

STATE OF NEW HAMPSHIRE  
COMMISSION FOR HUMAN RIGHTS

Tanya Collins

v.

Acclaimed Contracting, Inc. And John D. Wheeler

ES(H)0153-02  
EEOC #16DA200209

Decision Of The Commission

RECEIVED

JAN 24 2005

NH COMMISSION  
FOR HUMAN RIGHTS

This charge of employment discrimination based on sex was filed with the Commission for Human Rights on June 3, 2002, under RSA 354-A:7. It was dually filed with the US Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1942, as amended (24 U.S.C. 2000 e-2).

Probable Cause was found by Commissioner Laura Simoes on May 26, 2004. Orders of Notice were served by Certified Mail to the parties on May 28, 2004. The pre-hearing conference was held on August 2, 2004 at the Commission offices in Concord, NH. Attending were Tonya Collins, charging party, and Sharon Holmes, respondent's bookkeeper.

On October 15, 2004 complainant's counsel submitted a Motion to Amend Complainant's Charge to name John Wheeler individually because he was the principal of Acclaimed Contracting, Inc. At the time of complainant's employment and during the investigation of her charge, he was the individual identified as the alleged harasser. Complainant also alleged John Wheeler was liable pursuant to RSA 354-A:7,I; RSA 354-A:11 Interference, Coercion or Intimidation and RSA 354-A:19 Retaliation. Hearing Chair, Commissioner Brown, granted complainant's Motion to Amend to name John Wheeler individually. At the hearing on November 9, 2004, Complainant filed an amendment to her charge. That amendment is granted.

A hearing was held November 9, 2004 with Commissioners Kenneth Brown, Gayle Troy and Rogers Johnson sitting as the hearing panel. The complainant was represented by Attorneys Heather Burns and Gary Richardson. Present on behalf of Acclaimed Contracting, Inc. were Christopher Bresette and Robert Nadeau. Christopher Bresette stated that he is John Wheeler's son and the current president of Acclaimed Contracting, Inc. Robert Nadeau stated that he was the Vice President of Acclaimed Contracting, Inc. Mr. Wheeler was not present.

Complainant's charge of discrimination alleged that she was sexually harassed by John Wheeler while she was employed by him at Acclaimed Contracting. She sets forth claims of a hostile work environment and quid pro quo harassment.

On November 3, 2004, complainant's counsel filed a Motion to Non-Suit the Hostile Work Environment Claim. Counsel indicated complainant's intention to go forward at the November 9, 2004 hearing, solely on the other remaining claims embodied in the complaint filed June 3, 2002, and the amended complaint filed November 9, 2004.

John Wheeler did not appear at the Commission Hearing on November 9, 2004.

### **Background**

The complainant began working as a secretary/office manager at Acclaimed Contracting, Inc. On April 8, 2002. Acclaimed Contracting, Inc. is currently located in Weare, NH. The company does excavating work and delivers sand, loam and mulch to construction sites. At the time of complainant's employment, the company was located in Goffstown, NH. John Wheeler is the president of Acclaimed Contracting. The company shared its office, garage space and personnel with Area Contracting, Inc., a company owned by Robert Boisvert. Boisvert testified that he leased part of his office and garage space to Wheeler and that Wheeler paid a fee for the use of some of Boisvert's equipment.

Complainant's father, Lee Demond, had known Wheeler for more than 9 years. Demond was employed by Wheeler at the time of complainant's employment. Demond states that Wheeler was not getting along with his office manager, Sharon Holmes and Wheeler had indicated he was going to terminate her. Demond told Wheeler that complainant was looking for a bookkeeping job. Wheeler interviewed complainant and offered her a position.

Complainant states she received a diploma from Laconia Adult Education in accounting and bookkeeping in 1998. She is divorced from her ex-husband, Kevin Collins, and is the mother of two children, ages 10 and 8. Her employment background was as a teller and customer service representative for Citizen's Bank for three years. She left this job because her employer would not allow her time off for a medical reason.

Wheeler told complainant that he was going to terminate Sharon Holmes, his bookkeeper and office manager and that he would hire complainant to be his "office girl". Complainant assumed this meant she would be the new office manager. Complainant also states that Wheeler and her father had been discussing becoming business partners. Complainant thought that she was going to be their office manager.

Complainant testified that her duties were to answer the phones and do accounts receivable and payable. It was also part of her job to transport the half-way house employees to



work in the morning and home after work by 5:00 pm. At night when she left to drive these employees home, she would transfer the office phone to Wheeler's cell phone.

It was asserted by the Complainant that the first incident occurred on a Saturday in early April 2002. She went with her children to Wheeler's home in Weare to help him with a problem he was having with his computer. While she worked, her children played with the Cameron children, neighbors of Wheeler. Wheeler told Complainant that he wanted to go to her father's home in Marlow to talk about their joint business interests, and he asked Complainant if she wanted to come along. She agreed to go because she was interested in becoming their office manager. She drove, and they dropped her children off at her ex-husband's house in Meredith. Since this was approximately 8:00 pm at night, she planned to stay overnight and sleep in her father's camper.

Complainant states that Wheeler and her father were drinking beers while discussing business. About 10:00 pm she went to the camper for the night. She locked the door. The camper had a double bed in front and 2 twin beds in back. She testified that Wheeler had told her that he was going to sleep in the double bed up front, so she slept in one of the twin beds. About 20 minutes later, Wheeler knocked and she let him in. He followed her to the back and sat on the edge of her bed. He asked her if she wanted to sleep in the double bed with him. She told him no, that he was old enough to be her father and that he was her boss. Complainant states that Wheeler continued to ask her to sleep in the double bed, but she refused. Eventually he went to sleep in the double bed alone. The next morning when Wheeler got up, Complainant pretended to sleep. She alleges he touched her arm, kissed her forehead and told her he loved her. She waited until he left to leave the camper.

Complainant stated the next day she asked Wheeler if it would affect her job if she did not sleep with him. She states he said: "No, but I like you and want you for the office girl. I can fantasize."

The next week Wheeler was joking and laughing with her. He took steps to give her the ability to sign company checks and gave her a company credit card. Complainant states when Holmes found out about this she said: "It's amazing what you do when you want to f\*\*\* somebody".

According to the Complainant, the second incident of sexual harassment occurred on the following Saturday. At work, Wheeler discussed having a barbecue with his neighbors, the Camerons, and invited Complainant and her children. She said she had to do her laundry so Wheeler invited her to do this at his place. Complainant states she agreed to go to Wheeler's house because she could save the laundry money and because Chuck Morgan, another employee, was invited. Complainant and Morgan had already had one date and Complainant was interested in getting to know him better.

Complainant states when she arrived at Wheeler's house, Payne Cameron asked



complainant if she would babysit his two children the next morning. When she said that it was too far to come back the next day from her home in Meredith, Wheeler offered to let her and the children sleep on his pull-out couch.

About 9:30 pm, complainant's children became tired and Wheeler suggested she put them in his bed until the Camerons left. Chuck Morgan never showed up. When the Camerons left at 11:30, Wheeler went upstairs to get the children. Complainant turned out the lights and got into one side of the pull-out couch. Instead of bringing her children downstairs, Wheeler got into bed with her. She believes he was naked, although she states he could have had underwear on. She said he placed his leg over hers and put his hand on her shoulder. She shoved him aside and went upstairs to the room with the children. Complainant said she was scared, but felt she could not leave because she could not carry both children out at the same time. She called Chuck Morgan and asked him to come get her. He was unable to because he had been drinking and could not drive. Complainant stated the next morning Wheeler was gone when she awoke. The Cameron's child was sick and they did not need her to babysit.

The next Saturday Wheeler asked her to go with him to her father's house to deliver sand. She said that she couldn't go because she had other plans. He asked her why she wouldn't go and she told him that he didn't need her to hold his hand. She alleges that Wheeler responded: "You'll pay for this."

On Monday, Wheeler called complainant and said she didn't need to come in because there was no work for her. He had never done this before. To determine if other employees were also told to stay home, Complainant called the office and Holmes answered. Complainant worked Tuesday, but did not see Wheeler. On Wednesday, she left to transfer the employees back to the half-way house at 4:30 pm. She transferred the phones to Wheeler's cell. Wheeler called complainant and "screamed" at her that she wasn't to leave the office until 5:00 pm. He told her she was terminated. When complainant returned to the office, she spoke with Robert Boisvert, told him what had occurred and he offered her a job to work directly for him.

Complainant states when she told her father what had occurred, he said to her: "You know what he wanted." Lee Demond testified that on Saturday Wheeler wanted to come to Demond's house and discuss business. Demond states that complainant was also there because Wheeler wanted her to know what was going on since she would be handling the paperwork. Demond thought Wheeler would be sleeping on his couch, or in the back bedroom of his house. Instead, Wheeler went to bed in the same trailer in which complainant was asleep. Demond states the next morning, complainant came in and said that Wheeler had come on to her and tried to get into bed with her. Complainant told Demond: "No way I'd ever have sex with the guy." After she left Wheeler's employment, complainant told Demond that Wheeler had fired her because she wouldn't have sex with him. Demond states that he told complainant he was not surprised and that she knew what Wheeler wanted when he hired her.



Robert Boisvert did not recall the exact reason Wheeler terminated complainant, but knew Wheeler was “unhappy with certain things.” During the Commission investigation, Boisvert told Commission Investigator, Linda Chadbourne that he thought the “real reason was that she wasn’t accommodating Wheeler sexually.” When asked at the hearing if he told the investigator this, Boisvert said: “I’d say this isn’t my answer.” When he asked if he told the investigator that he was not surprised complainant was terminated because she wouldn’t sleep with Wheeler, Boisvert stated: “I’d not say it was because of sex. He spoke to me first. Then to her. Knowing the nature of the individual, that would not surprise me.” Boisvert said he had no concrete proof as to the reason for termination. He states complainant worked for him for a few months and left for a better job.

Charles Morgan testified that he owns an excavating company and stored some of his equipment at Acclaimed Contracting’s garage. He met complainant while working on his machines and stated that they once had dinner at his house. He had heard Wheeler make two or three remarks in the garage about complainant, such as: “Look at the body on her.” It was his impression that Wheeler was interested in getting to know complainant better. Morgan states late one night complainant called him from Wheeler’s home. Morgan was to attend a barbeque there, but decided at the last minute not to go. He never told complainant about his change in plans. Complainant called, saying that Wheeler, who was either naked or in his underwear, tried to jump into bed with her and she was shocked and scared. She had jumped out of bed, grabbed her cell phone and called Morgan. Because he had been drinking, he could not drive to Wheeler’s house to get her and the children. They talked for about 45 minutes to make sure everything would be alright.

All Exhibits were reviewed to the extent pertinent, they will be noted. The affidavit of Kevin Collins (Exhibit 5), and the statement of Robert Michaud (Exhibit 7) are accepted as true.

### **Legal Standard**

NH RSA 354-A:

In order to establish sexual harassment by a supervisor resulting in a tangible employment action (so-called “quid pro quo”), complainant must establish the following elements:

- (a) that she belongs to a protected class;
- (b) that she was subjected to unwelcome sexual conduct in the form of sexual advances, requests for sexual favors, or other verbal, non-verbal or physical conduct of a sexual nature; and
- (c) the harassment was based on sex.

The complainant must also show that her submission to the unwelcome sexual conduct was an express or implied condition for receiving job benefits, or that her refusal to submit to her

supervisor's sexual demands resulted in a tangible job detriment.

When a supervisor takes tangible employment action against a subordinate employee as a result of that employee's submission to or rejection of the supervisor's unwelcome sexual conduct, or when a supervisor makes submission to such conduct a term or condition of employment, the employer is vicariously liable. Hum 403.02(c); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

In order to claim retaliation, complainant must establish the following prima facie case:

- (1) that she participated in a "protected activity" by either opposing a discriminatory practice or assisting someone else to do so;
- (2) that respondent was aware of her protected activities;
- (3) that respondent took adverse employment action or otherwise retaliated against interfered with, or attempted to interfere with complainant;
- (4) that respondent's adverse action followed complainant's protected activities within such period of time that retaliatory motivation can be inferred, or that other evidence exists which tends to show illegal motivation.

### **Conclusion**

The Commission does not find Mr. Wheeler terminated complainant in retaliation for complaining about sexual harassment.

In the absence of any testimony to rebut complainant's allegations, the Commission finds that Mr. Wheeler individually and Acclaimed Contracting, Inc. subjected complainant to illegal quid pro quo sexual harassment in violation of RSA 354-A:7. The evidence presented at the hearing indicates that Mr. Wheeler, individually and as the principal of Acclaimed Contracting, Inc. made unwelcome sexual advances towards complainant, and when they were rebuffed he terminated her employment. The respondents are jointly and severally liable for the following award of damages.

### **Award Of Damages**

Having determined that the respondents engaged in unlawful discriminatory practices, the Commission is authorized to order the respondent to pay damages to the complainant. 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).

Immediately after Mr. Wheeler terminated her employment, complainant was hired by Robert Boisvert of Area Contracting, Inc. She was earning \$12.00 per hour employed by Mr.



Wheeler and \$11.00 per hour while employed by Mr. Boisvert. The Complainant submits that she earned \$4,596.90 while employed by Mr. Boisvert. At \$11.00 per hour, this calculates to 418 hours of employment. The Commission awards complainant the lost wages of \$1.00 per hour for 418 hours for a total of \$418.00.

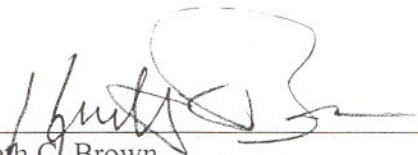
Claims for additional lost wages (Exhibit 1 and 2) and for psychological harm (Exhibit 3 and 4) are denied as not credible.

The complainant has prevailed on her claim of sexual harassment. The Commission orders the respondent to pay complainant's reasonable and necessary attorney's fees and costs incurred in connection with this charge. Complainant's counsel shall submit a detailed, itemized statement of fees and costs within 20 days of service of this order. Respondent is granted 10 days from the filing of the statement to object. The Commission will then enter a final order.

So Ordered,

January 21, 2005

Date

  
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Kenneth C. Brown  
Presiding Chair for the Hearing Commission

STATE OF NEW HAMPSHIRE  
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**RULINGS ON REQUESTS FOR FINDINGS OF FACT**  
**AND**  
**RULINGS OF LAW SUBMITTED BY THE COMPLAINANT**

I. FINDINGS OF FACT:

1. Paragraphs 1 through 52 are granted.
2. Paragraph 53 is denied in that the Complainant did not testify in support of said Finding of Fact;
3. Paragraph 54 through 64 are granted;
4. Paragraph 65 is denied in part. See decision of the Commission;
5. Paragraph 66 and 67 are denied; and
6. Paragraph 68 is granted.

II. RULINGS OF LAW:

1. Paragraphs 1 through 16 are granted.
2. Paragraphs 17, 18 and 19 are denied in part. See the decision of the Commission.

III. RESPONDENTS' REQUESTS

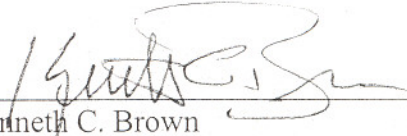
1. The respondents declined to submit requests for Findings of Fact and Rulings of Law.



So Ordered,

January 21, 2005

Date



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Kenneth C. Brown  
Presiding Chair for the Hearing Commission