfield set up a system for Burrell to "buzz line ten" when Staggs called or visited the office. When Burrell said or "buzzed line ten" Mansfield would relieve Burrell

of the front desk duties until Staggs left the office so that Burrell would not have any contact with Staggs. Since the law office only had nine telephone lines, "buzz line ten" would alert Mansfield to Staggs' presence in the office or on the telephone.

10. On December 22, 1997, Burrell met with Mansfield and requested that her work hours be changed from 8:00 a.m. to 5:00 p.m. to 7:00 a.m. to 4:00 p.m. in order to accommodate Burrell's transportation problems. Mansfield agreed to a temporary adjustment in Burrell's schedule until she could obtain reliable transportation.

11. Again on December 27, 1997 and January 2, 1998, Burrell requested that her work hours be changed permanently to 7:00 a.m. to 4:00 p.m. because Burrell needed to be home early with her boyfriend, who had a drinking problem, in order to prevent him from going to a bar. Mansfield indicated she could not accommodate the request because the law firm needed a receptionist for the full work day. Burrell told Mansfield that she would have to consider taking a waitress job closer to her home that could accommodate her schedule.

12. On January 19, 1998, only ten days after Mansfield was notified of the alleged harassment, Burrell's boyfriend called Danz's office and indicated Burrell would not be return to work because of the harassment.

13. Burrell only worked three and a half days between January 9, 1998, the day Mansfield implemented a plan to alleviate Burrell's exposure to Staggs, and January 19, 1998, the day Burrell quit.

Conclusions of Law

1. The Illinois Human Rights Commission has jurisdiction over the parties and the subject matter in this case.

2. Complainant is an "employee" within the meaning of section 2-101(A)(1) of Illinois Human Rights Act. ***775 ILCS 5/2-102(A)(1).***

3. At the time of the alleged incidents, Respondent was an "employer" within the meaning of section 2-101(B)(1)(b) of the Act and was subject to the provisions of the Act. ***775 ILCS 2-101(B)(1)(b).***

4. Complainant failed to establish a *prima facie* case of sexual harassment in that Complainant failed to prove by a preponderance of the evidence that her alleged harasser was an employee of Respondent as alleged in the complaint and in order to attach liability to Respondent under 775 ILCS 5/2-102(D).

5. Respondent did not constructively discharge Complainant. She left her job for reasons other than sexual harassment.

Determination

Complainant's case should be dismissed with prejudice because she failed to establish a *prima facie* case of either sexual harassment or constructive discharge.

Discussion

There are two issues to be resolved in this case. First, did Warren Danz, Attorney at Law, sexually harass Linda K. Burrell through the actions of Brian Staggs. Second, did Danz constructively discharge Burrell.

Sexual Harassment

Section 2-102(D) of the Illinois Human Rights Act makes it a civil rights violation:

> for any employer, employee, agent of any employer, employee agent of any employer, employment agency or labor organization to engage in sexual harassment; provided, that an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial employees and nonsupervisory employees only if the employer becomes aware of the harassment and fails to take reasonable corrective measures. ***775 ILCS 5/2-102 (D).***

Based on section 2-102 of the Act, it is clear that this case initially hinges on whether Brian Staggs was an *employee* of Respondent Danz. It is important to establish that fact

before any other element of this case is analyzed because the underlying complaint in this case alleges that Staggs was an "employee" of Danz's. Therefore, liability will only attach if Burrell established that fact at hearing.

However, Burrell submits that even if I find that Staggs was not an employee of Danz, the claim is still viable based on current federal precedent which holds that liability may also attach to employers for acts of non-employees. This is true without even glancing at federal law because section 2-102(D) of the Act makes employers liable for the actions of non-employees. Although, the language of 2-102(D) that covers *non-employees* is irrelevant because the complaint only alleges that Burrell was harassed by a co-worker/employee of Danz's and the record does not reveal that the complaint was ever amended to reflect Staggs' status as a non-employee. Therefore, Burrell must not only establish that Staggs was Danz's employee, but because the complaint did not allege that Staggs was a supervisory employee, which would trigger the strict liability language contained in 2-102(D), she also has to prove that Danz did not take reasonable corrective steps to alleviate the harassment.

An in-depth review of the record in this case revealed that nothing was presented at hearing to establish that Staggs was Danz's "employee," and certainly nothing was presented to suggest Staggs was Burrell's co-worker. According to the credible testimony from Burrell's witness, Mike Baughman, Staggs at most occasionally performed odd jobs for Danz. When pressed in his testimony, Baughman could only recall that Staggs drove to Florida once to pick up a vehicle for Danz.

The Commission has determined that the definition of an "employee" under the Act anticipates more of a relationship other than simply a person who performs a service for remuneration. In fact, in the case of ***Antonov and American Society of Clinical Hypnosis***, __ Ill. HRC. Rep. ___ , (1193CN3082,Order and Decision, October 23), 1995), the Commission applied the "relative nature of the work" test to illustrate the

distinction in employment status between an independent contractor from that of an "employee" as defined by section 2-101 of the Act. In applying the test , the Commission decided that if 1) "the worker does not hold himself out to the public as performing an independent business service," and 2) "regularly devotes all or most of his independent time to the particular employer, he is probably an employee." ***Antonov,*** slip op. at 3; *See also*, ***Whittington and K-mart Corp.,*** ___ Ill. HRC Rep. __,(1987SF0520, November 18, 1992).

In the case at bar, no evidence was presented surrounding the nature of Staggs' employment except that he sometimes performed odd jobs and drove a car to Florida once. We do not know what Staggs told the public about the nature of his employment with Danz, but it is safe to posit from the record before me that Staggs did not devote all of his independent time to Danz. This is especially true based on Baughman's testimony that over a period of years Staggs "might have been in and out on a couple of things." (hearing transcript, p. 26, lines 5- 6). The speculative nature of Baughman's testimony concerning Staggs' spotty work history with Danz is simply not enough to establish that Staggs was Danz's employee as defined by the Act.

If anything, Staggs was a client of the law firm as Becky Mansfield credibly testified. This would have been an easier reach for Complainant to make in prosecuting her case if the underlying complaint could have been amended to include that Staggs was not Danz's employee. Even so, the Commission has not recognized liability for sexual harassment of employees by non-employees unless the employer is aware of the harassment by the non-employee and fails to take reasonable measures to correct the harassment. See, ***775 ILCS 5/2-102(D).*** Here, the record just does not mete out the salient fact of Danz's failure to correct the harassment.

There is much quibbling in the record as to when Danz was actually notified that, at some unspecified time right before December 25, 1997, Burrell received two sexually

explicit letters from Staggs. However, both Burrell and office manager Becky Mansfield concur that they had a meeting at Mansfield's request concerning the letters on January 9, 1998, where Mansfield devised a system to eliminate Burrell's contact with Staggs. Mansfield created a phrase for Burrell to use when Staggs came into the office or called on the phone. When Burrell said or buzzed "line ten," Mansfield would relocate Burrell to another room in the office until Staggs left the area or hung up the telephone. Mansfield testified this was just a temporary fix until she could investigate the matter.

The corrective action plan Mansfield implemented was reasonable under the circumstances. This was not a significant change in Burrell's employment condition or environment. It was merely a diversionary tactic until Mansfield could shoo Staggs away. While it may not have been the ideal choice of Burrell, it was certainly a reasonable one nonetheless.[1]

Constructive Discharge

Burrell argues that she had no choice but to quit her job with Danz, thus creating a constructive discharge, because she could not handle the harassment any longer. I agree she had no other choice than to quit her job, but not because of Staggs' sexual harassment. In fact, Burrell concedes that on January 9, 1998, Mansfield's plan to limit her contact with Staggs worked. However, we have no way of knowing how well it would have worked over the long-term because Burrell quit her job ten days later, and only worked three and a half days out of the ten.

The credible testimony in this case revealed that Burrell was in a tumultuous personal relationship with a man who had a drinking problem. This relationship created problems for Burrell at work because she found it necessary to arrive home before her boyfriend in order to keep him from drinking. She asked Mansfield to accommodate her

[1] Compare the unreasonable corrective action in **In the Matter of the Request for Review of: Kolt and Illinois Department of Human Rights**, __ Ill HRC __, Charge No. 1995CF0526, (April 3, 1998), where the complainant is locked in her workspace to limit contact with her alleged harasser.

request to change her work hours so that she could achieve this task. Mansfield told Burrell that she could not permanently alter her work schedule because the law office needed a receptionist available during the hours the office was open to the public. Burrell then told Mansfield she may have to consider a job closer to her home in Delavan. Just a few days after this conversation, Burrell's boyfriend called the law office to inform Mansfield that Burrell would not return to work.

In summary, the credible evidence in this case points out that Burrell was experiencing immense personal problems that required her to locate a job close to home and allow her to cope with those issues. I do believe that Staggs gave Burrell sexually explicit letters, called the law office to irritate her for rebuffing him, and that her supervisor made a reasonable attempt to correct the behavior. However, I cannot say that Burrell established the necessary element alleged in her complaint that Staggs was an "employee" of Danz. This was crucial in order to attach liability to Danz. Even so, had she established that Staggs was an employee, Danz proved that his office manager made every attempt to correct the problem before Burrell quit her job to take a position closer to home.

Recommendation

Based on the above findings of fact and conclusions of law, I recommend that the Illinois Human Rights Commission dismiss with prejudice the complaint of LINDA K. BURRELL and WARREN E. DANZ, ATTORNEY AT LAW, together with the underlying charge.

ILLINOIS HUMAN RIGHTS COMMISSION

_____

KELLI L. GIDCUMB
Administrative Law Judge
Illinois Human Rights Commission

ENTERED THE 18TH DAY OF NOVEMBER, 2002.