This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 11/17/06

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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| IN THE MATTER OF: | ) | | |
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| **BARBARA J. TIPPS**, | ) | | |
| | ) | | |
| Complainant, | ) | | |
| | ) | | |
| and | ) | CHARGE NO(S): | 2004SN2715 |
| | ) | EEOC NO(S): | N/A |
| **JOHN HULL**, | ) | ALS NO(S): | S05-177 |
| | ) | | |
| Respondent. | ) | | |

# RECOMMENDED ORDER AND DECISION

This matter is ready for issuance of a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). On June 8, 2005, the Commission entered an Order, which set this matter for a public hearing on the issue of damages after finding that Respondent was in default. On November 3, 2005, a public hearing was conducted in Springfield, Illinois. Complainant and her attorney appeared at the public hearing. Respondent, however, did not appear at the public hearing. On November 14, 2005, an Order was entered which required the parties to submit written briefs on the issues of damages and directed Complainant to submit any petition seeking attorney fees and costs associated with the instant case. Neither party filed a post-hearing brief, and Complainant's counsel failed to file a petition seeking fees and costs.

## Contentions of the Parties

In the underlying Charge of Discrimination, Complainant asserts that she was the victim of sexual harassment when Respondent, a co-worker, essentially gave her a plastic vibrator/dildo as a gift. She also contended at the public hearing that she suffered lost wages and emotional damages, and that she incurred attorney's fees and costs associated with the prosecution of her claim.

## Findings of Fact

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

1. At some point prior to September 24, 2003, Complainant, a female, was employed as a bus driver for a company called Laidlaw.

2. On September 24, 2003, Respondent, a male co-worker of Complainant, announced on the company-wide radio system that he "had something" for Complainant, and that another co-worker Dan Motley had a gift from Hull to Complainant. Hull also instructed Motley to present Complainant with the gift and to come back the next day "with a smile."

3. Motley met Complainant at a gathering of about 12 workers at the end of Complainant's work shift on September 24, 2003. Complainant asked Motley to see the gift, and Motley told her that she would not want the gift. Complainant thereafter retrieved the gift from Motley's coat pocket and discovered that it was a plastic battery-powered vibrator/dildo.

4. At the time that Complainant opened the gift she became very embarrassed. Other co-workers who had gathered around Complainant began to laugh and tease her. Some of the co-workers asked if she was going to take the vibrator/dildo home.

5. After Complainant received the vibrator/dildo gift, she went into her supervisor's office to complain about the gift.

6. After Complainant's supervisor received Complainant's complaint, an investigation was conducted, which resulted in Respondent receiving a two-day suspension.

7. At some point in time, Complainant's supervisor indicated that if the gift had been given to her or to another female supervisor, Respondent would have been fired.

8. Respondent was terminated from Laidlaw approximately a month after the vibrator/dildo gift incident for conduct that was unrelated to the instant gift.

9. On January 26, 2004, Complainant was terminated by Laidlaw for alleged misconduct. Complainant thereafter filed a Charge of Discrimination against Laidlaw. The record is unclear regarding the status of the Complainant's Charge of Discrimination against Laidlaw.

10. On March 24, 2004, Complainant filed a Charge of Discrimination against Respondent, alleging that she was sexually harassed by Respondent. She also alleged in this Charge that she was terminated by her supervisor in retaliation for reporting the sexual harassment committed by Respondent.

11. On December 1, 2004, Complainant's allegations of termination/retaliation in her Charge of Discrimination against Respondent were administratively closed by the Department of Human Rights pursuant to Complainant's request.

12. On June 8, 2005, the Commission entered an Order finding Respondent in default and referred the matter to the Administrative Law Section for a hearing on damages.

## Conclusions of Law

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

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

3. As a consequence of the default order entered on June 8, 2005, all of the allegations contained in Complainant's Charge of Discrimination are deemed admitted.

4. A prevailing complainant may receive actual damages, including emotional distress arising out of her Human Rights Act claim.

## Discussion

On June 8, 2005, the Commission entered an Order finding Respondent to be in default due to his failure to file a verified response to the allegations in Complainant's Charge of Discrimination and his failure to file a timely Request for Review of the

Department's Notice of Default. The allegations of the Charge of Discrimination indicate that Respondent tendered to a co-worker a plastic vibrator/dildo to give to Complainant in front of her co-workers, and that Complainant found the gift to be grossly offensive and hurtful. As such, these admitted allegations adequately support Complainant's claim that she was a victim of sexual harassment under the Human Rights Act.

As to her damages, Complainant is seeking actual damages arising out of her emotional distress based on the amount of laughter and teasing she experienced by her co-workers who witnessed her opening the gift, as well as the false suggestion by some co-workers that she was romantically involved with Respondent. Complainant further testified that after she was terminated from Laidlaw, she obtained employment from another entity that shares a parking lot with Laidlaw, and that she continues to receive some teasing from Laidlaw employees about whether Complainant's supervisor retained the vibrator/dildo. Under these circumstances, where Complainant experienced no offensive sexual touching from this one-time occurrence, I find that Complainant is entitled to $5,000 in actual damages arising out of her emotional distress. See also, **Dinardo and P.C. Electronics**, ___ Ill. HRC Rep. ___, (2001SP0385, June 22, 2005), where the Commission awarded the complainant $4,000 in emotional damages for a one-time verbal incident of harassment that had emotional ramifications up to the date of the public hearing.

Complainant, though, also seeks from our Respondent $20,529.50 in total lost wages stemming from her termination by Laidlaw, that represent time spent while out of work, as well as the difference in pay that she is receiving from her current employer. However, the record shows that Respondent had been terminated months before Complainant's termination from Laidlaw, and her counsel readily conceded that our Respondent had no "say so" with respect to the decision by Laidlaw to terminate Complainant. Moreover, while the language in Complainant's original Charge of Discrimination talks about Complainant being terminated, it also asserts that the basis for

her termination was the retaliation committed by Laidlaw for her report of harassment. Indeed, it is significant to note that, pursuant to Complainant's own request, the Department administratively closed the retaliatory discharge aspect of Complainant's Charge against Respondent prior to seeking the instant default order.

Therefore, under these circumstances, and in the absence of any allegations or proof that Complainant was constructively discharged due to the Respondent's conduct, I find that Complainant has failed to causally link any lost wages to the decision by Laidlaw to terminate her as alleged and sworn in her original Charge of Discrimination. The same result applies to Complainant's request for "front" pay in the amount $162.95 per week (representing the difference in pay from Laidlaw and her current employer) for a period of five years not only because a portion of the request covers the same time period as Complainant's ill-fated request for back pay, but also because Complainant made no required showing as to how Respondent's conduct played any role on any inability to obtain future employment. See, **Belgrave and Southwick Properties, Inc.**, ___ Ill. HRC Rep. ___, (1994 CF 3287, July 16, 1998).

That leaves Complainant's request for attorney fees and costs as the final aspect of Complainant's damages claim. Unfortunately, though, the task of calculating said damages has been rendered more difficult due to the failure of Complainant's counsel to file a petition seeking said fees and costs as directed by the Order of November 15, 2005. Indeed, even if he had filed such a petition with an accompanying affidavit, I am unsure as to whether I could ever award fees in the amount he was seeking at the public hearing. Specifically, Complainant's counsel urged me to award Complainant $10,702.50 (roughly 72.1 hours), which represented half of the $21,405 in total attorney fees (i.e.,142.2 hours) billed to Complainant arising out of counsel's representation of Complainant in her causes of action against Respondent and Laidlaw. Counsel also sought as costs $12.08, representing half of $24.16 that his law firm accrued in computer-generated legal research.

But, aside from maybe filing a Charge of Discrimination, what did counsel do in this case? A review of the record indicates that the Department's attorney did all of the legwork in obtaining a default judgment and setting this matter for a damages hearing. True enough, counsel did appear in front of me at the public hearing, and thus, it only seems fair that I award Complainant one hour of attorney fees (at the $150 per hour rate counsel stated at the public hearing). Anything beyond that would constitute improper speculation in the absence of any fee petition and affidavit outlining what counsel actually spent on issues relating to the establishment of damages in this case. Same thing goes for Complainant's request for costs associated with computer-generated fees, where there is nothing in the record to establish whether said fees were typically charged to clients over and above the law firm's hourly fee.

## Recommendation

For all of the above reasons, I recommend that the Commission enter an Order which:

1. Directs Respondent to pay Complainant $5,000 in actual damages arising out of Complainant's emotional distress associated with the sexual harassment committed by Respondent.

2. Directs Respondent to pay Complainant $150 in attorney fees.

3. Denies Complainant's requests for back pay, front pay and costs.

4. Directs Respondent to cease and desist from sexual harassment.

HUMAN RIGHTS COMMISSION

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

ENTERED THE 27TH DAY OF SEPTEMBER, 2006