

New Hampshire Commission for Human Rights



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2 CHENELL DRIVE
CONCORD, NEW HAMPSHIRE 03301-8501
TEL. (603) 271-2767
TDD Access: Relay NH 1-800-735-2964
FAX (603) 271-6339
E-MAIL: humanrights@nhsa.state.nh.us

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ES(H)(R) 6703-97
EEOC: 16D970603

Nicole Alward

v.

The Green Forrest Inn, Ltd.

and

Forrest H. "Sonny" Sell, Jr.

DECISION OF THE COMMISSION

RECEIVED

JUL 12 1999

NH COMMISSION
FOR HUMAN RIGHTS

I. Factual Background

Nicole Alward, the complainant, started work as a waitress for the Green Forrest Inn of Derry, N.H. on January 29, 1997. She worked there until she quit on or about June 15, 1997. She earned \$2.38 per hour. With tips, she averaged about \$250 per week.

At the time, the Green Forrest Inn was owned and operated by Forrest H. "Sonny" Sell, Jr. and Patricia Freije, who were husband and wife. Both were active in the management of the restaurant, although Freije was not there often. Other managers were Lucy Beaudry, Kathy Brunell, and Kathleen Carroll.

Thomas Puskarich was hired initially as a chef and was then promoted to "executive chef" shortly after the complainant was hired.

The respondent did not have a sexual harassment policy in place and did not provide an employee handbook to its employees.

Shortly after the complainant began work Puskarich began making a

series of friendly comments to her. The complainant then began to object to his comments as they became sexual, and she indicated that she would not tolerate them.

Puskarich's comments included an observation that the complainant had an awesome body and that he could not believe that she had three children. He also asked the complainant if she were taking applications for lovers, and that he would like to apply. He also asked the complainant if she touched herself. Another chef employed by the respondent informed the complainant that Puskarich had a "hard on" for her. Other verbal comments included referring to the complainant as a "c----" and calling her a "bitch."

The complainant also stated that Puskarich had unwanted physical contact with her, rubbing his groin against her body, breathing on her and biting her on the neck.

The complainant and Puskarich met in private after Puskarich told the complainant that she was acting funny. He apologized for offending her. The complainant states that she made it clear that she did not like his behavior and wanted it to end. Puskarich promised to stop. A few days later, Puskarich came into the break room where the complainant was working, closed the door and turned off the light. He continued to ask the complainant for hugs.

The complainant testified that she did not feel comfortable in reporting the sexual harassment to Sell. She testified he was not a pleasant person, and that he used extremely vulgar language. She also said she did not feel comfortable in reporting Puskarich to Sell because she had been told by two employees that Sell had engaged in sexual activities with another employee during working hours.

The complainant did attempt to telephone Freije. Although the complainant was not able to reach Freije for a few days despite leaving telephone messages for her, the complainant was able to inform her of everything that Puskarich had done to her.

Freije told the complainant that Puskarich had been fired from the Cafe Pavone for sexual harassment prior to being hired by the Green Forrest Inn. She later told the complainant that she had informed Sell about her complaint.

Freije promised to speak with Puskarich and that she would tell him, "One more thing and he's out the door."

When the complainant went to work on a Friday, she met with Freije, who told her that she had spoken with Puskarich and warned him that he would be terminated if there were future problems. Freije also told the complainant that she informed Puskarich that the complainant had complained about his behavior.

That evening, Puskarich came up behind the complainant and poked her in the back. During the next couple of shifts, he became nasty toward her, swearing and accusing her of working too slowly.

On Sunday, June 15, 1997, complainant overheard Puskarich talking to one of the prep cooks about not being able to get an erection in the presence of a naked woman. During the same shift, Puskarich yelled at the complainant about several topics. Finally, when Puskarich yelled at the complainant about an order of French fries, the complainant walked out of the restaurant. She testified that she went to Sell as she left and said she was leaving because of Puskarich. She testified that Sell did not say anything to her.

The complainant testified that some employees called her at home after she quit. She said Freije called her and told her that Sell wanted her to return to work. She said Freije also told her that she needed an executive chef and suggested that she would "cut off her nose to spite her face" in terminating Puskarich.

II. Legal Standards

RSA 254-A:7 V states: "Harassment on the basis of sex constitutes unlawful sex discrimination. Unwelcome sexual advances, request for sexual favors and other verbal, non verbal or physical conduct of a sexual nature constitute sexual harassment when:

(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."

Rule Hum 403.02 (e) states: "With respect to conduct between fellow employees, an employer shall be responsible for acts of sexual harassment in the workplace where the employer, its agents or supervisory employees, knows or should have known of the conduct, unless it can show that it took prompt, appropriate remedial action."

III. Analysis

A. Unwelcome Conduct of a Sexual Nature Reported to Management

The uncontested allegations in this case are that Puskarich, the complainant's co-worker, engaged in unwelcome verbal and physical sexual harassment of the complainant. The complainant informed him that his conduct was unwelcome prior to reporting the sexual harassment to management. The sexual harassment continued after the complainant complained, and Puskarich engaged in retaliatory behavior after he learned that the complainant had complained to Freije.

Even after the complainant quit in response to continuing sexual harassment and retaliation, Puskarich remained employed despite the earlier warning that he would be fired if he engaged in

additional sexual harassment.

During public hearing held on June 14, 1999, Attorney Susanna Robinson, representing the complainant, made a proffer of proof and submitted the investigative report as an exhibit. The complainant also testified regarding the allegations raised in her complaint.

No representative of Green Forrest Inn Ltd. appeared at the hearing. Attorney Joseph Williams, representing Sell, attended the hearing and questioned the complainant and a witness called by the complainant. Sell did not attend the hearing in person. Neither the Green Forrest Inn Ltd. nor Sell submitted a verified answer to the complaint, as required under Rule Hum 209.04 (a).

The commission enters a default judgment against Green Forrest Inn, Ltd. under Rule Hum 209.12 (a).

Based on the report entered into evidence at the hearing and the complainant's testimony, the commission finds respondent Sell liable for discrimination based on the facts of the case. Sell owned and operated the business, and was directly responsible for day-to-day management. He had an opportunity to present witnesses and cross-examine the complainant and witnesses. There was no challenge to the complainant's allegation that he tolerated a hostile work environment and failed to take immediate effective steps to end the harassment.

B. Constructive Discharge

The complainant argues that she was forced to quit because of the harassment and retaliation. To establish constructive discharge she must demonstrate the "working condition would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Landgraf v. USI Film Products, 968 F.2d 427, 59 FEP 897 (5th Cir 1992) aff'd in part on other grounds, 128 L. Ed. 2d 229, 64 FEP 820 (1994) See also Appeal of T&M Associates, Inc., 134 NH 617 (1991).

The report and complainant's testimony indicate that Puskarich made sexual comments to the complainant: making remarks about the complainant's body; asking her if she was taking applications for lovers; telling another employee that he "had a hard on" for the complainant; remarking that she looked like the type who touches herself; and asking the complainant to leave her husband and move in with him. Puskarich also engaged in unwanted physical conduct of a sexual nature: rubbing against the complainant and bumping into her; breathing down her neck and blowing in her ear; and pressing his groin area into her. Finally, Puskarich came into the break room where the complainant was working, closed the door and turned out the light.

The commission finds that the complainant has met her burden of showing constructive discharge.

IV. Conclusion

The complainant has articulated a prime facie complaint of sex discrimination, retaliation, and constructive discharge: 1) that she was a female employee of the respondent; 2) that she was sexually harassed by a co-worker; 3) that she communicated that the co-worker's behavior was offensive; 4) that she informed management of the sexual harassment; 5) that management failed to take immediate and effective steps to end the harassment; 6) that the sexual harassment continued after she complained; 7) that she was retaliated against by the co-worker; and 8) that any reasonable person would have resigned under the circumstances.

Respondents Green Forrest Inn, Ltd. and Sell did not file a verified response to the complaint. Green Forrest Inn, Ltd. was not represented at the hearing. Sell was represented by an attorney at the hearing. Green Forrest Inn, Ltd. and Sell did not present a defense.

Accordingly, the commission finds that Green Forrest Inn, Ltd. and Sell jointly and severally discriminated against Nicole Alward on the basis of sex in tolerating a hostile work environment, tolerating retaliation, and creating a work environment that would cause any reasonable person to resign.

V. Award of Damages

Having determined that the respondent has engaged in an unlawful practice in an unlawful practice, the commission is authorized to order the respondent to pay damages to the complainant. These damages include back pay, front pay, compensatory damages and attorney's fees. RSA 354-A:21, II(d); E.D. Swett, Inc. v. New Hampshire Commission for Human Rights and Leonard Briscoe, 124 N.H. 404 (1983). The commission is also authorized to order the respondent to pay an administrative fine in order to vindicate the public interest. RSA 354-A:21, II(d).

A. Back Pay

In determining the back pay award, the commission calculates the amount the complainant would have earned but for the unlawful discriminatory practice. The commission subtracts from that amount any unemployment compensation or interim earnings received by the complainant during the time period covered by the award. RSA 354-A:21, II(e).

The complainant requested \$3,500 in lost wages, covering a period of 14 weeks between the time she left the respondent company and began earning commissions in her subsequent position with a real

estate company.

The complainant testified that she took a test for real estate agents in July 1997 after completing a six-week course. She began working as a real estate agent in August 1997, but did not earn commissions for seven or eight weeks.

The commission finds that the complainant did not mitigate her damages by seeking other employment. The commission therefore orders back pay in the amount of \$1,000, representing four weeks of lost wages.

B. Compensatory Damages

The commission finds that the complainant suffered emotional harm, embarrassment and humiliation as the result of unlawful discrimination by Green Forrest Inn, Ltd., and Sell. She testified that she felt humiliated and disgusted. She said she feared that Puskarich would hurt her. Physical manifestation included chest pains and frequent crying. She testified that she sought psychological counseling after she quit.

Rhona Shagoury, a clinical social worker, testified that the complainant entered therapy with her shortly after the complainant left the Green Forrest Inn. The 14 counseling sessions lasted between June 24, 1997 and January 6, 1998. The initial diagnosis was general anxiety, subsequently changed to post traumatic stress disorder (PTSD). Shagoury described the sexual harassment as the precipitating factor. The complainant took prescription drugs for anxiety and the underlying depression.

The complainant requested \$25,000 in compensatory damages.

The commission orders the respondents to pay the sum of \$16,000 in compensatory damages. In addition the commission orders the respondents to pay \$805 for the cost of therapy and \$342.07 for the cost of prescription drugs.

C. Administrative Fine

The commission finds that the respondents had no sexual harassment policy and that no employment policies have been submitted. Management response to the complainant's allegations of sexual harassment were totally inadequate. In order to vindicate the public interest and deter others, the commission orders the respondent to pay an administrative fine to the State of New Hampshire in the amount of \$2,500.

D. Attorney's Fees and Costs

E. The commission orders the respondents to pay complainant's reasonable and necessary attorney's fees and costs. Complainant's

counsel is ordered to submit a detailed, itemized statement of fees and costs within 20 days of this order. Respondent is granted 10 days from the filing of the statement to object. The commission will then enter a final order.

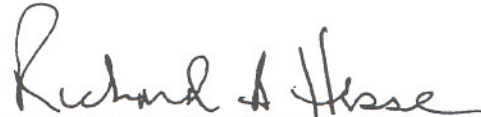
F. Total damages

Respondents are ordered to pay the complainant the sum of \$18,147.07 plus attorney's fees, to compensate her for lost wages, emotional harm, and the costs of therapy and prescription drugs.

Respondent is also ordered to pay \$2,500 to the State of New Hampshire.

So ordered

July 12, 1994
Date



Commissioner Richard Hesse, Esquire
Presiding Officer

Commissioner John Coughlin, Esquire
Commissioner Loren Jean

RULINGS ON REQUESTS FOR
FINDINGS OF FACT AND RULINGS OF LAW
SUBMITTED BY COMPLAINANT

Findings of fact:

1. Granted
2. Granted
3. Granted
4. Granted
5. Granted
6. Granted
7. Granted
8. Granted
9. Granted
10. Granted
11. Granted
12. Granted
13. Granted
14. Granted
15. Granted
16. Granted
17. Granted
18. Granted
19. Granted
20. Granted
21. Granted
22. Granted

23. Granted

Rulings of law:

24. Granted

25. Granted, but citations changed to Harris v. Forklift Sys., 570 US 17 (1993) and Lattimore v. Polaroid Corp., 99 F3rd 456 (1st Circuit, 1996)

26. Granted

27. Granted

28. Granted

29. Granted

Award of damages:

30. Awarded \$1,000.

31. Awarded in the amount of \$16,000.

32. Granted

33. The respondent is ordered to pay a fine of \$2,500.

34. Granted upon submission of an itemized bill for attorney's fees.