This Recommended Order and Decision became the Order and Decision of the Illinois Human Rights Commission on 10/24/05

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	**) CHARGE NO. 2002CN0924**
CHERILYN BENNETT	**) EEOC NO: N/A**
Complainant,	**) ALS NO: 12287**
and	**)**
CHRISTOPHER CAPPUCCILLI	**)**
Respondent.	**)**
	) CHARGE NO. 2002CF0925
CHERILYN BENNETT	**) EEOC NO:21BA20042**
Complainant,	**) ALS NO: 12288**
and ,	**)**
BROWN & JOSEPH, LTD.,	**)Consolidated ALS No: 12288C**
Respondent.	**)**
	)

RECOMMENDED ORDER AND DECISION

The Department of Human Rights, (Department) filed two separate Complaints, on behalf of Complainant, alleging sexual harassment and retaliation discrimination against the Respondents. Both Complaints were consolidated on January 30, 2004, and a public hearing on the merits was held on June 1 and 2, 2005. This matter is ready for a decision.

CONTENTIONS OF THE PARTIES

Complainant contends that Respondents Christopher Cappuccilli and Brown & Joseph, Ltd. subjected her to sexual harassment discrimination and that Respondent Brown & Joseph, Ltd. subjected her to retaliation discrimination in violation of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq*. (Act). Respondents contend that Complainant cannot establish a *prima facie* case of sexual harassment or retaliation.

FINDINGS OF FACT

1. Complainant filed a Charge of Discrimination, Charge Number 2002CN0924, with the Illinois Department of Human Rights (Department) on October 24, 2001. The Department, on behalf of Complainant, filed a Complaint with the Illinois Human Rights Commission (Commission) alleging sexual harassment against

Christopher Cappuccilli, Respondent, on November 20, 2003. The case was designated ALS No. 12287.

2. Complainant filed a separate Charge of Discrimination, Number 2002CF0925, with the Department on October 24, 2001. The Department, on behalf of Complainant, filed a Complaint with the Commission alleging sexual harassment and retaliation discrimination against Brown & Joseph Ltd, Respondent, on November 20, 2003. The case was designated ALS No: 12288.
3. Both cases were consolidated under ALS No. 12288 by Order of the Chief Administrative Law Judge on January 30, 2004. (Both Complaints indicate the Charges as having been filed with the Department on October 24, *2002*; however, copies of the Charges in the record show both Charges as having been filed on October 24, *2001*).
4. Kevin Walsh (Walsh) is the president and owner of Respondent Company, Brown & Joseph Ltd., a collection outsourcing company (Brown & Joseph, or company). Walsh purchased the company from then owner Christine Brennan in April 1997.
5. In 1996, prior to purchasing Brown & Joseph, Walsh worked as a credit manager for Jays Foods Company (Jays) in Chicago, Illinois. Jays was a client of Brown & Joseph when Christine Brennan owned it.
6. Walsh met Respondent Christopher Cappuccilli (Cappuccilli) while Walsh worked in the capacity of credit manager for Jays Foods. Mike Brennan, of Brennan & Clark, and Cappuccilli, who also worked for Brennan & Clark at the time, had come to Walsh's office at Jays Foods to solicit Jays Foods' credit business in 1994. (Brennan & Clark is a company unrelated to Brown & Joseph and Brown & Joseph's owner at the time—Christine Brennan—had no connection to Brennan & Clark).

7. Cappuccilli began working as a sales representative for Brown & Joseph Ltd. in 1996, prior to Walsh's ownership of the company. Cappuccilli remained in that position after Walsh purchased the company in 1997. In 2001, Cappuccilli was one of 3-4 sales representatives for Brown & Joseph. Despite his official title as a sales representative, Cappuccilli had the authority to hire, to make salary offers, to sign checks and to speak as a spokesperson for Brown & Joseph — authority that the other sales representatives did not have.

8. In April 2001, Complainant responded to a Brown & Joseph Ltd. newspaper advertisement for a legal correspondent by sending in a resume. Complainant had been laid off from her previous job approximately two weeks prior to responding to the advertisement. Complainant was contacted by Brown & Joseph and asked to come in for an interview. Complainant went to the interview at the company's office and Cappuccilli interviewed Complainant for approximately 20 minutes. Cappuccilli told Complainant that he was a partner in the company and Cappuccilli was the only person who interviewed Complainant. Complainant told Cappuccilli that her previous salary had been $34,000.00 annually and Cappuccilli offered to match it. Complainant accepted the salary offer and Cappuccilli hired her immediately at a starting salary of $34,000.00 annually. Complainant was hired as a legal correspondent and she began work the following day on April 26, 2001. Complainant's workplace was at Brown & Joseph's office in Bensenville, Illinois. Complainant's job duties included contracting with outside attorneys to handle collection cases for Brown & Joseph. Complainant's prior experience in the collections industry included seven years in various aspects of collections, including working in the collections area at various law firms.

9. Complainant's understanding of her job duties was that Gail Rosen (Rosen) was to train her to assist Rosen and that Complainant was to fill in for Rosen on a temporary basis when Rosen went on maternity leave.
10. The following week after beginning her job with Brown & Joseph, Complainant approached Cappuccilli in his office and requested a pay advance of $50.00 so that she would have money for lunch and gas until she received her first paycheck. Cappuccilli indicated that he would look into the matter. Later that day, Cappuccilli came to Complainant's cubicle and put two one hundred dollar bills under a file on her desk. Complainant telephoned Cappuccilli at his office later that day to thank him and told him that she could not afford to have $200.00 deducted from her paycheck at one time. Cappuccilli told her not to worry about it. Cappuccilli never asked Complainant to repay the $200.00; Complainant never repaid the $200.00; nor was the money ever deducted from her paycheck.
11. When initially hired, Complainant reported directly to Walsh, until Terry Thorsen (Thorsen) was hired in June 2001 as Collections Operations Manager; then, Complainant reported to Thorsen. Complainant never reported directly to Cappuccilli.
12. Complainant spent her first week in a training session given by Rosen. (Complainant's co-workers referred to her as Lynn). During this time, Cappuccilli would stop by and ask Rosen how Complainant was doing and tell Complainant to let him know if she needed anything. At times, when Complainant was near the file cabinets retrieving or removing files, Cappuccilli would walk by her and compliment her on her clothing and her body.
13. Irene Pak (Pak) was a data entry clerk for Brown & Joseph in 2001. Pak reported directly to Jennifer Knowles and also worked with Cappuccilli. Pak's office was across a hall approximately five feet away from Complainant's cubicle.

Sometime between April 26, 2001 and May 31, 2001, Pak complained to Cappuccilli that she was bombarded with work and asked Cappuccilli if she could train Complainant to assist her. Cappuccilli agreed to allow Pak to train Complainant in her job duties so that Complainant could assist Pak when needed.

14. Sometime between April 26, 2001 and May 30, 2001, Cappuccilli telephoned Complainant at work and informed her that he wanted to meet with her outside of the office to discuss some things he was putting in place. On May 31, 2001, Cappuccilli telephoned Complainant at home and asked her to meet him at a restaurant called Yanni's Inn. Complainant had not given Cappuccilli her home telephone number at that time. Complainant met Cappuccilli at Yanni's Inn and both had a drink, which Cappuccilli paid for. Cappuccilli told Complainant that it was his intent to place Complainant in the position held by Rosen permanently and to increase her salary from $34,000.00 to $40,000.00 per year when she took on the new position. Cappuccilli told Complainant that he was aware that things were financially tough for her and offered to pay Complainant for working overtime hours in the claims department so that she could make extra money. Cappuccilli said that he was going to need some time to work out the details of Complainant's promotion because Walsh was not aware of his plans. After the discussion ended and as she and Cappuccilli were leaving the restaurant, Cappuccilli asked Complainant what she thought about him coming to her home to spend a little time with her. Complainant did not tell Cappuccilli "no" and Cappuccilli followed Complainant home from the restaurant in his car. Complainant had already arrived home when Cappuccilli rang her intercom system telephone. Complainant answered the telephone; Cappuccilli identified himself and told Complainant to buzz him in. Complainant pushed the buzzer,

which allowed Cappuccilli to enter the building and come up to Complainant's apartment. Complainant allowed Cappuccilli into her apartment. Cappuccilli started kissing her and touching her, bent her over the kitchen counter and had sexual intercourse with her. The two engaged in sex for approximately 10 minutes, then chatted for five minutes and Cappuccilli left.

15. On June 7, 2001, Complainant asked Walsh if she could speak with him and Walsh invited her into his office. Complainant told Walsh that Cappuccilli was a "flirt" and Walsh replied that Cappuccilli was "harmless." Complainant did not tell Walsh that she had engaged in sexual intercourse with Cappuccilli or that she had a sexual relationship with Cappuccilli.

16. At the end of the workday on June 7, 2001, Complainant and Cappuccilli attended a birthday party for an employee named Natalie that was held at a restaurant near the company. Many other company employees attended the party. Complainant stayed at the party for approximately 1 ½ hours, then left the party and went home. Fifteen to twenty minutes after she arrived home, Cappuccilli rang her intercom system telephone; Complainant pushed the buzzer, which allowed Cappuccilli to enter the building and come up to Complainant's apartment. Complainant allowed Cappuccilli into her apartment. When Cappuccilli arrived, Complainant was dressed in a robe because she had just taken a shower. Complainant and Cappuccilli engaged in sexual intercourse on a chair.

17. Complainant began receiving her $6,000.00 annual increase in pay on her paycheck the first week in July 2001.

18. Marybeth Sherer (Marybeth) is the sister of Patricia Genster, known as Patty (Genster). Genster was already an employee of Brown & Joseph in 1997 when Walsh bought the company. Genster's position was that of supervisor of the

Manpower outsourcing project. In that position, Genster managed the collectors that worked on the Manpower account. Genster referred Marybeth for a position with the company after Walsh became the owner. At some time between April 2001 and September 27, 2001, Marybeth worked as Complainant's assistant.

19. The third and final time Complainant and Cappuccilli had sexual intercourse was on July 19, 2001, when Cappuccilli arrived at Complainant's apartment unannounced and rang her intercom system telephone. Complainant buzzed him in and allowed him into her apartment. They both started physically touching one another and engaged in sexual intercourse. Afterward, they talked for approximately 10 minutes. Cappuccilli told Complainant that he wanted to take her out to dinner and they discussed a company picnic that was to take place sometime in August, around the time of Cappuccilli's birthday. This conversation took place in the bedroom while they were on the bed. During this conversation, Complainant told Cappuccilli that the husband of her assistant, Marybeth, did not like him. Cappuccilli appeared to be very surprised at this information.

20. On July 20, 2001, one day after her July 19, 2001 intimate encounter with Cappuccilli, Cappuccilli began acting "cold" toward and ignoring Complainant. Cappuccilli no longer complimented Complainant and did not return pleasantries to Complainant at work when Complainant greeted him with "good morning" or "good night."

21. Complainant sent Cappuccilli an electronic mail message (e-mail) on September 5, 2001. The content of the message was as follows:

> Hi, How long are you going to ignore me? If you really don't want to be bothered with me, then please let me know, I know you'll never respond via e-mail, but I'm willing to make it easy for you, leave a message at the new number ***-***-**** and I promise you I'll never bother you again. Although I was upset at what you did, I'm certainly not holding on to that. I just wasn't aware that I had to be cautious at what I say. What bothered me most was you

> didn't seem to care about what you did. The words "I apologize" was not forthcoming. The last time I saw you, I was lying in your arms, and you surprised me with a dinner invitation. That night you made me happy, I felt wonderful. It's been over a year since I've been out to dinner with the opposite sex. I was so looking forward to it. With that aside, I have to admit "I miss you." I'm beginning to accept the fact that I'll never see you again (in a personal way). It's been a long time. It would be greatly appreciated if you wouldn't allow me to just assume what you're thinking. Just tell me yourself. Thanks, L.B. *[Telephone number redacted].*

22. Prior to September 27, 2001, Marybeth was moved from her position as Complainant's assistant to a different job position. Genster was angry with Complainant because she believed Marybeth's transfer was as a result of Complainant having complained to Walsh and Thorsen about Marybeth's job performance while Marybeth worked as Complainant's assistant.

23. On September 27, 2001, Complainant arrived to work at 7:30 a.m., went to her office, got a cup of tea, went to Pak's desk and borrowed her knife, and returned to her desk to eat a muffin. Pak always kept a small steak knife in her office and Complainant came to Pak's office every day and borrowed the knife to use to cut her muffin, apple or other food item she had brought for breakfast. Complainant would return the knife to a drawer in Pak's office when she was finished using it.

24. After Complainant had cut her muffin, she laid the knife on her desk and sat at her desk with her back to the cubicle opening eating her muffin. Just then, Genster came into Complainant's office, began cursing at her and said, "I know you're fucking Chris." Complainant understood Genster's comment to mean that Genster knew Complainant and Cappuccilli were having a sexual relationship. Complainant stood up, cursed at Genster and ordered Genster out of her office. Genster did not immediately leave, but did leave when she finished arguing with Complainant. Genster did not observe a knife on Complainant's desk.

25. Allen Watson (Watson) is a collection manager for Brown & Joseph. Watson's office was approximately ten feet away from Complainant's cubicle. On the morning of September 27, 2001, Watson heard a loud verbal altercation and came out of his office to investigate. He observed Complainant and Genster in Complainant's cubicle in a verbal confrontation cursing at one another. Watson went back to his office.
26. Following the altercation with Genster, Complainant was crying and shaking and Pak came over to comfort her. Complainant saw Thorsen, went into his office, told him what had happened and asked him to call the police. Thorsen refused to call the police, told Complainant that he would handle the matter and asked her to return back to her desk. Complainant went back to her cubicle.
27. Thorsen went to Complainant's cubicle and observed a knife on her desk. Thorsen ordered Complainant at least twice to return the knife back to the company kitchen. Complainant repeatedly replied, "It doesn't go in the kitchen." Although Complainant did not take steps to return the knife to the kitchen, Thorsen walked away from Complainant's cubicle.
28. Thorsen assumed Complainant had obtained the knife from the workplace kitchen; however, in fact, Complainant had borrowed the knife from co-worker Pak. Although Complainant had repeatedly told Thorsen that the knife did not belong in the company kitchen, Complainant never told Thorsen that the knife belonged to Pak or that it was her intent to return the knife to Pak.
29. After Thorsen left Complainant's cubicle, he summoned Genster to his office to listen to her version of the incident. While Genster was in Thorsen's office, Archie Smith (Smith), a bill collector for Brown & Joseph, came to Watson's office and reported to him that Complainant had a knife. Smith's office was across the hall approximately 5-10 feet from Complainant's cubicle.

30. On Smith's information, Watson went to Thorsen's office and notified Thorsen that Complainant had a knife. Thorsen went to Complainant's cubicle and again asked her to return the knife to the kitchen. Complainant refused to take the knife to the kitchen.
31. Complainant put the knife in the waistband of her pants and took it back to Pak's office and placed it in the drawer. Then, while Genster was still in Thorsen's office, Complainant told the receptionist that she was going home to wait until Walsh or Cappuccilli arrived at the office. Complainant left the office and went home.
32. Thorsen did not see Complainant return the knife to Pak's office and assumed Complainant had left the workplace with the knife in her possession. Thorsen then telephoned the police and telephoned Walsh — who had just arrived in the company parking lot around 9:00 a.m. — and told Walsh about the altercation between Genster and Complainant and about the knife incident. Thorsen and Walsh then made the decision to terminate Complainant because of her refusal to return the knife to the kitchen.
33. Complainant telephoned Walsh and left a message for him that she had gone home and requested that he return her call as soon as he arrived to work. Walsh telephoned Complainant later that morning and informed her that he would investigate the matter and contact her later. Walsh asked Complainant if she thought things could be worked out and Complainant answered that she had not done anything wrong and that she was sure things could be worked out.
34. Walsh contacted Complainant again later that same day and informed her that things could not be worked out and discharged her. Walsh told Complainant that he would mail her final paychecks to her. Complainant asked if she could pick up her paychecks and Walsh told her that he could not let her back in the building,

but that he would meet her in the parking lot. Complainant met Walsh and Thorsen in the parking lot the following day, on September 28, 2001, and received her paychecks.

35. Prior to being discharged on September 27, 2001, Complainant had received no previous disciplinary measures from Brown & Joseph.
36. On September 29, 2001, Complainant sent an e-mail to Cappuccilli expressing her anger at him for allowing Walsh to terminate her.
37. On October 4, 2001, Complainant send an e-mail to Walsh entitled "The Cat's Out!" divulging her clandestine sexual relationship with Cappuccilli. Prior to the October 4, 2001 e-mail message to Walsh, Complainant had never told Walsh or any other Brown & Joseph employee that she had been having a sexual relationship with Cappuccilli or that she was uncomfortable or unwilling to have sex with Cappuccilli.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter in this cause.
2. Complainant is an "aggrieved party" in accordance with the Act at Section 5/1-103(B); Respondent Cappuccilli is an "employee" and Respondent Brown & Joseph is an "employer" in accordance with the Act at Section 5/2-101.
3. Respondent Cappuccilli was a "supervisor" or "managerial" employee for Respondent Brown & Joseph in April 2001 through September 2001. **Parkins v. Civil Contractors of Illinois,** 163 F.3d 1027, 1034**; Cunningham and Wal-Mart and Webb, __** Ill HRC Rep. __ (1992CF0496, April 16, 1998; 1990SN0336, 1990 SF0335, April 17, 1998)).

4. Complainant failed to establish a *prima facie* case of sexual harassment because she failed to prove that the sexual advances on the part of Respondent Cappuccilli were unwelcome.
5. Complainant failed to establish a *prima facie* case of retaliation because she failed to prove that the decision makers in her discharge action were aware of her complaints of sexual harassment or that there was a causal connection between her discharge and her sexual relationship with Cappuccilli.

DETERMINATION

Complainant has failed to prove by a preponderance of the evidence a *prima facie* case of sexual harassment or retaliation.

DISCUSSION

Was Cappuccilli a supervisor / manager, or merely a co-worker?

To determine Respondent's level of liability as to any sexual harassment perpetrated upon Complainant by Cappuccilli — an employee for Respondent Brown & Joseph — necessitates an inquiry to determine whether the perpetrator of the alleged sexually harassing conduct was a supervisory/ managerial employee. The record supports that Cappuccilli was indeed a supervisory/ managerial employee and thus, Respondent Company is automatically liable for any sexual harassing conduct by Cappuccilli perpetrated upon Complainant. **Board of Directors, Green Hills Country Club v. Illinois Human Rights Commission,** 162 Ill App.3d 216, 514 N.E.2d 1227 (5th Dist. 1987).

According to Section 2-102(D) of the Act, an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures; however, there is no safe harbor for the employer where managerial and supervisory employees commit sexual harassment

because managerial and supervisory employees act on behalf of the employer and, therefore, there is a certain identity of employer and supervisory/managerial employees, which means that the employer necessarily has notice of sexual harassment committed by these employees. **Cunningham and Wal-Mart and Webb,** *supra*.

The essence of managerial/supervisory status is the authority to affect the terms and conditions of an employee's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer or discipline an employee. **Parkins v. Civil Contractors of Illinois, 163 F.3d 1027, 1034; 78 Fair Empl. Prac. Cas. (BNA) 1329, 1334 (7th Cir. 1998**).

Respondent put forth much credible evidence in support of its argument that Cappuccilli was not in a supervisory or management position for the company. Watson, a collection manager for the company, testified that Cappuccilli was one of the top salespeople in the company, but that he was not a partner or manager; Smith, a commercial bill collector for the company, testified that Cappuccilli was a sales representative, not an owner, supervisor or manager; and Walsh, owner of the company, testified that Cappuccilli was a sales representative and who had no more authority than the other 3-4 sales representatives who worked for the company at the time.

However, other credible evidence contradicts this testimony. Complainant testified credibly that, during her interview, Cappuccilli represented himself to her as a partner of Respondent Company and engaged in conduct indicating that he held a position of authority over her that affected the terms and conditions of her employment. For instance, Complainant credibly testified that Cappuccilli, alone, interviewed and hired her; that Cappuccilli offered to match the salary of her previous job; that Cappuccilli made the decision to allow her to work overtime; and that Cappuccilli offered her a promotion with a substantial raise. Further, Complainant testified credibly that

Cappuccilli told her that Walsh was unaware of his plans to promote her and that he would need some time to work out the plans.

Reginald Pertiller (Pertiller), a collector at the company in 2001, who left in September 2004, testified that Cappuccilli was head salesman in 2001 and that Cappuccilli may have held the position of manager over the sales department at the time. Pak, who works for the company processing data entry of claims, testified that it was her understanding that Cappuccilli was part owner of the company and that she came to this belief because Cappuccilli was in charge of the collection agents and because she went to Cappuccilli with questions about claims.

While acknowledging that all of the witnesses were credible as to their respective understanding of Cappuccilli's role in the company, the most convincing evidence of Cappuccilli's manager status came from Walsh, whose testimony supports the inference that Cappuccilli held a management position at the operative time. Walsh admitted that Cappuccilli was a spokesperson for the company and that he had the authority to sign checks, authorities the other sales representatives did not have. This admission, taken along with Complainant's credible testimony of Cappuccilli's actions in her hiring and promotion processes, weighs in support of the conclusion that Cappuccilli — despite his official title as a mere sales representative— had the authority to interview, hire, promote, and make salary offers to other employees, essential powers of a managerial employee.

Sexual Harassment

Under Section 5/2-101(E) of the Act, sexual harassment is defined as "any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual,

or (3) such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. There are two types of sexual harassment, *quid pro quo* and hostile environment.

Quid Pro Quo Sexual Harassment

Quid Pro Quo sexual harassment is established when the complainant proves by a preponderance of the evidence that she was either penalized for her refusal to submit to unwelcome sexual conduct, or that a tangible job benefit was conditioned upon such submission. It is not necessary to prove there was a "meeting of the minds" on the consequences of refusal to submit to such conduct in order to state a claim of *quid pro quo* harassment. (See, **Huitt v. Market Street Hotel Corp., 62 Fair Empl. Prac. Cas. (BNA) 538, (D. Kan. 1993)**, where the court rejected employer's contention that a complainant must allege an express statement from the harasser linking consequences of the employee's refusal to a sexual advance in order to state a case of *quid pro quo* harassment).

Since it is unnecessary to show a "meeting of the minds," a complainant may prevail in one of two ways. A complainant may either prove that an express statement was made by the harasser linking consequences of the employee's refusal of a sexual advance, or make an indirect case by showing that the complainant rejected the harasser's advances and was penalized for such refusal.

Complainant alleged no direct communication from Cappuccilli linking any future employment consequences to her refusal to submit to his advances. Complainant also puts forth no evidence that she rejected Cappuccilli's advances. Other than Complainant's general assertion that she felt obligated to submit to Cappuccilli's advances in order to retain her position, there was no evidence presented to support that Cappuccilli or any Brown & Joseph decision maker actually linked Complainant's job,

salary or other benefits to her sexual relationship with Cappuccilli. Thus, Complainant fails to make a showing of *quid pro quo* sexual harassment.

Hostile Work Environment Sexual Harassment

Hostile work environment sexual harassment is established when a complainant proves by a preponderance of the evidence that her workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the complainant's work environment. **Green Hill Country Club v. Illinois Human Rights Comm'n,** *supra.*

There are three items of consideration in determining whether a hostile environment exists. First, it must be determined whether the alleged sexually harassing incidents occurred. Second, it must be determined whether a reasonable person would find that the conduct in question created an intimidating, hostile or offensive working environment. Finally, it must be determined whether the complainant actually considers the conduct in question "unwelcome." Under Commission case law, if the complainant did not find the behavior in question offensive, there is no sexual harassment, even if another person would have found the conduct objectionable. **Borling v. Wildwood, Industries**, __ Ill HRC Rep. __ (1988SF0355, January 6, 1995).

The facts here do not present a case of sexual harassment as defined under the Act in that the evidence does not support that the sexual advances by Cappuccilli toward Complainant were unwelcome. On the contrary, the facts support a circumstance in which there was a consensual sexual relationship between Complainant and Cappuccilli, that Cappuccilli ended the relationship, and that Complainant desired the relationship to continue.

The facts reveal that Cappuccilli made the sole decision to hire Complainant in April 2001. Cappuccilli soon found himself physically attracted to Complainant and pursued her affection by complimenting her, giving her money gifts, authorizing her to

work overtime to earn extra money, authorizing a substantial pay increase and authorizing a promotion for her. Although Cappuccilli initiated the intimate relationship between the two, the record supports that Complainant welcomed the attention and willingly entered into a sexual relationship with Cappuccilli. However, Complainant's initial participation in a romantic relationship with Cappuccilli is not necessarily fatal to her sexual harassment claim if the record shows she gave fair warning that she did not wish to continue the relationship. (See, **Gelbach and State of Illinois, Department of Corrections, Logan Correctional Center**, __ Ill HRC Rep. __ (1995SF0694, April 23, 1999)).

The facts here support the opposite. Complainant testified that she did not tell Cappuccilli "no" (Tr. p. 185, 15-16) when he first asked to spend some time with her when they both were leaving Yanni's Inn restaurant on May 31, 2001. Further, Complainant's testimony about the three sexual encounters she had with Cappuccilli at her home supports that she missed three opportunities to shun Cappuccilli's sexual advances simply by refusing to ring the intercom buzzer that allowed him entry into her apartment building.

Despite Complainant's contention that she endured Cappuccilli's sexual advances because she was in a desperate financial state and felt obligated to engage in a sexual relationship with Cappuccilli to protect her job, the record supports that Cappuccilli did nothing to make Complainant believe that her continued employment, her salary increase, or her promotion were conditioned on her sexual relationship with him. When Cappuccilli discontinued his pursuit of Complainant's affection by purposely ignoring her beginning on July 20, 2001, Complainant continued in her same position and continued to be paid her substantial $6,000.00 annual salary increase — a raise given to her by Cappuccilli after she had worked for the company for approximately two months. Moreover, Complainant's September 5, 2001 e-mail message to Cappuccilli

does not reveal a picture of sexual intimacy fueled by desperation. Complainant testified that Cappuccilli had not spoken to her and had essentially been ignoring her since July 20, 2001, approximately 46 days prior to her September 5, 2001 e-mail message to him. Complainant explains that she used the language in the September 5, 2001 e-mail to "butter" Cappuccilli up and to get a reaction from him because Cappuccilli's recent display of indifference toward her caused her to worry that her job was in jeopardy. However, this explanation does not justify the tone of the language in Complainant's e-mail message, as the message was limited to inquiring about the personal relationship between the two and made no reference whatsoever to Complainant's job or her job performance. The opening sentences in the message begin with the query, "How long are you going to ignore me? If you really don't want to be bothered with me, then please let me know." In one paragraph in the message, Complainant states, "I miss you. I'm beginning to accept the fact that I'll never see you again (in a personal way)", implying that, although Complainant expected to come into contact with Cappuccilli professionally at the workplace, she lamented that she would no longer see him outside of the workplace. In another paragraph Complainant declares, "The last time I saw you, I was lying in your arms, and you surprised me with a dinner invitation, That [sic] night you made me happy, I felt wonderful." This e-mail message, taken in its totality, paints the picture of a woman forlorn at being the recipient of rejection.

Likewise, in a different e-mail message from Complainant to Walsh, Complainant praises Cappuccilli's sexual prowess. In this October 4, 2001 e-mail message, Complainant divulges her clandestine intimate relationship with Cappuccilli to Walsh. Complainant references specific sexual conduct she and Cappuccilli had engaged in, and compliments Cappuccilli's sexual expertise. Again, Complainant uses language here consistent with that describing a consensual relationship; for example, Complainant states that she and Cappuccilli "have been involved up until recently when we got into a

riff." Although other language in this same e-mail message accuses Cappuccilli of manipulating Complainant into a sexual relationship as a basis for her continued employment, instead of cries of protest directed toward the cruel oppression she felt as an employee forced into sex by a manager as a condition of her continued employment, the language in this communication expresses the vengeance of a woman scorned by her lover; for instance, Complainant accuses Cappuccilli of treating her like a "discarded slut" and threatens to e-mail other employees to embarrass Respondent Company.

The facts of Complainant's and Cappuccilli's intimate relationship do not support that Cappuccilli's initial advances were unwelcome or that Complainant gave any indication that she did not wish to continue the relationship. Thus, Complainant has failed to make a *prima facie* showing of sexual harassment by Respondent Cappuccilli and Respondent Brown & Joseph.

Although I heard from Cappuccilli as to the nature of the relationship between him and Complainant, as well as to other matters in this case, I found Cappuccilli to be a totally unbelievable witness. Due to the potential significance of his testimony, I carefully observed his demeanor and listened attentively to his responses. During his testimony, Cappuccilli's answers were generally evasive, argumentative, sarcastic, not forthcoming, and — ofttimes — rambling and ambiguous. He repeatedly feigned that he did not understand even simple questions and appeared to feign that he did not remember dates and occurrences of material events, such as the dates and circumstances of sexual encounters with Complainant. Cappuccilli admitted to having had a sexual relationship with Complainant, however, much of Cappuccilli's recount of the circumstances of his and Complainant's business and personal encounters was contrary to Complainant's; for example, Cappuccilli testified that Complainant initiated the intimate relationship with him by coming into his office, closing the door and asking him for a date; he denied that he knew anything about Complainant's pay increase; he could

not remember any of the specific dates he had sexual intercourse with Complainant; and he denied he gave her money.

As to facts concerning the nature of Complainant and Cappuccilli's intimate relationship, I find Complainant to be a more credible witness, as much of her testimony was detailed and emphatic and she had little trouble recalling specific dates, times and circumstances of her intimate encounters with Cappuccilli and the behaviors that led up to them. I find Cappuccilli's reticence to be forthcoming upon questioning to negatively affect his credibility and I did not consider his testimony as to any issue in this decision.

Retaliation

Absent direct evidence of retaliation, Complainant must establish a *prima facie* case of retaliation in accordance with the analysis set out in **McDonnell Douglas Corp. v. Green** 411 U.S. 792 (1973). Complainant must demonstrate that (1) she engaged in a protected activity that was known by the respondent; (2) the respondent subsequently took some adverse action against the complainant; and (3) there is a causal connection between the protected activity and the disadvantageous employment action. **Pace and State Of Illinois, Dept. of Transportation**, __Ill HRC Rep. __ (1989SF0588, February 27, 1995). Once a *prima facie* case is established, Respondent must articulate — not prove — a lawful reason for its adverse action. Once this is done, Complainant must prove by a preponderance of the evidence that the articulated reason is merely a pretext for unlawful discrimination. **Texas Dept. Of Community Affairs v. Burdine**, 450 U.S. 248, (1981). This method of proof has been adopted by the Commission and approved for use by the Illinois Supreme Court in **Zaderaka v. Illinois Human Rights Comm'n**, 131 Ill. 2d 172, 545 N.E.2d 684, 137 Ill.Dec 31 (1989).

Complainant's *prima facie* case fails easily as to the first element. In her Complaint, Complainant alleges that she complained to Walsh on June 7, 2001 that Cappuccilli had been sexually harassing her. However, Complainant admitted on cross

examination that she never reported to Walsh that Cappuccilli had been making sexual advances to her or that Cappuccilli and she had had sexual intercourse. Complainant admitted that she merely reported to Walsh on June 7, 2001 that Cappuccilli was a "flirt."

Indeed, the language in Complainant's e-mail message to Walsh dated October 4, 2001, several days after her discharge, and entitled "The Cat's Out," conveys that Complainant is revealing her intimate relationship with Cappuccilli to Walsh for the first time. Further, Complainant testified that, at the time Genster confronted her on September 27, 2001, Genster told her "I know you're fucking Chris." Complainant said that she was surprised that Genster knew about her intimate relationship with Cappuccilli because Complainant believed that only she and Cappuccilli were aware of the relationship. Complainant testified, (Tr. pg 225, 22; pg 226 1-2):

> First of all, just Chris [Cappuccilli] and myself were in this sexual situation, so I knew about it and he knew about it. For her to know about it, it came from him. She told me I know you're fucking Chris, and I believe that just angered her. She was very upset about that.

Complainant's testimony on this issue belies her allegation in the Complaint that she complained of sexual harassment by Cappuccilli to Walsh on June 7, 2001. The facts do not support that Complainant complained to or told anyone in the company about any sexual harassment or sexual conduct by Cappuccilli toward her. Moreover, as previously analyzed in this decision, Complainant admitted that she never told Cappuccilli "no" or engaged in any conduct to reject his sexual advances or to indicate to him that his sexual advances were unwelcome.

Notwithstanding that Complainant cannot make out a *prima facie* case of retaliation, even if Complainant could, Complainant cannot prove that Respondent's articulated reason for discharging her was pretextual in that the record is void of any evidence that Cappuccilli was involved in the decision to discharge Complainant. The record shows that Cappuccilli broke off the relationship with Complainant on July 20,

2001. Although Cappuccilli did not directly communicate his intent to break off his relationship with Complainant, Cappuccilli stopped speaking to Complainant and began ignoring her. Since that time, Complainant continued to work and earn her salary increase without disruption, and without any contact whatsoever from Cappuccilli. Only hours following the altercation with Genster — which took place over two months after Cappuccilli had broken off the sexual relationship with Complainant — Complainant was discharged by Walsh on advice he received from Thorsen concerning the Genster confrontation and Complainant's subsequent refusal to take the knife to the kitchen on Thorsen's orders. Nothing in the record supports any indication that either Thorsen or Walsh was aware of Complainant's sexual relationship with Cappuccilli at the time of her discharge.

Further, there is support in the record that Thorsen was genuinely concerned with Complainant's custody of the knife. Thorsen initially refused to contact the police on Complainant's suggestion immediately following the Genster incident; however, Thorsen reversed that decision after Complainant repeatedly refused his order to return the knife to the company kitchen. Thorsen then contacted the police and made a police report when they arrived.

The close proximity of time between the Genster confrontation and Complainant's discharge and the lack of evidence tying the discharge decision to any input whatsoever from Cappuccilli, support the reasonable inference that Complainant was discharged because of her refusal to obey Thorsen's order to take the knife to the kitchen. Thus, Complainant's retaliation showing fails.

RECOMMENDATION

For the foregoing reasons, it is recommended that the Complaint and the underlying Charge of Discrimination be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

August 31, 2005

SABRINA M. PATCH
Administrative Law Judge
Administrative Law Section