

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:)	
)	
JESSE MANSKER,)	
)	
Complainant,)	
)	
and)	CHARGE NO: 1999SF0356
)	EEOC NO: 21B990715
PINNACLE LIMITED PARTNERSHIP)	ALS NO: S-11202
d/b/a SPRINGFIELD HILTON and)	
MICHAEL MONTGOMERY)	
)	
Respondents.)	

RECOMMENDED LIABILITY DECISION

This matter is ready for a decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing was held before me on February 5 and 6, 2002 in Springfield, Illinois, during which all of the parties except Respondent Montgomery appeared. The parties have filed their post-hearing briefs.

Contentions of the Parties

In the Complaint, Complainant alleges that he was the victim of sexual harassment when Respondent Montgomery, a male co-worker, made a series of sexual requests and comments at the workplace. Complainant also submits that Respondent Springfield Hilton (Hilton) is liable for the conduct of Montgomery since Hilton allegedly failed to take reasonable corrective measures once he reported the offensive conduct to his supervisors. Hilton contends that it was unaware of Montgomery's conduct until Complainant made his claims of sexual harassment after he had been terminated. It further submits that while its investigation of Complainant's claims revealed that Montgomery had made sexual comments to three other male co-workers, it eventually concluded that Complainant had not been the victim of sexual harassment since no

witness had overheard any sexual comment that Montgomery may have made to Complainant.

Findings of Fact

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

1. On May 12, 1998, Respondent Hilton hired Complainant as a server in its Manhattan Grill Room, a restaurant located within the hotel. At the time of his hire, Anita Perkins, Hilton's Human Resources Manager, instructed Complainant on Hilton's sexual harassment policy which required its employees to make any complaints of sexual harassment in writing to their manager.

2. At all times pertinent to this Complaint, Complainant was a homosexual male living with Jerry Richardson, another homosexual male. At the time of his hire, Complainant had been in a relationship with Richardson for approximately three years.

3. In June of 1998, Complainant was on break from his position with two other co-workers when he encountered Michael Montgomery, a part-time bartender and occasional server in Hilton's banquet department whom Complainant had previously met at a bar where Complainant and Richardson had frequented.

4. During the June 1998 conversation, Montgomery relayed a story about his participation in explicit sexual encounters with men while on an out-of-town trip. Complainant told Montgomery that he did not want to hear about Montgomery's sexual encounters. At some point during the conversation, Complainant declined Montgomery's request to participate in a three-some sexual encounter.

5. On August 23, 1998, Perkins received a complaint from Vicki Boze, Complainant's manager in the Manhattan Grill Room, about Complainant's attitude. In her complaint Boze indicated that she wanted Complainant to be terminated, and that Complainant had been disruptive in his job performance and had made a racist statement to a co-worker. Perkins told Complainant that because he could not get along with people

in the Manhattan Grill Room she would give him a second chance and transfer him to the banquet department. Complainant's full-time hours, which ranged from 32 to 40 hours per week, did not change as a result of the transfer.

6. Complainant began working in the banquet department on or near September 10, 1998. At this time, Complainant's supervisors were Lori Smothers, who was employed as an assistant banquet manager, and Abbas Zolghadr, who was employed as Hilton's banquet manager.

7. On either September 12, 1998 or September 24, 1998, Montgomery asked Complainant whether he would be interested in having Montgomery give him a haircut "and a blow job." Montgomery further offered Complainant the opportunity to come to Montgomery's home for the purpose of having sexual intercourse. Montgomery additionally requested that Complainant participate in a three-some sexual encounter and informed Complainant that he did not think Richardson would mind since he had previously had sex with Richardson. Montgomery frequently repeated his requests for sex and his statements about Richardson having sex with Montgomery whenever Montgomery encountered Complainant while working a banquet.

8. On September 15, 1998, someone called on Complainant's behalf to inform management that Complainant was in the emergency room and would not be at work that day or the next day. Smothers considered Complainant's absence as unexcused because he had called in within two hours of his scheduled shift. Montgomery did not work that day.

9. On September 29, 1998, Complainant informed management that he would not be working that day since he fell down some stairs. Smothers considered Complainant's absence as excused. Montgomery did not work that day.

10. On October 4, 1998, Complainant informed management that he would not be working that day. Smothers considered Complainant's absence as unexcused

because he called into work within two hours of the start of his shift. Montgomery did not work that day. Complainant also received a written warning from Smothers dated October 4, 1998, indicating that Complainant had been excessively absent since transferring into the banquet department, and that he risked suspension or termination if his absenteeism continued.

11. On October 6, 1998, Complainant reported to work thirty minutes after the scheduled start of his shift. Montgomery did not work that day.

12. On October 13, 1998, Complainant informed management that he had been arrested and would not be into work that day because he had to move out of his house. Montgomery did not work that day. Smothers considered Complainant's absence as unexcused.

13. On October 20, 1998, Complainant told management during his first shift that he was ill and was going to see the doctor. Later that day, Complainant called management to inform it that he was unable to see the doctor and would be in the next day for his first shift. Complainant did not show up the next day for the first shift but called in the afternoon to say he had the flu and would not be there for his second scheduled shift. Montgomery worked on October 20, 1998, but did not work on October 21, 1998.

14. When Complainant reported to work after the October 20, 1998 incident, Abbas told him that he was terminated. However, Complainant met with Perkins who later spoke with Abbas and converted the termination into a two day suspension.

15. During the fall of 1998, Complainant and Montgomery began shifts within twenty minutes of each other in the Hilton complex on only nine days (September 12 and 24, 1998; October 5, 8, 10 and 15, 1998; November 19, and 24, 1998; and December 13, 1998). Additionally, Complainant and Montgomery worked shifts in which they clocked in more than 20 minutes apart on eight days (October 7, 9, 20 and 24, 1998; November 19 and 24, 1998; and December 3 and 11 1998).

16. At all times pertinent to this Complaint, the Hilton had between 10 and 12 banquet rooms and generally had more than one banquet going on during any particular shift.

17. At some point in November 1998, Complainant approached Zolghadr and requested that he not work with Montgomery because Montgomery had made certain telephone calls to Complainant's probation officer and another unspecified organization making false claims that Complainant was drinking alcohol and using drugs. Zolghadr granted Complainant's request.

18. At some point between Zolghadr's November meeting with Complainant and December 13, 1998, Zolghadr asked Complainant whether he and Montgomery had "kissed and made up" so that he could resume scheduling both men on the same banquets. Complainant indicated that he still wanted to work separately from Montgomery.

19. At some point during the first week of December, 1998, Zolghadr overheard Complainant using profanity when complaining to co-workers that Montgomery had called Complainant's probation officer and lied about Complainant's conduct. Zolghadr requested that Complainant stop the conversation about Montgomery.

20. At some point shortly before December 13, 1998, Zolghadr asked Complainant whether he would work a large banquet with Montgomery scheduled for December 13, 1998. Zolghadr made the request because the Hilton had only one banquet scheduled for the day, and he would be required to send Complainant home if Complainant had refused to work with Montgomery. Complainant agreed to work the banquet as long as Zolghadr did not place him next to Montgomery's work station. Zolghadr granted Complainant's request and separated Complainant's and Montgomery's working stations for the banquet.

21. At around 9:00 p.m. on December 13, 1998, Complainant went to Smothers to ask if he could leave early because he had to go to Centralia the next day to attend a court hearing. When Smothers told him that he would have to stay, Complainant asserted that Smothers was being unfair, and that he would “get even” with her.

22. For the next three hours Complainant periodically asked Smothers to let him go home. Each time, Smothers declined. At one point during this time frame, Complainant opened the ballroom door and, within earshot of people attending the banquet, yelled at Smothers that she was being unfair for not letting him go home early.

23. At around 11:00 p.m., Smothers called Zolghadr to ask if Complainant could leave early. Zolghadr refused.

24. Smothers placed a second telephone call to Zolghadr in the evening after Complainant had contacted the hotel's night manager and complained about his inability to leave early. Zolghadr again declined to send Complainant home early. While others were permitted to go home early that evening, Zolghadr's reason for refusing to send Complainant home was his belief that it was Complainant's turn to remain until the end to finish the clean-up process.

25. On December 16, 1998, Complainant returned to work his scheduled shift. At that time, Zolghadr escorted Complainant to Perkins' office where he was told he was being terminated due to his insubordinate conduct on the night of December 13, 1998. After unsuccessfully attempting to convince Perkins and Zolghadr to reverse the termination decision, Mansker then informed them that he had been sexually harassed by Montgomery. This was the first time that Complainant had informed either Perkins, Zolghadr or anyone in management about any sexual harassment by Montgomery against Complainant.

26. Later that same day, Complainant attended a meeting with Michael Fear, Respondent's general manager. During the meeting, Complainant claimed that

Montgomery had asked him for sexual favors. Perkins then conducted an investigation of the matter, which included interviewing three individuals mentioned by Complainant as witnesses to Montgomery's conduct. These individuals told Perkins that while Montgomery had made sexual comments to them, they did not witness any comments he may have made to Complainant. Perkins eventually closed the investigation after finding that there was no evidence to support the conclusion that Montgomery had sexually harassed Complainant.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.
2. Respondent Michael Montgomery is an "employee" as that term is defined under the Human Rights Act.
3. Respondent Hilton is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.
4. Complainant established a *prima facie* case of sexual harassment with respect to his claim against Respondent Montgomery in that Montgomery made a series of sexual propositions to Complainant, that these propositions were based on Complainant's gender, and that the sexual propositions altered Complainant's work environment.
5. Complainant failed to establish a *prima facie* case of sexual harassment with respect to his claim against Respondent Hilton in that Complainant failed to show that he had made Hilton's management aware of Montgomery's offensive conduct during his employment.

Determination

With respect to his claim against Respondent Montgomery, Complainant sustained his burden of showing that he was the victim of hostile environment, sexual harassment

under section 2-102(D) of the Human Rights Act (775 ILCS 5/2-102(D)). Complainant failed to establish his claim of sexual harassment against Respondent Hilton.

Discussion

Complainant's claim for same-sex, sexual harassment by his co-worker, Michael Montgomery, is based on section 2-101(E) of the Human Rights Act (775 ILCS 5/2-101(E)), which defines sexual harassment as "any unwelcome sexual advances or requests for sexual favors or conduct of a sexual nature when...(3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." The Commission has declared that there is no "bright line" test for determining what behavior will lead to liability under a sexual harassment theory and has charged the administrative law judge to assess not only what was done but how it was done in relationship to the total working environment. See, for example, **Robinson v. Jewel Food Stores**, 29 Ill. HRC Rep. 198, 204 (1986).

However, as the Commission observed in **Ford and Caterpillar, Inc.**, ___ Ill. HRC Rep. ___ (1993SF0242, October 28, 1996), not all comments about sexual matters made by male employees to male co-workers constitute "conduct of a sexual nature" for purposes of section 2-101(E). Here, though, where the subject conduct concerned a sexual advance or a request for sexual favors, I cannot say that Montgomery's conduct toward Complainant pertained to only sexual "teasing" that was found not to be actionable in **Ford**. Rather, I find that Montgomery's conduct is actionable under the Human Rights Act where: (1) the record establishes that Montgomery was a homosexual and was aware of Complainant's homosexuality; (2) Montgomery stated his desire to have casual sex with other men; and (3) Montgomery's series of sexual requests appeared to be sincere, persistent and motivated out of a sexual attraction for Complainant. See, for example, **Ward v. Ridley School District**, 940 F.Supp. 810 (E.D. Penn. 1996), and **Shermer v.**

Illinois Department of Transportation, 937 F.Supp. 781 (C.D. Ill. 1996), aff'd. on other grounds, 171 F.3d 475 (7th Cir. 1999), where the court similarly looked to proof that the male harasser acted out of a sexual attraction for the male victim, when determining the viability of a same-sex, sexual harassment case.

As to the issue of whether Montgomery's conduct created a hostile environment, I am initially troubled by the fact that the attendance records do not support Complainant's assertion as to the number of instances that Montgomery allegedly made requests for sex. Nonetheless, the attendance records suggest that Complainant and Montgomery worked similar shifts on nine days, and that Montgomery was physically present at Hilton at some point during Complainant's shift on eight other occasions over a three-month period. Moreover, Complainant testimony that Montgomery's requests for sexual encounters made him upset and necessitated that he go home early supports his over-all argument that Montgomery's conduct altered his work environment. In the absence of any contrary evidence from Montgomery, I find that Montgomery's series of between nine and seventeen requests for oral sex and for sexual intercourse over a three-month period sufficiently altered Complainant's work environment so as to establish a *prima facie* case of sexual harassment against Respondent Montgomery.

The question of whether Complainant has established a sexual harassment claim against Respondent Hilton, though, is a separate question since, under section 2-102(D) of the Human Rights Act (775 ILCS 5/2-102(D)), an employer can be liable for the sexual harassment committed by a nonmanagerial or nonsupervisory employee such as Montgomery "only if the employer becomes aware of the conduct and fails to take reasonable corrective measures." Here, Complainant contends that he made both Smothers and Zolghadr aware of Montgomery's requests for sexual favors within the first week of his transfer into the banquet department. He similarly submits that he constantly complained to management about Montgomery's conduct throughout the fall months of

1998, and that management did nothing about his requests to have Montgomery stop the harassment.

However, after carefully reviewing the transcript and the attendance records, I find that it is more likely that Complainant did not inform management of Montgomery's sexual advances or comments until after Complainant's termination. Specifically, as noted above, I did not find Complainant particularly credible in his description of the number of occurrences of Montgomery's harassment given the fact that the attendance records did not place Montgomery at the worksite at times when Complainant contends that he was harassed. For example, Complainant's assertion that he notified Zolghadr and Smothers about Montgomery's conduct after having worked with Montgomery three to five times within the first week of his transfer to the banquet department does not square with the attendance records reflecting that Complainant worked with Montgomery at most only once during his first week of employment in the banquet department and only twice during the whole month of September, 1998. Similarly, I doubt Complainant's claim that he told Zolghadr and Perkins about Montgomery's conduct during an October 20, 1998 meeting that resulted in Complainant receiving a two-day suspension for excessive absenteeism since there was no mention of Montgomery's conduct in Complainant's extensive written remarks on the disciplinary report that arose out of the meeting.

Other evidence in the record casts doubt on Complainant's veracity. Initially, I found it odd that Complainant lied about the details of his transfer into the banquet department given the documentary evidence indicating that Complainant's former supervisor wanted him to be terminated. Moreover, other than the October 20, 1998 suspension, Complainant could not give a particulate date as to when he reported Montgomery's conduct to his supervisors, and I note that Complainant otherwise failed to comply with Hilton's sexual harassment policy requiring that all complaints of harassment be in writing. Most important, though, is Complainant's candid testimony indicating that he

did not want others in the workplace to know anything about him or his sexual preference. (See, Transcript, Vol. 1 p. 34.) While Complainant's penchant for privacy about his personal matters is understandable, it also demonstrates a likelihood that he did not notify management about Montgomery's requests for oral sex and for sexual three-somes, for to do so would have risked exposure of Complainant's sexual preference and his relationship with his male partner.

Complainant alternatively submits that even if he did not inform management of Montgomery's harassment until after his termination Hilton should have known about the harassment at the time it was occurring and taken appropriate action since Complainant's frequent absenteeism and anger in the workplace are classic symptoms of a victim of sexual harassment. Additionally, Complainant contends that Zolghadr must have had some idea of the true nature of the difficulties that he was experiencing with Montgomery, given Complainant's request to work separate banquets and given Zolghadr's "kiss and make-up" comment that he made when inquiring whether it was permissible to schedule both men for the same banquet. However, a close review of the record does not establish that Hilton was either actually or constructively aware of Montgomery's sexual harassment.

Initially, I note that, with one exception, Montgomery did not work any of the days that Complainant had called to inform management of his absence. Thus, at least with these absences, Complainant could not have been attempting to stay away from Montgomery, and management could otherwise conclude that Complainant was away from the worksite for the reasons that he cited to his supervisors at the time of the requests for time-off. Moreover, as to his request to be separated from Montgomery, Zolghadr credibly testified that the reason Complainant gave for the request was because he was upset with Montgomery calling Complainant's probation officer and accusing Complainant of using alcohol and drugs. Again, there is nothing in the excuse proffered

by Complainant that should have tipped management off that Complainant was being sexually harassed by Montgomery. Indeed, Zolghadr's "kiss and make-up" comment could have been nothing more than Zolghadr's perception that only a personal animosity existed between Montgomery and Complainant.

Finally, I find that the nature of the events surrounding the December 13, 1998 incident were not so obvious so that they would have given Hilton the requisite notice of Montgomery's harassment. Specifically, both Smothers and Complainant testified that the reason Complainant wanted to leave early on the evening of December 13, 1998 was because Complainant had an out-of-town court appearance the next day. Thus, where Complainant gave management a neutral reason for leaving work early, I am hard-pressed to fault Hilton for failing to think that sexual harassment was the real cause for Complainant's belligerent attitude when Smothers refused his request. Similarly, while the record does not reflect whether Complainant gave neutral reasons for why he wanted to go home early on other occasions, Complainant has not explained why Hilton's management should have assumed that Montgomery's sexual harassment was the root of his absenteeism problem.

Parenthetically, I note that Complainant makes much of the fact that, in his opinion, Hilton did a substandard investigation of his claim of sexual harassment against Montgomery, and therefore came to the wrong conclusion on the issue of Montgomery's sexual harassment. Specifically, Complainant asserts Respondent's finding that no harassment occurred is contrary to the statements given by three co-workers indicating that Montgomery had made sexual comments to them. He also finds it suspicious that Perkins did not include the comments of the co-workers in her summary report of her investigation. Complainant similarly maintains that the mysterious destruction of Perkins' notes of her interviews with Complainant's co-workers demonstrates that Hilton had something to hide with respect to the investigation results. Finally, he contends that Hilton

did not take reasonable corrective action based upon the objective evidence of sexual harassment, and that Hilton's termination constituted an improper punishment for job performance problems caused by Montgomery's sexual harassment.

Complainant's arguments in this regard, however, are unavailing. Initially, I note that the Complaint in this case does not contain an allegation of discriminatory discharge, and that Complainant concedes in his brief that issues with respect to his termination, and, for that matter, his job performance, are limited to damages, as opposed to liability. Thus, the issue as to whether Hilton conducted an adequate investigation is really beside the point on the issue of Hilton's liability. Moreover, Complainant's arguments assume that he would have received his job back had Hilton conducted an adequate investigation of his sexual harassment claims against Montgomery. However, the Commission in **Cunningham and Wal-Mart**, ___ Ill. HRC Rep. ___ (1992CF0496, April 16, 1998) recognized the possibility that an employee could still be terminated for his or her own conduct in the workplace even though that employee had been the victim of sexual harassment. Here, that dual result is permissible since the record establishes that Complainant's termination resulted from his own conduct that was unrelated to Montgomery's sexual harassment, i.e., a three-hour tantrum with Smothers over her refusal to let him go home early so that he could attend an out-of-town court hearing. Accordingly, any issue with respect to the quality of Perkins' investigation has relevance only with respect to Montgomery's, as opposed to Complainant's, continued employment.

As to the issue of Complainant's damages with respect to his claim against Montgomery, I note that Complainant seeks payment of certain medical bills generated from an accident at a time after he had been terminated. Complainant argues that these damages are recoverable in this action since: (1) he would have been covered under Hilton's medical plan had he still been employed with Hilton at the time of his accident; and (2) Montgomery's harassment was a contributing factor to his termination. Given my

finding that Complainant's termination arose out of his own conduct that was unrelated to Montgomery's sexual harassment, I find that Montgomery should not be responsible for these damages. Alternatively, I find that Complainant cannot receive damages arising out of his termination since Complainant's Complaint against Montgomery did not allege a discriminatory discharge. See, for example, **Hertzberg v. SRAM Corp.**, 261 F.3d 651 (7th Cir. 2001), where the court similarly found that an employee could not receive any back pay on a sexual harassment claim where no theory of discriminatory discharge had been placed before the jury.

However, this is not to say that Complainant is not entitled to emotional distress damages arising out of a series of requests by Montgomery for oral sex and sexual intercourse. In this regard Complainant convincingly testified that he was upset about Montgomery's sexual requests, as well as Montgomery's attempts to impugn Complainant's partner as a means to have Complainant agree to Montgomery's sexual requests. While I note that Montgomery did not physically assault Complainant, I still find that Complainant is entitled to \$10,000 in emotional damages.

Recommendation

For all of the above reasons, it is recommended that:

1. The portions of the Complaint and the underlying Charge of Discrimination against Respondent Hilton be dismissed with prejudice.
2. The portions of the Complaint and the underlying Charge of Discrimination against Respondent Montgomery be sustained.
3. Respondent Montgomery pay Complainant the sum of \$10,000 which represents emotional damages.
4. Complainant is directed to file a motion for attorney fees within 21 days of the date of this Recommended Liability Decision accompanied by a detailed affidavit and any other necessary supporting materials required by the Commission's decision in **Clark**

and Champaign National Bank, 4 Ill. HRC Rep. 193 (1982). Failure to file such a motion will be taken as a waiver of Complainant's claim of fees. Following the filing of such a motion, pursuant to section 5300.785 of the Rules and Regulations of the Commission, 56 Ill. Admin. Code, Chi. XI, §5300.785, Respondent Montgomery shall have 21 days in which to file a written response. Failure to file such a response will be taken as evidence Respondent Montgomery does not contest the amount of fees sought in the motion.

5. The recommendations set forth in paragraphs one through three are stayed, pending the issuance of a Recommended Order and Decision addressing the issues of attorney fees and costs.

HUMAN RIGHTS COMMISSION

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

ENTERED THE 28TH DAY OF JANUARY, 2003