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

IN THE MATTER OF:	)	
	)	
JANA WEST,	)	
	)	
Complainant,	)	CHARGE NO: 2003SF3334
	)	EEOC NO: N/A
and	)	ALS NO: S04-229
	)	
BERT JACHINO,	)	
	)	
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.). On October 26, 2005, a public hearing was held at the Taylorville Correctional Center, in Taylorville, Illinois, where Respondent was serving an unspecified sentence for conduct unrelated to the allegations in the instant Complaint. Complainant appeared *pro se* at the public hearing, while Respondent was represented by counsel. Respondent has filed a post-hearing brief.

Contentions of the Parties

Complainant asserts that she was the victim of sexual harassment when Respondent, a manager at a convenience store where Complainant was a cashier, subjected her to a series of sexually offensive comments and physical contacts. At the public hearing, Respondent denied making any sexual remarks and maintained that any physical contacts were asexual in nature. Respondent also argues that, to the extent that there is any liability finding, he is entitled to a $22,500 offset in Complainant's damages based upon a settlement that she reached with the parties' employer, Qik 'N EZ.

Findings of Fact

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

1. In January of 2003, Complainant, a female, was hired as a cashier at a Qik 'N EZ gas and convenience store in Lincoln, Illinois. At the time of her hire, Respondent, Bert Jachino, a male, served as the manager of the store and was one of Complainant's supervisors.

2. Throughout her tenure at the Qik 'N EZ, Complainant typically worked an evening shift and spent only a half of an hour per shift with Respondent approximately five to six times a week.

3. Beginning in February of 2003 and continuing to April 26, 2003, Respondent on an almost a daily basis made a sexually offensive comment to Complainant and her co-workers. At one point, Respondent suggested that Complainant should provide him with sexual favors because "there is only one way to get a raise." Occasionally, Respondent also pointed to his crotch and told Complainant to "suck this" and/or "I have something for you to suck the stink out of."

4. Beginning in February of 2003 and continuing to April 26, 2003, Respondent played a "game" with his assistant manager, Ron Brawdy, a male, that was occasionally witnessed by Complainant. Typically, the game started with Respondent telling Brawdy: "Are we going to have to play the game?" and ended with Respondent coming up and grabbing Brawdy's breast. Brawdy never reciprocated by grabbing Respondent's breast. At times Brawdy would tell Respondent to quit it, and then Respondent would move on to another employee and do the same thing. About once every two weeks, Respondent would grab Brawdy's breast in front of customers, which made Brawdy uncomfortable.

5. In March of 2003, Respondent walked up behind Complainant, smacked her in her posterior with the store's money bags, told her he "couldn't help" himself, brushed her hair back, breathed in her ear and whispered "Oh, doesn't that work for you?" Complainant replied "no it does not." Respondent thereafter laughed at Complainant and left the store shortly after. Brawdy witnessed the incident, but did nothing about it.

6. On April 16, 2003, Complainant came into work and discovered that Respondent had opened up a cash register under her name twenty minutes prior to Complainant coming into work. Complainant became upset with Respondent and told him that she did not want to become responsible for any lost money that had been in the cash register. At some point during this conversation, Respondent asked Complainant: "Do you want to play a game?" Complainant responded: "No, I don't want to play a game." Respondent thereafter went up to Complainant, who was near Brawdy, and pinched her left breast. As Complainant walked away, Respondent went up to her and started to pull her shirt out of her pants. Complainant started to scream and told Respondent to keep his "damn hands" off of her.

7. On April 20, 2003, Complainant went to the local police station and requested that criminal charges be filed against Respondent arising out of the breast-pinching incident. Complainant also brought to the police station videotapes from the store in the hope of being able to show the police what Respondent had been doing to her. The police indicated to Complainant that they would investigate the matter.

8. Shortly after Complainant made her report to the police about Respondent's conduct, Respondent came into the store with his fiancé. After he performed an errand, Respondent put his arm around Complainant and whispered into her ear: "Just look at, see the donut man coming in?" Complainant responded: "Yeah", and Respondent replied: "Just think of all the cream you can suck out of him." Complainant then turned to Respondent's fiancé and told her that Respondent was "one sick motherfucker."

9. On April 28, 2003, Complainant telephoned Amy Chronister, who served as a Director of Human Resources for all of the Qik 'N EZ stores, and gave a detailed account of Respondent's conduct. Shortly after Complainant's telephone call, Chronister telephoned a subordinate, who drove to the Qik 'N EZ store where Complainant worked and interviewed at least two other female workers, who reported that they were aware of what they believed to

be harassment on the part of Respondent. Respondent was terminated by the end of the day.

10. For a two to three week period after Respondent was terminated, Complainant was scheduled for her normal work hours. However, at times during this period, Complainant was either unable to come into the store or unable to finish her shift because she was experiencing emotional distress as a result of Respondent's conduct.

11. Approximately two weeks after Respondent's termination, Linda Rivera, a customer at the Qik 'N' EZ and a friend of Respondent, came up to Complainant in the store, exposed one of her breasts on the counter, and said she "had something" for Complainant and her sexual harassment claim. Complainant became embarrassed, turned away and began to laugh because she felt that nothing could be done to a customer. Brawdy, who was standing nearby, was also stunned by the incident.

12. At all times pertinent to the instant Complaint, Rivera spent approximately $200 to $300 per week at the Qik 'N EZ store where Complainant worked.

13. At some point in May of 2003, Complainant telephoned Chronister and quit her job after telling Chronister that the stress of the harassment was too much for her.

14. Complainant remained unemployed for a four-month period after she quit her position at the Qik 'N EZ. During this time period Complainant experienced periods of frequent vomiting and sought counseling for her stress arising out of the sexual harassment committed by Respondent. Complainant's total out-of-pocket expenses included $274 for doctor visits and $600 for Paxil and Ativan that were prescribed for Complainant to combat her stress and anxiety. Complainant remained on these drugs for a six-month period.

15. Complainant experienced $15,000 in actual damages arising out of her emotional distress stemming from Respondent's sexual harassment.

16. At some point in time after Complainant left the Qik 'N EZ, criminal charges were filed against Respondent stemming from Complainant's allegations that Respondent

had pinched her breast. Respondent eventually pleaded guilty to these charges and received a sentence of probation for an unspecified length of time.

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. Complainant established a *prima facie* case of sexual harassment in that Complainant demonstrated by a preponderance of the evidence that Respondent's conduct of a sexual nature had the purpose and effect of substantially interfering with her work performance and created an intimidating, hostile and offensive working environment.

4. Respondent is not entitled to a set-off of damages in this case arising out of Complainant's prior settlement of her cause of action against her employer where Respondent failed to establish any apportionment of dollar amounts to the various elements of potential damages in Complainant's cause of action against her employer.

Discussion

Section 2-102(D) of the Human Rights Act (775 ILCS 5/2-102(D)) provides that it is a civil rights violation "[f]or any…employee…to engage in sexual harassment." Section 2-101(E) of the Human Rights Act (775 ILCS 5/2-101(E)) further defines sexual harassment as "any unwelcome sexual advances or requests for sexual favors or conduct of a sexual nature when [among other things]…(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 with assessing not only what was done in the workplace, but how it was done in relationship to the total working environment. (See,

Robinson v. Jewel Food Stores, 29 Ill. HRC Rep. 198, 204 (1986).) Ultimately, however, the threshold issue in any sexual harassment case is whether the instances of harassment alleged by the complainant rise to a level of hostility so as to be considered actionable conduct. (See, **Scott v. Sears, Roebuck & Co.**, 798 F.2d 210 (7th Cir. 1986).) According to the United States Supreme Court in **Harris v. Forklift Systems, Inc.**, 510 U.S. 17, 126 L.Ed. 2d 295, 114 S.Ct. 367, 370 (1993), a cause of action for sexual harassment arises, at least in a Title VII setting, "[w]hen the work-place is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." The Commission has used a similar standard for evaluating sexual harassment claims under the Human Rights Act. See, **Kauling-Schoen and Silhoutte American Health Spas**, ___ Ill. HRC Rep. ___, (1986SF0177, February 8, 1993).

In reviewing the record, I found that Complainant was believable as to all of her allegations against Respondent so as to establish a *prima facie* case of sexual harassment. In this regard, I find that Respondent's conduct had the purpose or effect of substantially interfering with Complainant's work environment and created an intimidating, hostile and offensive working environment given the almost daily barrage of sexual comments, Respondent's occasional references to his penis and oral sex, as well as his offensive physical contacts that included the smacking of her buttocks, the pinching of her breast, and the pulling up of her shirt from her pants. True enough, Respondent denied all of Complainant's allegations and explained that any physical touching was attributable to the small working area in the store. However, I did not take much stock in his testimony given the necessary admission contained in his guilty plea on criminal charges stemming from Complainant's allegations that he pinched her breast in the workplace, and given his judicial admission in paragraph 10 of his verified answer that he "sexually harassed Complainant in violation of Section 2-102(D) of the [Human Rights] Act." Evidently, Respondent's counsel

shared my concern in that counsel laudably pointed out after his client's testimony that his client had admitted in his verified answer that he subjected Complainant to an unwelcome sexual touching when he pinched Complainant's left breast.

As to her damages claim, Complainant indicated that Respondent's conduct had a negative effect on her emotional state, and that she began seeing a doctor during her employment at the Qik 'N EZ when she realized that her employer was not going to do anything about the harassment she was experiencing in the workplace. Specifically, Complainant asserted that she became depressed over Respondent's conduct towards her at work, and that her depression manifested itself into bouts of vomiting that lasted approximately three months after she had left her employment with the store. Moreover, Complainant testified that she had out-of–pockets costs of $274 for doctor fees, and spent $600 for drug prescriptions over a six-month period. She was, however, able to overcome her depression after a period of four months and began a new job. Under these circumstances, therefore, I find that Complainant is entitled: (1) $874, which represents a reimbursement for money spent on doctors and drug prescriptions; and (2) $15,000, which represents actual damages stemming from her emotional distress. See, also, **Feleccia and Sangamon County Sheriff's Department**, ___ Ill. HRC Rep. ___, (1999SF0713, January 3, 2006), where the Commission awarded $10,000 for emotional damages arising out of a two and a half-month campaign of unwelcome requests for sex and sexually related-gestures, as well as **York and Al-Par Liquors**, 37 Ill. HRC Rep. 265 (1988), where the Commission awarded $12,000 for emotional damages arising out of a nine-month period when the complainant experienced multiple physical contacts, a physical restraint, and a request for sex in exchange for money.

The real dispute as to Complainant's damages claim, though, concerns Respondent's contention that he is entitled to a setoff from any damages award in this case due to Complainant's prior $22,500 settlement of her Human Rights Act claim against Qik 'N EZ. In

this regard, I would note that the "double recovery" doctrine precludes a party from obtaining more than one full recovery per injury (see, **Kim v. Alvey, Inc.**, 322 Ill.App.3d 657, 749 N.E.2d 368, 255 Ill.Dec. 267 (1st Dist., 3rd Div. 2001), and it would seem at first blush that, at least with respect to Complainant's emotional damages stemming from Respondent's sexual harassment, Complainant's injuries would be the same regardless of whether she sought relief from Respondent or her employer, given Respondent's managerial/supervisory status at the Qik 'N EZ, as well as the provisions of section 2-102(D) of the Human Rights Act that make employers strictly liable for the sexual harassment committed by its managers/supervisors.[1] However, a careful review of the record indicates that Respondent is not entitled to any setoff.

Initially, it is significant to note that Respondent has not provided the Commission with the actual terms of the settlement that Complainant reached with the Qik 'N EZ, a defect that the court in **Dolan v. Gawlicki**, 256 Ill.App.3d 153, 628 N.E.2d 1188, 195 Ill.Dec. 724 (3rd Dist. 1994) found to be fatal in a similar request by defendant to obtain an offset of damages based upon plaintiff's receipt of insurance proceeds. In our case, the lack of knowledge with respect to the terms of the settlement, as well as any allocation of the settlement proceeds to the various elements of Complainant's damages claim, poses a problem here in that: (1) any potential claim by Complainant against Qik 'N EZ could have asserted a loss of wages that she experienced after left the store; and (2) it is questionable whether Complainant could have received any back wages in the instant claim where neither the Complaint nor Complainant asserted them and where Respondent had been removed from the store prior to her departure. In this regard, there is not a complete symmetry in terms of damages arising out of Complainant's claims against Respondent and her employer

[1] Chronister's observation, though, that she would not have paid Complainant any settlement money because she did not believe that her company had done "anything inappropriate" is all the more curious since it was the company's, as opposed to Complainant's, choice to place Respondent in a supervisory role in the store.

so as to make any reliable assumption that a settlement of one cause of action should be applied to a judgment on the other. Moreover, as the court noted in **Barkei v. Delnor Hospital**, 207 Ill.App.3d 255, 565 N.E.2d 708, 152 Ill.Dec. 175 (2nd Dist. 1990), even if I could say that the settlement proceeds in the Qik 'N EZ lawsuit covered only Complainant's claim for emotional distress arising out of Respondent's conduct, there is nothing in the record to indicate that the settlement terms were meant to fully compensate Complainant for all of her emotional damages. **Barkei**, 628 N.E.2d at 1190.

Too, Respondent's setoff demand further assumes that any claim against Qik 'N EZ was based solely on his conduct towards Complainant. However, Complainant testified that subsequent to Respondent's termination she experienced harassment/hostility from upper management after she had reported Respondent's conduct, and the record otherwise shows that a customer (Linda Rivera) came into the store after his termination and exposed her breast to Complainant and Brawdy, a Qik 'N EZ assistant manager. Yet, neither of these events can be directly attributable to Respondent, and Brawdy's failure to do anything about Rivera's breast-exposing conduct[2] would seem to be at odds with section 2-102(D) of the Human Rights Act, which specifically requires employers to take reasonably responsive "corrective measures" against known sexual harassment committed by non-employees.[3] That rule, of course, holds true even for well-paying customers such as Rivera who are committing the harassment.

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[2] Indeed, Brawdy only characterized Rivera's conduct as "Linda being Linda".

[3] Rivera testified that she exposed her breast to Complainant because: (1) she was making a purchase requiring some sort of identification to establish her age; and (2) she believed that an examination of her breast would establish that she was over 21 years old because "you don't get breasts this big and out of shape if you're under 21 years old." (Tr. at p. 74.) Given Brawdy's suggestion that Rivera flashed her breast on more than one occasion, I believe that Rivera probably did flash her breast on at least one occasion in an attempt to establish her age. However, I find Complainant more believable when she indicated that in May of 2003 Rivera flashed her breast in an attempt to provide Complainant with an actual example of what Rivera believed to be an act of sexual harassment.

Thus, for all of the above reasons, I find that Respondent is not entitled to any setoff based on Complainant's settlement with Qik 'N EZ given the lack of evidence as to the precise terms of the settlement, as well as the necessary speculation as to what the settlement covered. Finally, because Complainant represented herself in the instant proceedings, there will be no award for attorney fees, and Complainant has presented no claim for costs.

Recommendation

In view of the above, it is recommended that the Commission enter an Order which:

1. Sustains the Complaint alleging sexual harassment against Respondent.

2. Requires Respondent to reimburse Complainant $874 in medical and drug expenses.

3. Requires Respondent to pay to Complainant $15,000 in actual damages arising out of her emotional distress.

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 22nd DAY OF SEPTEMBER, 2006