

***Comm'n on Human Rights ex rel. Martinez v.
Joseph "J.P." Musso Home Improvement & Joseph Musso***

OATH Index No. 2167/14 (Feb. 27, 2015)

Respondents engaged in employment discrimination against the complainant by sexually harassing her and firing her in retaliation for opposing discrimination. Compensatory damages of \$17,020 plus interest for lost wages and \$10,000 for mental anguish, and a civil penalty of \$10,000 recommended.

**NEW YORK CITY OFFICE OF
ADMINISTRATIVE TRIALS AND HEARINGS**

In the Matter of
COMMISSION ON HUMAN RIGHTS

EX REL.

VALERIE MARTINEZ

Petitioner

- against -

**JOSEPH "J.P." MUSSO HOME IMPROVEMENT
& JOSEPH MUSSO**

Respondents

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

Petitioners, the New York City Commission on Human Rights, brought this action on behalf of complainant Valerie Martinez alleging that respondents, Joseph "J.P." Musso Home Improvement ("Company") and Joseph Musso ("Mr. Musso") violated Sections 8-107(1)(a) and 8-107(7) of the New York City Administrative Code ("Human Rights Law") by sexually harassing the complainant and retaliating against her by firing her when she opposed such discrimination (Pet. Ex. 1). Respondents did not file an answer (Tr. 8).

Respondents did not appear for a settlement conference on June 2, 2014. A trial, scheduled for August 12, 2014, was adjourned at petitioner's request to October 20, 2014, to accommodate the complainant's schedule. Respondents did not appear on October 20, 2014, and the matter was adjourned to November 25, 2014, at petitioner's request, to re-serve the charges and notice of trial (Tr. 4).

On November 25, 2014, respondents again failed to appear. After petitioner showed that it properly served the complaint and notice of trial, I found respondents in default and the trial continued in respondents' absence (Tr. 5-9; Pet. Exs. 1a, 4a, 5a, 9a). *See* 48 RCNY §§ 1-28(a), 2-27(a) (Lexis 2014). At the hearing, the complainant's allegations were deemed admitted (Tr. 13). *See* Admin. Code § 8-111(c) ("Any allegation in the complaint not specifically denied or explained shall be deemed admitted and shall be so found by the commission unless good cause to the contrary is shown"); 47 RCNY § 1-14(b) (same) (Lexis 2014). Petitioner also relied on documentary evidence and the testimony of the complainant and Natalie Bryan. Following receipt of petitioner's post-trial brief, the record was closed on February 6, 2015.

For the reasons below, I find that respondents discriminated against the complainant based on her gender and retaliated against her when she complained about discrimination, and recommend compensatory damages of \$17,020 plus interest for lost wages, \$10,000 for mental anguish and, and a civil penalty of \$10,000.

ANALYSIS

The facts are undisputed. Mr. Musso is the owner of the Company, a home improvement contractor located in Queens (Pet. Ex. 1). In July 2013, Mr. Musso hired the complainant through Goodwill Industries (Tr. 31; Pet. Ex. 1). Mr. Musso told Goodwill Industries that the Company was seeking a worker to clean up at construction sites (Pet. Ex. 1). During the interview, which took place in Mr. Musso's truck, he told the complainant that she would be cleaning construction sites and also babysitting on the side (Tr. 17).

On the complainant's first day of work, Mr. Musso took her to his home where she babysat for his daughter and two friends (Tr. 17-18). The next day, the complainant worked at a construction site, lifting equipment and putting it in a truck (Tr. 18). After her fourth day at work, Mr. Musso invited the complainant and their respective children out to eat and for a boat ride (Tr. 19-20). During the outing, Mr. Musso told the complainant that, if they went out more, he would buy her clothes from Victoria's Secret (Tr. 21). Before dropping the complainant and her children off at a bus stop, Mr. Musso commented on the complainant's weight and attempted to touch her waist, but she put her arms in front of her to stop him (Tr. 19-21).

On August 2, 2013, the complainant was off-duty and she met Mr. Musso to pick up her pay (Tr. 22). Instead of the jeans that she normally wore to work, the complainant wore a pair of

tights, a tank-top, and a sweater (Tr. 25). After the complainant received her pay and left, Mr. Musso sent her the following text message, “Why don’t you look that good when you come to work?” The complainant answered via text, “That is inappropriate. Let’s keep this professional.” In a reply text, Mr. Musso wrote, “OK, you’re fired” (Tr. 22-24; Pet. Ex. 11).

The complainant sent a text message to Mr. Musso asking whether he was serious about firing her and whether she should report to work the next day. Mr. Musso replied via a text message, “I never needed u 2 work. I just made work 4 u. If u call what u were getting paid 4 work” (Pet. Ex. 11). As the exchange of text messages continued, the complainant assured Mr. Musso that she was a hard worker and she added, “I thought you would have understood my having to let you know that I was uncomfortable” (Pet. Ex. 11). He replied, “Now u don’t have 2 worry about being uncomfortable anymore” (Pet. Ex. 11).

I fully credited the complainant’s undisputed testimony. She supported her detailed account with photos of the text messages that she exchanged with Mr. Musso (Pet. Ex. 11). Her testimony was corroborated by the director of Goodwill Industries’ Jobs Plus Workforce program, Ms. Bryan, who testified that her organization maintained a job bank and she helped the complainant find work with Mr. Musso’s Company (Tr. 30-31). According to Ms. Bryan, she spoke with the complainant about a week after Mr. Musso hired her (Tr. 34). After seeing the text messages, Ms. Bryan referred the complainant to another Goodwill Industries worker to assist in filing a complaint with the Commission (Tr. 34).

Section 8-107(a) of the City’s Human Rights Law prohibits discrimination in the terms, conditions, or privileges of employment based on gender. To prevail, petitioner must prove by a preponderance of credible evidence that the complainant “has been treated less well than other employees because of her gender.” *Williams v. N.Y.C. Housing Auth.*, 61 A.D.3d 62, 66, 77-78 (1st Dep’t 2009) (rejecting federal “severe or pervasive” test for sexual harassment claims and emphasizing that the City’s Human Rights Law requires “an independent liberal construction analysis” to be undertaken in all civil rights cases, which is broader than comparable state and federal laws); *see also Mihalik v. Credit Agricole Cheuvreuz N. Am. Inc.*, 715 F.3d 102, 110 (2d Cir. 2013) (adopting *Williams* standard for sexual harassment claims under the City’s Human Rights Law).

Petitioner proved that respondent was treated less well because of her gender. Mr. Musso’s references to Victoria’s Secret, his thwarted attempt to touch the complainant’s waist,

his comments regarding her attire, and his text suggesting that her job was “make-work” all diminished the role of women in respondents’ workplace. Individually and collectively, Mr. Musso’s words and deeds subjected the complainant to unwanted, different treatment based on her gender. That was unlawful discrimination.

By firing the complainant immediately after she protested that his remarks concerning her clothing were inappropriate and asked him to keep things professional, Mr. Musso also engaged in unlawful retaliation. *See* Admin. Code § 8-107(7) (unlawful to “retaliate or discriminate in any manner” against a person who “has opposed any practice” forbidden by New York City’s Human Rights Law); *see Williams*, 61 A.D.3d at 70-71 (defining retaliatory acts as those “reasonably likely to deter a person from engaging in protected activity”); *see also Albunio v. NYC*, 16 N.Y.3d 472, 477-78 (2011) (provisions of the New York City’s Human Rights Law should be construed “broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible”). The complainant opposed Mr. Musso’s gender discrimination when she told him that his remarks were inappropriate and unprofessional. In direct response, Mr. Musso fired her. That was retaliation. Such an extreme, adverse employment action was reasonably likely to deter the complainant or others from engaging in protected activity.

In sum, the undisputed evidence proved that respondents unlawfully discriminated against the complainant because of her gender and unlawfully retaliated against her for opposing discrimination. Because Mr. Musso owns the Company that hired the complainant and had direct control over employment decisions, both respondents are liable. *See* Admin. Code § 8-107(13)(b)(1) (employer liable for unlawful discrimination by employee who exercised managerial or supervisory responsibilities); *see also McRedmond v. Sutton Place Restaurant and Bar, Inc.*, 95 A.D.3d 671, 673 (1st Dep’t 2012) (owner, general manager, and supervisor can be held liable for employee’s discriminatory conduct).

FINDINGS AND CONCLUSIONS

1. Petitioner proved that respondents were properly served with the complaint and notice of hearing.
2. Petitioner proved that respondents discriminated against the complainant based on her gender, as alleged in the complaint.
3. Petitioner proved that respondents discriminated against the complainant by unlawfully retaliating against her, as alleged in the complaint.

RECOMMENDATION

In its post-trial brief, petitioner requested compensatory damages of \$15,580 plus interest for lost wages and \$15,000 for emotional distress, and a \$20,000 civil penalty. The complainant is entitled to a greater amount of lost wages, but a lesser emotional distress award and civil penalty are appropriate.

Petitioner seeks lost wages for the 79 weeks from the date of the complainant's termination, August 2, 2013, until the record closed, February 6, 2015, less any wages from other employment that the complainant earned during that period. *See NYS Office of Mental Health v. NYS Division of Human Rights*, 53 A.D.3d 887, 890 (3d Dep't 2008) (the purpose of awarding back pay is to make the complainant whole); *Comm'n on Human Rights ex rel. Canty v. Magnamart Cleaners & Launderers*, OATH Index No. 2659/08 at 8-9 (Aug. 7, 2008), *adopted*, Comm'n Dec. & Order (Feb. 19, 2009) (lost wages awarded until the complainant is able to find a job with a comparable or higher salary). Based on the evidence presented, the complainant is entitled to \$17,020 plus interest for lost wages.

The complainant earned \$280 for the week that she worked for the respondents. Assuming the same rate of pay (4 days per week, 7 hours per day, \$10 per hour), the complainant would have earned \$22,120 had she continued to work for respondents for 79 weeks. During that period, the complainant had two lower-paying temporary jobs for which she earned a total of \$5,100. She earned \$2,500 for five months of babysitting at \$500 per month and approximately \$2,600 for 20 weeks of work at a retail store for an average of 15.75 hours per week at \$8.25 per hour (Tr. 27-28). Thus, the complainant's lost wages were \$17,020 (\$22,120 less \$5,100). The complainant is also entitled to 9% interest on the lost wages, from the date of her termination, August, 2, 2013, until the Commission issues a final order. *See CPLR § 5004* (Lexis 2014); *Aurecchione v. NYS Div. of Human Rights*, 98 N.Y.2d 21, 27 (2002).

The complainant is also entitled to compensatory damages for mental anguish. *See Admin. Code § 8-120(a)(8)* (Lexis 2013); *see NYC Transit Auth. v. NYS Div. of Human Rights*, 78 N.Y.2d 207, 216 (1991) (mental anguish may be shown by complainant's testimony and circumstances of discriminatory conduct). The standard is whether "a reasonable person of average sensibilities could fairly be expected to suffer mental anguish from the incident." *Batavia Lodge v. NYS Div. of Human Rights*, 35 N.Y.2d 143 (1974), *rev'g for reasons stated by dissent*, 43 A.D.2d 807, 810 (4th Dep't 1973). Among the factors to be considered are the

severity and duration of the discrimination, the level of anguish caused by the misconduct, and comparable awards. *See Comm'n on Human Rights ex rel. Cherry v. Stars Model Management*, OATH Index No. 1464/05 at 17 (Mar. 7, 2006), *adopted*, Comm'n Dec. & Order (Apr. 13, 2006), *aff'd*, 831 N.Y.S.2d 350 (Sup. Ct. N.Y. Co. 2006) (compensatory damages of \$10,000 awarded where employment agency engaged in racial discrimination, aggravated by racial epithets, and complainant was humiliated, embarrassed, ashamed, and felt violated); *see also Comm'n on Human Rights ex rel. Zoleo v. Weinstein Family Services of NY*, OATH Index No. 623/09 at 28 (Dec. 7, 2009), *superceding* (Mar. 25, 2009), *adopted*, Comm'n Dec. & Order (Sept. 17, 2010) (\$10,000 award for mental anguish resulting from sexual harassment based on employer's yelling at complainant in front of staff, making demeaning comments about her hair, clothing, and Sicilian heritage); *Comm'n on Human rights ex rel. Manning v. HealthFirst, LLC*, OATH Index No. 462/05 at 29 (Mar. 15, 2006), *adopted*, Comm'n Dec. & Order (May 10, 2006) (\$10,000 for mental anguish where employer failed to accommodate disability and fired complainant weeks after returning to work, causing her to suffer stress and depression for about three months); *cf. Jowers v. DME Interactive Holdings, Inc.*, 2006 U.S. Dist. LEXIS 32536 (S.D.N.Y. May 22, 2006) (\$15,000 for complainant who experienced mental and physical problems after employment termination; symptoms included depression, panic attacks, headaches, nausea, appetite loss, severe insomnia, and breaking out in hives caused by hostile work environment).

The complainant credibly maintained that she was hurt, shocked, and disappointed that she was fired (Tr. 26). She also testified that the stress and financial pressure of losing her job caused her to lose weight and led to arguments between her and the father of her two children (Tr. 26). The complainant suffered mental anguish. However, there was no specific evidence regarding the duration of that anguish or that the complainant ever sought treatment. It was also not shown that the complainant's weight-loss or arguments with the father of her children could be attributed to respondents' actions.

Based on the evidence presented, a \$10,000 compensatory damage award is appropriate. *See Comm'n on Human Rights ex rel. Chen v. NOC Construction Inc.*, OATH Index No. 1011/11 (Apr. 21, 2011), *adopted*, Comm'n Dec. & Order (June 26, 2011) (\$7,500 award for mental anguish where employer fired worker because she planned to get married and have a baby). This case is similar to *Chen*, where an employer fired a female employee after less than one week on

the job. When the employer was alone with the employee in a car, he asked her why such a beautiful girl did not have a boyfriend. After the employee replied that she had a boyfriend and planned to marry soon, the employer complained that she would have a baby and stop working. The next day, the employee was fired. According to the employee, she was angry and depressed, under considerable financial pressure, and her family blamed her for losing her job. The Commission imposed a \$7,500 emotional damage award, based in part on findings that there was “no evidence that the complainant’s distress was extreme, debilitating, or protracted.” *Chen*, OATH No. 1011/11 at 16.

Here, as in *Chen*, the complainant was fired after less than a week of work due to the employer’s unlawful discrimination and she suffered obvious anguish, financial pressure, and family turmoil. And there was no evidence that such anguish was extreme or debilitating. Unlike *Chen*, where the complainant found another comparable job within ten days, the complainant here was unemployed for three or four months before she found a new, lower-paying job (Tr. 27). Because the anguish here was more prolonged, an award of \$10,000 for emotional damages would be consistent with Commission precedent.

Civil penalties are also warranted. *See* Admin. Code § 8-126(a) (Lexis 2014). Relevant considerations include the pervasiveness of the violations, the public impact, and aggravating factors, such as offensive language. *Compare Stars Model Management*, OATH 1464/05 at 14-15 (\$15,000 civil penalty imposed where employment agency handled bookings for hundreds of companies, discriminated based on race and told complainant, “we don’t take niggers in the show”); *Comm’n on Human Rights, ex rel. Campbell v. Personal Employment Services*, OATH Index No. 1579/07 at 7 (Aug. 20, 2007), *adopted*, Comm’n Dec. & Order (Dec. 14, 2007) (\$5,000 civil penalty recommended where small employment agency committed age discrimination but there was no history of discrimination or evidence of significant public impact).

Once again, *Chen* is instructive. There, the Commission adopted a recommended civil penalty of \$5,000 where an employer unlawfully discriminated against a short-term employee based on gender. The employer denied any wrongdoing, there was no evidence that the employer was a large company with many employees, there was no evidence of pervasive discrimination, and the substantial compensatory damage award was taken into account. *Chen*, OATH No. 1011/11 at 17-18.

Here, as in *Chen*, there was no evidence that the employer was a large company, there was no evidence of prior discrimination, and there are significant compensatory damages. However, there are some aggravating factors. Petitioner proved two separate violations of New York City's Human Rights Law. Respondents sexually harassed the complainant and engaged in improper retaliation. And by failing to cooperate with petitioner's investigation or participate in the proceedings, respondents also demonstrated a continued unwillingness to follow the law. Thus, a civil penalty of \$10,000 is appropriate.

Accordingly I recommend an award of \$17,020 plus interest for lost wages, \$10,000 for emotional distress, a \$10,000 civil penalty, and affirmative relief of requiring respondents to attend anti-discrimination training. *See* Admin. Code § 8-120(a) (Lexis 2014) (authorizing affirmative relief to "effectuate the purpose" of the City's Human Rights Law).

Kevin F. Casey
Administrative Law Judge

February 27, 2015

SUBMITTED TO:

CARMELYN P. MALALIS
Commissioner

APPEARANCES:

RACHEL VINCENT, ESQ.
Attorney for Petitioner

No Appearance by or for Respondents