



This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 2/04/05.

**STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION**

**IN THE MATTER OF:** )  
 )  
**MARTA PREGENT,** )  
 )  
 **Complainant,** )  
 )  
**AND** )  
 )  
**PAT'S PIZZA,** )  
 )  
 **Respondent.** )

**ALS NO. 12115  
CHARGE NO. 2003CF0446**

**RECOMMENDED ORDER AND DECISION**

This matter is before me following a public hearing conducted on April 21<sup>st</sup>, 2004 and May 6<sup>th</sup>, 2004. Both Complainant and Respondent filed post-hearing briefs as well as replies to those briefs. There are no further submissions from the parties. The matter is now ripe for decision.

**HISTORY OF PROCEEDINGS**

On July 3<sup>rd</sup>, 2003, the Illinois Department of Human Rights filed a complaint with the Illinois Human Rights Commission on Complainant Pregent's behalf. That complaint alleged that around mid-January 2002, Complainant opposed sexual harassment when she told the Respondent's owner, Pat Harris, that his behavior was inappropriate and that he had to stop after he allegedly made a sexually explicit comment to her while she was working for Respondent as a waitress. The complaint alleges that Pregent was discharged by Respondent on January 31<sup>st</sup>, 2002 in retaliation for having opposed sexual harassment. The complaint only alleges and seeks relief for retaliation; it does not seek relief for sexual harassment.

Respondent filed its *Verified Answer and Affirmative Defenses* on July 28<sup>th</sup>, 2003. After engaging in discovery, the parties filed their joint *Pre-Hearing Memorandum* on

December 12<sup>th</sup>, 2003. A public hearing on the case was held in the Commission's Chicago offices on April 21<sup>st</sup>, 2004 and May 6<sup>th</sup>, 2004.

### **FINDINGS OF FACT**

The following findings of fact are based upon the public hearing record in this matter. The record consists of two-hundred and forty-five (245) pages of transcript and the exhibits admitted into evidence during the hearing. Factual assertions made at the public hearing, but not addressed in these findings, were determined to be unproven by a preponderance of the evidence or were otherwise immaterial to the issues at hand. Any citations to the public hearing transcript are indicated as "Tr. page\_\_\_\_\_". Any joint exhibits admitted into evidence are denoted "JX\_#", Complainant's exhibits are denoted "CX-#" and Respondent's exhibits are denoted "RX-#".

1. Complainant filed Charge No. 2003CF0446 with the Illinois Department of Human Rights on July 29<sup>th</sup>, 2002.
2. Respondent is an employer as defined by the Illinois Human Rights Act. 775 ILCS 5/2-101.
3. Complainant began working for Respondent restaurant in November or December of 2000 as a delivery driver.
4. Patrick ("Pat") E. Harris is the owner and president of Respondent restaurant.
5. In March of 2001, Complainant stopped working as a delivery driver and began working regularly as a waitress for Respondent.
6. Complainant's job as a waitress was a part-time position.
7. Complainant worked as a waitress for Respondent from March of 2001 to January of 2002.
8. For the relevant time period in question, Kristine Kuebler was the general manager of the restaurant.

9. For the relevant time period in question, Karen Weinert worked as the head waitress/manager of the dining room for the restaurant.
10. Some of Karen Weinert's responsibilities as head waitress were to manage the wait staff, hire and fire wait staff, write up shift schedules for the waitresses and deal generally with any problems related to the dining room of Respondent restaurant.
11. At the time of Complainant's employment with Respondent, Respondent did have a sexual harassment policy.
12. At the time of Complainant's employment with Respondent, Respondent's sexual harassment policy was posted in writing above the employee time-clock near the kitchen.
13. As part of the hiring process, one of Karen Weinert's duties was to make new wait staff aware of Respondent's sexual harassment policy and to direct them to read the policy.
14. At the time Complainant was hired as a waitress, Karen Weinert instructed Complainant to read Respondent's sexual harassment policy.
15. Respondent's policy on harassment instructs employees who have been subjected to sexual harassment to report any incidents to their supervisor and/or Deann or Pat Harris.
16. Karen Weinert, along with other waitresses who worked for Respondent, trained Complainant to work as a waitress.
17. On several occasions, Complainant appeared for work looking tired, disheveled and emotionally upset.
18. On one occasion, Complainant appeared for work wearing pajama bottoms.

19. The dress code for Respondent's waitresses was a Pat's Pizza T-shirt, either knee-length shorts or blue jeans and an apron.
20. In the summer of 2001, Pat Harris told Complainant that she should try to wear make-up while at work.
21. Pat Harris told Complainant that she should wear make-up because he believed that Complainant had low self-esteem and believed that by doing so Complainant would feel better about herself.
22. Harris also told Complainant to wear make-up because he was concerned about the unprofessional image she was projecting to customers of the restaurant.
23. Respondent had a system for waitresses to write down pizza orders, which included specific numbers that were assigned to certain ingredients.
24. On a couple of occasions, Complainant mixed up the number assigned to sausage with that of the number assigned to pepperoni.
25. Respondent later made use of a computer program called "Rapid Fire" for the taking of orders by its wait staff.
26. All of the waitresses, including Complainant, made mistakes using the "Rapid Fire" program. Complainant, however, had some prior experience with this program and thus had somewhat more knowledge of the program than did the other waitresses at the time.
27. In September of 2001, Complainant failed to appear for work on a Friday night due to the fact that she had to take her son to Cook County Hospital. Although Complainant was not formally disciplined for this occurrence, Respondent's owner, Pat Harris, spoke to Complainant about being irresponsible.

28. During her employment with Respondent, Complainant had many personal problems relating to both her family life and to her mental and physical health. Complainant often discussed these problems with her co-workers.
29. Complainant often cried while at work due to her personal problems.
30. Beginning in November of 2001, Complainant's crying episodes, emotional upsets and lack of attention to her appearance while at work got increasingly worse.
31. In November 2001, Complainant began to experience more performance problems while at work. Complainant would physically shake, had problems entering orders into the computer and a hard time remembering things.
32. In addition to Kristine Kuebler, Kellie Schmidt and Karen Weinert, any waitress Complainant happened to be working with on a particular shift would help Complainant and cover her duties for her whenever she had performance problems and/or became emotionally upset.
33. Complainant experienced two panic attacks while working for Respondent.
34. The first panic attack occurred in the Fall of 2001. At the time, Complainant felt as if "everything just sort of dropped out of [her] head". Complainant could not function at work as a result of this panic attack and was told by Kellie Schmidt that it was okay for her to go home and that Schmidt would cover for Complainant.
35. On more than a few occasions, Complainant left work early because of her emotional state. When Complainant left work early, other waitresses would cover her duties for her.

36. On January 30<sup>th</sup>, 2002, Complainant had something in the nature of another panic attack while working as a waitress for Respondent. Complainant “fell apart”, started crying and said that she “could not do it”.
37. On January 30<sup>th</sup>, 2002, due to Complainant’s apparent mental and physical state, Kristine Kuebler made the decision to send Complainant home as Complainant was in no condition to work at the time.
38. Pat Harris was not present at Respondent restaurant at the time of Complainant’s panic attack on January 30<sup>th</sup>, 2002.
39. Pat Harris did not yell “get her out of here” on January 30<sup>th</sup>, 2002.
40. Complainant was not taking medication for her panic attacks while she worked for Respondent.
41. Complainant was taking different medications for treatment of bipolar manic-depressive disorder while she worked for Respondent.
42. Complainant was taking over-the-counter medication for treatment of irritable bowel syndrome while working for Respondent.
43. The working atmosphere for Respondent’s wait-staff can be characterized as that of a “family-type” atmosphere.
44. In general, Complainant felt comfortable with Pat Harris and had a good rapport with him.
45. On at least one occasion, Harris asked Complainant about problems she was having with her son.
46. Harris never made the statement to Complainant, “I’ll bet you’re one of those women who likes a lot of tongue action”, nor did he say anything of a sexual nature to Complainant during the second week in January 2002. Additionally, Complainant never responded to that statement by telling

Harris, "I don't think I like this question and I think that you better go away."

47. Complainant's last day of work as a waitress for Respondent was January 30<sup>th</sup>, 2002.
48. Complainant was not fired from her waitress position with Respondent on January 30<sup>th</sup>, 2002. Rather, Complainant was to contact Karen Weinert when she felt mentally and physically ready to come back work.
49. After January 30<sup>th</sup>, 2002, both Kristine Kuebler and Karen Weinert considered Complainant to be on a leave of absence.
50. Complainant never telephoned Kristine Kuebler or Karen Weinert after January 30<sup>th</sup>, 2002 about coming back to work as a waitress.
51. After January 30<sup>th</sup>, 2002, for approximately six (6) months, Respondent's other waitresses covered the Complainant's shifts, before Respondent had to hire another waitress to take Complainant's place.
52. Pat Harris had no involvement in the hiring, firing or scheduling of the waitresses at the restaurant or in taking the Complainant off the waitress schedule after January 30<sup>th</sup>, 2002.
53. Pat Harris was told by Kristine Kuebler that Complainant had been taken off the waitress schedule and would not be put back on until she called and said she was better.
54. Complainant returned to work on February 2<sup>nd</sup>, 2002 as a delivery driver at the request of Pat Harris who asked her if she was able to drive. Complainant worked about two hours that day as a driver and then left. Harris had been short one driver that day.
55. Complainant has not worked in any capacity for Respondent since February 2<sup>nd</sup>, 2002.

### **CONCLUSIONS OF LAW**

1. Complainant is an “employee” as that term is defined under the Illinois Human Rights Act.
2. Respondent is an “employer” as that term is defined under the Illinois Human Rights Act.
3. The Commission has jurisdiction over the parties and the subject matter of this action.
4. Complainant failed to establish a *prima facie* case of retaliation in that the record does not establish that (1) Complainant engaged in a protected activity that was known by the alleged retaliator; (2) Respondent took a subsequent adverse action against Complainant; and (3) a causal nexus exists between the protected activity and the adverse act.

### **DISCUSSION**

Under the Illinois Human Rights Act, 775 ILCS 5/6-101(A), it is a civil rights violation to retaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be . . . sexual harassment in employment . . . . To establish a *prima facie case* of retaliation, a Complainant must prove that: (1) she engaged in a protected activity (i.e. either opposing practices forbidden under the Human Rights Act or participating in proceedings or investigations under the Act) that was known by the alleged retaliator; (2) Respondent subsequently took an “adverse action” against Complainant; and (3) the circumstances indicate a causal connection between the protected activity and the adverse act. *Feleccia and Sangamon County Sheriff’s Dept.*, WL, Charge No 1999SF0713, ALS No. S-11330.

Once Complainant has established a *prima facie* case, the burden is on the Respondent to provide a legitimate, non-discriminatory reason for the adverse employment action. If the Respondent meets this burden, the burden then shifts back to

the Complainant to prove that the proffered reason is merely a pretext for retaliation. *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill.2d 172, 545 N.E.2d 684 (1989).

In this case, Complainant contends that on a Friday night in mid-January of 2002, while she sat in one of Respondent's booths counting her order tickets, Respondent's owner and president, Pat Harris, walked up, stood next to the booth where she was sitting and sexually harassed her. Specifically, Complainant alleges that Harris made the comment: "I bet you're one of those women who likes a lot of tongue action." Complainant contends that she opposed Harris' harassment by replying: " I don't think I like this question and I think you better go away". Tr. page 60-61; see Complaint of Civil Rights Violation, July 3<sup>rd</sup>, 2003. Complainant argues that she was the victim of retaliation when approximately two (2) weeks later she was discharged from her waitress position for having opposed Harris' sexual harassment. Complaint of Civil Rights Violation, July 3<sup>rd</sup>, 2003.

Based on the testimony of the witnesses during the public hearing, this tribunal does not believe that the alleged sexual harassment incident ever occurred. All of the witnesses that testified on behalf of Respondent - - Kristine Kuebler, Karen Weinert, and Kellie Schmidt - - have worked for Respondent restaurant and with the owner, Pat Harris, for over 10 years. All of these women testified that they had never seen or heard Harris say or do anything of a sexual nature to any employee of Respondent. Specifically, Kellie Schmidt, who has worked for twelve (12) years as a waitress for Respondent, testified that she has never observed Harris saying or doing anything of a sexual nature while on the job. Tr. page 109. Karen Weinert, head waitress and dining room manager, has worked for Respondent for thirteen (13) years. She testified that she has never seen or heard Harris say or do anything of a sexually inappropriate nature. Tr. page 176. Kristine Kuebler, Respondent's general manager for the last ten (10) years, testified that she has never had an employee complain to her that Harris said or did

anything sexually inappropriate. Tr. page 148. It is unreasonable to believe that Harris suddenly decided to single out Complainant for a sexually inappropriate comment.

In addition, both Schmidt and Kuebler testified that Complainant never mentioned nor complained to them about Harris making a sexually inappropriate comment. Tr. pages 109, 63 and 148. Considering the frequency that Complainant would discuss her personal problems with both Schmidt and Kuebler, it strikes this tribunal as odd that Complainant never mentioned the alleged sexual harassment by Harris. Complainant did testify that she told a waitress named “Kim” and a delivery driver named Gary Hines about the incident. However, Complainant failed to produce either of these people as witnesses during the hearing.

Even if Harris did make the sexually inappropriate comment as alleged by Complainant and Complainant in turn told Harris, “I don’t think I like this question and I think you better go away”, Complainant’s response to Harris falls far short of satisfying the “protest” element of a retaliation claim. In *Troyer and Northtown Ford, Inc.*, 14 Ill. HRC Rep. 392 (1984), the Commission considered the issue as to what a complainant must do to oppose a practice prohibited by the Human Rights Act. There the Commission found that a complainant must make clear to her alleged retaliator that she is opposing a discriminatory practice either by calling it “discrimination” or some similar name, or by describing a situation in a way that indicates that the complainant believes that the situation is discriminatory. *Troyer*, 14 Ill. HRC Rep. at 412-413. Simply stating that she did not like the question and that she thought Harris should go away would not make clear to Harris or to anyone that Complainant was opposing a *discriminatory practice*. In addition, Complainant testified that she never made a formal complaint to anyone about Harris’ alleged comment. Tr. page 63. Thus, even if the sexual harassment incident as described by the Complainant did occur, Complainant would not be able to satisfy the “protest” element of a *prima facie* case of retaliation.

Finally, even assuming the “protest” element could be satisfied by the words allegedly spoken by Complainant to Harris, it is unreasonable to conclude that Harris discharged Complainant on January 30<sup>th</sup>, 2002 in retaliation for the protest. This is true for several reasons. First, the testimony presented at the hearing by Complainant’s co-workers in no way supports the proposition that she was terminated by Pat Harris or anyone on or after January 30<sup>th</sup>, 2002. Kristine Kuebler, Respondent’s general manager, testified that she was the one who told Complainant to go home on January 30<sup>th</sup>, 2002, as Complainant was physically and mentally unable to waitress that night due to her panic attack. Complainant herself testified that this panic attack rendered her incapable of working that night. Tr. page 50. Kuebler also testified that Pat Harris was not even present at the restaurant that evening. Tr. pages 144-145. Kuebler further testified that she did not terminate Complainant on January 30<sup>th</sup>, 2002, but rather considered her going on a leave of absence until she felt better. Tr. pages 146-147. Finally, Kuebler testified that Complainant was never terminated by anyone and that Complainant never bothered to call her or Karen Weinert after January 30<sup>th</sup>, 2002 regarding coming back to waitress at the restaurant. Tr. page 147.

Karen Weinert, Respondent’s head waitress who is in charge of the hiring and firing of wait staff, testified that it was her understanding that after Complainant’s January 30<sup>th</sup>, 2002 panic attack, Complainant was to come back to work whenever she felt mentally and physically ready. Tr. pages 173-174. Weinert testified that after January 30<sup>th</sup>, 2002, Complainant never contacted her about returning to the job. Tr. page 174.

Kellie Schmidt also testified that she understood Complainant to be on a leave of absence after January 30<sup>th</sup>, 2002 - - that Complainant was simply taking a “mental break” - - and that Complainant was to let Kristine Kuebler know when she was ready to come back to work. Tr. pages 123-124.

Throughout the entire public hearing transcript it is clear that Weinert was the person in charge of the hiring and firing of wait staff and that Complainant should have contacted either Weinert or Kuebler when she was ready to come back to work. Complainant never did. Pat Harris had no involvement in the hiring, firing or the scheduling of the wait staff for Respondent Pat's Pizza, including Complainant. Tr. pages 161, 164, 174 and 195. In addition, neither Kuebler or Weinert testified that they had any knowledge of the alleged mid-January 2002 sexual harassment incident involving Pat Harris.

Finally, the record cannot support termination of Complainant's employment by Pat Harris when indeed both Complainant and Harris testified that two days after Complainant's January 30<sup>th</sup>, 2002 panic attack Harris telephoned her to see if she was able to come in and work as a driver. Complainant, in fact, came to work on February 2<sup>nd</sup>, 2002 and did work as a delivery driver. Tr. page 199. Harris contacting Complainant to work as a driver is inconsistent with Complainant's contention that he discharged her from employment on January 30<sup>th</sup>, 2002 by yelling "get her out of here" in retaliation for her opposing sexual harassment.

### **CONCLUSION**

For all of the above reasons, I recommend that the instant Complaint and Charge of Discrimination of Marta Pregent against Pat's Pizza be dismissed with prejudice.

**ENTERED: December 14<sup>th</sup>, 2004**

**HUMAN RIGHTS COMMISSION**

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**MARIETTE LINDT  
ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION**

