



**STATE OF ILLINOIS**

**HUMAN RIGHTS COMMISSION**

IN THE MATTER OF )  
 )  
 Dyana Rutkowski, )  
 Complainant )  
 and )  
 )  
 Temperature Equipment Corp., )  
 Respondent )

Charge No.: 2002CF3415  
 EEOC No.: 21BA 30308  
 ALS No.: 04-023

**RECOMMENDED ORDER AND DECISION**

This matter comes before me pursuant to an order of default entered against Respondent on March 24, 2004 following the filing of the Department of Human Rights Petition for Hearing to Determine Complainant's Damages on February 5, 2004. A public hearing on damages was conducted on May 26, 2004 with only Complainant and her attorney participating. Although given the opportunity to do so through notices duly mailed and apparently received, Respondent did not appear at the public hearing and it did not submit any written brief after the transcript became available. No petition for attorney's fees and costs on behalf of Complainant was submitted on or before July 30, 2004. Therefore, this matter is now ready for disposition.

**Statement of the Case**

In her perfected Charge No. 2002CF3415 filed on January 8, 2003, Complainant alleged that she was sexually harassed by Respondent and its branch manager, Shawn Spain, and that she was discharged from her

employment in retaliation for complaining to Respondent's Vice-President about this harassment. Certified mail return receipts, signed by a representative of Respondent, for both the unperfected and perfected copies of the Charge are found in the Department's file. The address shown on these return receipts is the same address to which the Commission has sent all of the orders and notices issued since this matter was received for the purpose of scheduling a damages only public hearing. To date, Respondent has not submitted a change of address or other notice concerning its whereabouts to either the Department or the Commission.

After receiving the perfected charge, Respondent did not file a verified response within 60 days as required by the Human Rights Act. Respondent's in-house counsel promised on three occasions after the expiration of the initial 60-day period to submit the verified response, but did not do so. Finally, on October 7, 2003, the Department issued its Notice of Default against Respondent. Respondent did not file a timely request for review of the Notice of Default and on February 2, 2004, the Chief Legal Counsel of the Department entered a default order against Respondent. The Petition for a damages-only public hearing and the Commission's order then followed as indicated above.

### **Findings of Fact**

1. Complainant Dyana Rutkowski filed her perfected Charge No. 2002CF3415 with the Illinois Department of Human Rights on January 8, 2003 alleging that Respondent Temperature Equipment Corporation subjected her to sexual harassment during her

employment and subsequently discharged her in retaliation for her complaint to a corporate executive about the harassment.

2. Although it was duly served with the Charge, Respondent did not file a verified response to it. The time period for doing so expired on or about April 24, 2003 and Respondent's in-house counsel represented on June 2, 2003, July 17, 2003 and July 21, 2003 that a verified response was forthcoming. No verified response was ever filed.
3. On August 5, 2003, the Department sent Respondent its Notice to Show Cause why a Notice of Default should not be issued. There was no response to this Notice. Then, on October 7, 2003, a Notice of Default was sent to Respondent that included the opportunity to file a request for review of the notice within 30 days after its receipt. When no request for review was received, the Department's Chief Legal Counsel issued an order of default on February 2, 2004.
4. Subsequently, the Department's Petition for a Public Hearing on Damages was filed with the Commission on or about February 5, 2004. The Commission's Order of Default requesting that the Administrative Law Section schedule such a hearing was then issued on March 24, 2004. An order was entered setting a public hearing on the issue of damages for May 26, 2004 at 10:00 a.m. at the Commission's office in Chicago.

5. Only Complainant and her counsel appeared for the public hearing on May 26, 2004. Respondent did not appear at or participate in the public hearing or in the briefing of this matter following the public hearing.
6. Complainant is seeking reinstatement to employment with Respondent.
7. Complainant is entitled to an award of \$70,624.31 as back pay and \$653.85 per week until such time she is reinstated to her employment with Respondent (or until the parties otherwise mutually agree to resolve the issue of reinstatement).
8. Complainant is entitled to an award of \$60,000.00 for the emotional distress caused by the unlawful harassment and retaliation of Respondent.
9. In that no petition for attorney's fees or costs was submitted, there will be no award for these elements of damages included here.

### **Conclusions of Law**

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined by the Illinois Human Rights Act, 775 ILCS 5/103(B) and 5/2-101(B).
2. The Commission has jurisdiction over the parties and the subject matter of this action.
3. In accord with the default order entered on March 24, 2004, Respondent is liable for a violation of the provisions of the Illinois

Human Rights Act that prohibit sexual harassment and retaliation as alleged in this Charge.

4. Based on the default of Respondent and its failure to effectively dispute or oppose any of the requests made by Complainant with regard to an award for back pay, reinstatement and emotional distress, Complainant is entitled to an award for each of these elements of loss in order to be made whole. The details of the award are listed at the end of this recommended order and decision, and are incorporated in this finding.

### **Discussion**

#### *A. Default*

As noted above, an order of default was entered by the Commission on March 24, 2004. Respondent has not come forward regarding that order at any time subsequent to the entry of the order. There is no reason to review the entry of the default and the decision of the Commission should remain in place.

#### *B. Damages*

**Back Pay** -- The first element of damages to be considered is Complainant's request for back pay. Complainant's charge and her testimony at the public hearing make it clear that the discharge flowed from senior management's support for the errant supervisor, Shawn Spain. Complainant testified that she was told by Respondent's Vice-President, Todd Allen, that if she did not like it there, she should find employment elsewhere and, further, she was

fired. Charge 2002CF3415; Tr. 22. Her last date of paid employment with Respondent was February 27, 2002.

Through the date of the public hearing, Complainant was only able to find brief stints of part-time employment. In 2003 she earned \$1,709.00 and in 2004, she earned \$1,500.00. She was unemployed at the time of the public hearing. Tr. 26-27. These amounts will be set off against the gross total of back pay computed below. Complainant also noted that she earned some money during her period of unemployment from preparing tax returns. Tr. 31. However, she also did this tax work during the time she was employed by Respondent and her income from this activity will not be subject to deduction from her back pay award. See Irma Langston and Chicago State University/Board of Governors of State Colleges and Universities, \_\_\_\_\_ Ill. H.R.C. Rep. \_\_\_\_\_ (Charge No. 1988CF1078, June 29, 1992).

Complainant testified that for 2002, she was likely to earn \$32,000.00 consistent with the hourly increases and bonuses she earned in the prior years while employed by Respondent. She expected to earn an additional \$1,000.00 in each subsequent year based on the usual practice of the company, *i.e.*, \$33,000.00 in 2003, \$34,000.00 in 2004 and \$35,000.00 in 2005. Therefore, in the first two months of 2002, she earned \$5,333.34, leaving lost back pay for 2002 in the amount of \$26,666.66. Her lost wages from Respondent in 2003 are \$33,000.00 less the \$1,709.00 she earned at part-time employment, a net amount of \$31,291.00. Then, for the five-month period of 2004 up to the date of the public hearing, Complainant's lost wages from Respondent were \$14,166.65,

less \$1,500.00, a total of \$12,666.65. Thus, her total back pay from the date of discharge through the date of the public hearing is \$70,624.31.

While the calculation of back pay is always somewhat speculative, the task is made even more difficult when, as in this case, a respondent has deliberately failed to provide information through the discovery process or participation in the public hearing that would make the task more direct. It is the Commission's general principle that any ambiguity in this process be resolved against the respondent. Clark v. Human Rights Comm'n, 141 Ill.App.3d 178, 183, 490 N.E.2d 29, 95 Ill.Dec. 556 (1<sup>st</sup> Dist. 1986). This principle must be rigorously followed when a respondent has not been available to provide information that could possibly contribute to a more informed calculation of back pay. Therefore, it is recommended that Complainant be awarded back pay in the amount of **\$70,624.31**.

**Reinstatement** -- During the public hearing, Complainant requested reinstatement to the position from which she was discharged. Tr. 30. The Commission has the authority to make a complainant whole through an order that he or she be reinstated to the position that was lost due to the unlawful discrimination of a respondent employer. It is recommended that this be the order in this case. Until Complainant is reinstated (or the parties otherwise agree on how to resolve her right to reinstatement), she is entitled to receive compensation at the rate of **\$653.85 per week** beginning on May 28, 2004 through the date of reinstatement.

**Emotional Distress** -- Complainant also requests compensation for the emotional distress she suffered due to the sexual harassment and retaliation of Respondent. It has been long established that the Commission's statutory authority to award a prevailing complainant his or her actual damages includes the ability to award monetary damages for emotional distress. Village of Bellwood v. Illinois Human Rights Comm'n, 184 Ill.App.3d 339, 355, 541 N.E.2d 1248, 133 Ill.Dec. 810 (1<sup>st</sup> Dist. 1989).

Here Complainant testified at the public hearing to the pain and stress she experienced due to the sexual harassment of Shawn Spain and the retaliatory action of Todd Allen in discharging her. She requested \$150,000.00 as compensation for the emotional distress caused by these two individuals. Tr. 38. This amount is twice as high as any award for emotional distress approved by the Commission to date, and even though Respondent has not responded in any way to this request, this amount cannot be recommended to the Commission when compared to other awards given in default cases where the conduct described was more egregious than that described here. In the case of Annelies B. Westley and C.L. Management, Inc., \_\_\_\_\_ Ill. H.R.C. Rep. \_\_\_\_\_ (Charge No. 1997CF2799, January 2, 2001), also a default case in which I presented the recommended order and decision to the Commission, the complainant testified to a course of harassing conduct that included aggressive physical contact against the complainant by the perpetrator and a brief period during which the same perpetrator refused to allow the complainant to escape from the work place. The recommended award for emotional distress in that case was \$75,000.00. Using

that case as a comparative, but also recognizing that the Commission has increased its emotional distress awards in general over the course of the last five years, I recommend that this Complainant be awarded **\$60,000.00** for her emotional distress in this case.

**Attorney's Fees and Costs** -- Complainant's counsel declined to submit a petition for attorney's fees and costs in this matter. Therefore, no recommendation for such fees and costs will be included with this ROD.

\* \* \*

Other elements of the award, as permitted by the cited section of the Act and the Commission's procedural rules, or otherwise not requiring additional analysis, are specified in the recommendation summary below.

### **Recommendation**

It is recommended that the default entered against Respondent be affirmed, that Respondent accordingly be found liable for a violation of the Human Rights Act as alleged in the complaint, and that Complainant be awarded the following relief:

- A. That Respondent pay Complainant back pay in the amount of \$70,624.31;
- B. That Complainant be reinstated to employment with Respondent in a position and at a salary commensurate with that she would currently hold if the discharge of February 27, 2002 did not occur. Further, all seniority and other benefits are to be restored to Complainant as if she never left the employ of Respondent, with the

cost of all such adjustments to be borne by Respondent. Finally, from May 27, 2004 through the effective date of her reinstatement, Complainant shall receive compensation at the rate of \$653.85 per week (any employment income received during the prescribed period from any source other than income tax preparation, a part-time occupation pursued by Complainant during her previous employment with Respondent, shall be deducted from the net amount awarded under this paragraph);

- C. That Respondent pay Complainant interest on all elements of this award contemplated by Section 8A-104(J) of the Human Rights Act (735 ILCS 5/8A-104(J)) and calculated as provided in Section 5300.1145 of the Commission's Procedural Rules, to accrue until payment in full is made by Respondent;
- D. That Respondent pay to Complainant \$60,000.00 for emotional distress;
- E. That any public contract currently held by Respondent be terminated forthwith and that Respondent be barred from participating in any public contract for three years in accord with Sections 8-109(A)(1) and (2) of the Human Rights Act. 775 ILCS 5/8-109(A)(1) and (2).
- F. That Respondent cease and desist from any discriminatory actions with regard to any of its employees and that Respondent, its managers, supervisors and employees (including, but not limited to

Shawn Spain and Todd Allen) be referred to the Department of Human Rights Training Institute (or any similar program specified by the Department) to receive such training as is necessary to prevent future civil rights violations, with all expenses for such training to be borne by Respondent;

- G. That Complainant's personnel file or any other file kept by Respondent concerning Complainant be purged of any reference to this charge and litigation; and,
- H. If it is determined that Respondent is no longer in business under the name shown in the caption of this case, but is functioning through a successor business organization or through one or more of its principals personally, all elements of this award are understood to be entered against any such successor or individual as otherwise defined by the precedents of the Commission or other applicable law.

HUMAN RIGHTS COMMISSION

ENTERED:

October 20, 2005

BY: \_\_\_\_\_  
DAVID J. BRENT  
ADMINISTRATIVE LAW JUDGE  
ADMINISTRATIVE LAW SECTION