New Hampshire Commission for Human Rights

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

Joseph Thomas

v.

Computer Town, Inc.

ES(H)(R) 0115-00
EEOC #16DA 00094

DECISION

This charge of employment discrimination based on sex and retaliation was filed with the Commission for Human Rights on March 20, 2000. It was dual-filed with the US Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, as amended (24 U.S.C. §2000e-2).

Probable cause was found by investigating Commissioner Elizabeth Lown on June 4, 2001. Orders of Notice were served by Certified Mail on counsel of record for the parties on June 12, 2001. An Order of Notice, a copy of the Charge of Discrimination, Investigator's Report, and the pre-hearing conference scheduling notice were personally served on James Hancock, new owner, president, and CEO of Computer Town, Inc. on August 7, 2001.

No one appeared on behalf of respondent at the pre-hearing conference held on August 28, 2001, at the Commission offices in Concord, NH. A pre-hearing conference Order, notifying the respondent that the hearing was scheduled for October 9, 2001, was served on the respondent by Certified Mail on September 18, 2001.

A hearing was held on October 9, 2001, with Commissioners Hesse, Coughlin, and Allen sitting as the hearing panel. The complainant was represented by Attorney Julie Moore, of Windham, New Hampshire. No one appeared on behalf of respondent. The Commission proceeded to take testimony from the complainant, Joseph Thomas, and his wife, Mary Ellen Thomas, and to receive documentary evidence into the record.

Based upon the evidence received at the hearing, the Commission finds the respondent in default and rules in favor of the complainant.

BACKGROUND

The charging party began work for respondent Computer Town, Inc. in December 1993, at the respondent's Salem, New Hampshire store. Complainant started out in Service and earned $7.00 per hour. In 1994 he was moved into Sales, where he received $10,000.00 per year plus commissions. He received favorable performance evaluations and pay raises thereafter. He was given more responsibility, such as opening and closing the store. In 1996 complainant received an award for the highest gross profit margin in the company among 63 employees.

In March 1998, Lawrence O'Connell came to the Salem store as manager. In May 1998, complainant became the assistant manager and received a pay increase of $900.00. In August 1998 complainant's performance was reviewed by O'Connell, and he received a pay increase of $1890.00 to $20,790.00 plus commissions. On August 18, 1999 complainant's performance was again reviewed, and, although he received an acceptable review, his pay increase was only $600.00. On September 22, 1999, Joseph Thomas was terminated from employment by O'Connell.

The complainant alleges that his supervisor, Lawrence O'Connell, sexually harassed him. Complainant charges that because he rejected O'Connell's behavior and advances and told O'Connell to stop, O'Connell recommended a smaller pay increase than was warranted in August 1999 and terminated complainant on September 22, 1999.

The evidence shows that O'Connell began to harass complainant in approximately March 1999. Complainant testified that the incidents occurred mostly in the back of the store when no one else was present. Only the manager and assistant manager had keys to that area of the store, where computers were stored. O'Connell commented to complainant that they should "get together" and on an occasion in approximately April 1999, hit complainant on the behind when complainant bent over to pick up a box. Complainant told O'Connell to stop, that he didn't appreciate that. O'Connell laughed, and complainant became angry, stating that the behavior was "not right."

In May, in the back room, O'Connell closed the door and said, "Hey Joe, did you know I was a cop in Arizona and I was shot - would you like to see?" O'Connell began to pull up his shirt. Complainant told him to stop.

In July, complainant was planning a vacation and was asked by O'Connell if he would show him his tan lines when he got back. Complainant told O'Connell that he didn't like that type of talk, that it was unprofessional.

In August, in the back room again, O'Connell came up behind complainant and put his hand on his left shoulder and patted him as complainant was getting ready to pick up a box. Complainant testified that the way O'Connell touched him was similar to the way he would touch his wife and was not what you do to a stranger. It was not a greeting. Complainant again told O'Connell to stop and O'Connell said if complainant went to Human Resources he, O'Connell would just deny it.

Complainant testified that it felt like every time he went in the back, O'Connell was following him. On another occasion in August, O'Connell said to complainant, "I can make your job a lot easier for you." Complainant told O'Connell to stop, that he was a married man with two children. Complainant testified that he understood O'Connell's statement to mean that he wanted him to give in to his sexual propositions. To complainant there could be no other meaning because complainant did his job, was there everyday, so why would O'Connell say that?

During complainant's employment, respondent had an Employee Handbook. (Ex. #2) It contains an "Equal Opportunity" policy which mentions sex discrimination. But the Handbook does not mention sexual harassment, except to say that it could lead to termination. Nor does it contain a grievance policy by which employees can complain of discriminatory treatment, including sexual harassment.

In August 1999, when complainant was notified that his pay increase would only be $600.00, he questioned O'Connell why it was so small. O'Connell told complainant "That's all they'll let me give you." Complainant then talked to Tom Jacobs, the owner of Computer Town [at that time]. Jacobs informed complainant that raises were based on what the managers asked for and that complainant's raise was all O'Connell had asked for.

On September 22, 1999, O'Connell terminated complainant. He told complainant, "I've got a problem, don't know what I'm going to do with you." Complainant asked him what he meant, and O'Connell again stated that complainant was a "problem - you're not a team player." He told complainant that he was fired.

Complainant's wife contacted Theresa (Terry) Uzdavinis, the human resource director, who took care of benefits, insurance, and other personnel matters. Complainant and his wife had dealt with Uzdavinis in August 1998 when complainant had to miss a day of work because of illness. O'Connell had threatened to fire complainant if he did not come to work and Mrs. Thomas had talked to Uzdavinis, although it did not do any good.

In September 1999, Uzdavinis said to Mary Ellen Thomas that she didn't understand it [the firing] either and that Tom Jacobs was looking into it. Mrs. Thomas testified that she told Uzdavinis that she and Mr. Thomas were going to contact an attorney regarding "harassment."

Complainant contacted Tony Violanti, the vice-president, and Tom Jacobs, the owner, after he was terminated. Although Jacobs promised to help complainant, he also said "If a manager fires you I can't go against him." Jacobs did not help complainant find another job.

Documentary evidence submitted into the record shows that Computer Town, Inc. was aware that complainant believed he was being harassed by O'Connell. Exhibit #15, is an e-mail sent 9/22/99 by Lawrence O'Connell to Tom Jacobs, Terry Uzdavinis, Tony Violanti, and Michael Wax. The topic is Joe Thomas. In it, Lawrence says, "Under no circumstance have I ever harassed Mr. Thomas he is just angry because he was let go. Once again I have to go and get statements from all my employee's [sic] saying that I never harrass [sic] anyone. . . " The e-mail also contains the following: "Terry Uzdavinis wrote: I just received a phone call from Joe's wife and she is filing a lawsuit against Lawrence for Harassment She will be consulting her lawyer today."

Documentary evidence also shows that Computer Town, Inc. had received at least one previous complaint about O'Connell's sexual conduct toward his employees, and possibly more. The personnel file of another employee, fired by O'Connell in February 1999, contains that employee's complaint of February 5, 1999, by e-mail, to Tony Violanti, the vice-president. (Exhibit #12) In it, the employee states,

> "You knew, when you brought O'Connell over from the failed Portsmouth location, that O'Connell has difficulty separating his sexual orientation from his "professional" conduct in the workplace. Since O'Connell's arrival at Salem I, as well as others, have been forced to endure his homosexual advances and innuendoes. Further I have been subjected to a repeated barrage of comments about my age. His behavior are [sic] clearly in violation of both Federal and NH laws regarding discriminatory conduct toward employees. The running and continual commentary about homosexual behavior, e.g., "try it, you might like it!. . ." etc. . . . are discriminatory and have subjected Computer Town to legal exposure."

The evidence regarding Computer Town's investigation of this complaint indicates that Computer Town focussed primarily on whether O'Connell was justified in terminating the employee in question, and secondarily on O'Connell's behavior. O'Connell was not warned regarding his behavior.

In April 2000, after complainant filed his charge with the Commission, Computer Town investigated complainant's allegations regarding O'Connell. Their investigation confirmed complainant's allegations. It showed O'Connell was continually making sexual remarks at work and had often commented to another employee that he thought complainant was a "closet gay" and that it was time for him to "come out of the closet". O'Connell was offered the option of being laid off or taking a position at another location. O'Connell was eventually terminated after losing his temper and retaliating against the employees whom he thought had been interviewed during the company's investigation. However, O'Connell's personnel file shows that the termination was listed as "mutually agreeable" and that he is

eligible for rehire. (Exhibit #13)

No one contacted complainant to advise him of the outcome of the investigation or to offer him his job back.

After being terminated from Computer Town, complainant tried to find comparable employment in sales. In the first month he applied for positions in eight or nine places and heard back from three. He did not receive an offer from any of them. Complainant testified that two potential employers, Coca-Cola and Boston Granite Exchange, told him that Computer Town had given him a bad reference. Coca-Cola told complainant that they were not going to hire him because of his last employer. Complainant collected unemployment and on May 22, 2000, was hired to drive a truck.

LEGAL STANDARDS

Complainant's charge of discrimination articulates three theories of discrimination: (1) hostile work environment sexual harassment; (2) quid pro quo sexual harassment; and (3) retaliation.

In order to establish sexual harassment by his supervisor which creates a hostile work environment, complainant must establish the following elements: (a) that he belongs to a protected class; (b) that he 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; (c) the harassment was based on sex; (d) the harassment complainant of was sufficiently severe or pervasive to alter the conditions of employment and create a working environment that a reasonable person in complainant's position would find hostile or abusive; and (e) there is some basis for employer liability. Harris v. Forklift Systems, 510 U.S. 17 (1993); NH RSA 354-A:7,V(c).

In order to establish sexual harassment by a supervisor resulting in a tangible employment action (so-called "quid pro quo"), complainant must establish elements a, b, and c above, **and** that his submission to the unwelcome sexual conduct was an express or implied condition for receiving job benefits, or that his refusal to submit to his 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).

When a supervisor takes no tangible employment action, but his or her unwelcome sexual conduct creates a hostile work environment or unreasonably interferes with another

employee's ability to perform his or her job, an employer is liable. The employer's liability is subject to the following affirmative defense as to damages or liability or both, which the employer must prove:

(a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and

(b) the complaining employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

NH RSA 354-A:19 makes it an unlawful discriminatory practice for any person engaged in any activity to which the chapter applies to discharge, expel, or otherwise retaliate or discriminate against any person because he has opposed any practices forbidden under the chapter or because he has filed a complaint, testified or assisted in any proceeding under the chapter.

In order to establish a prima facie case of retaliation based on circumstantial evidence, complainant must show that he opposed a discriminatory practice, that his employer knew he was opposing a discriminatory practice, that his employer subsequently took adverse employment action against him, and there is a causal connection between complainant's opposition and the employer's adverse action. A causal connection may be shown by a short time period between a complainant's opposition activity and the employer's adverse action, or any other evidence of retaliatory motive.

Once complainant establishes a prima facie case, respondent must articulate a non-retaliatory explanation for its actions. If it does so, complainant is offered the opportunity to show that respondent's reasons are a pretext for retaliation. See: Hochstadt v. Worchester Foundation, 11 FEP Cases 1426 (D. Mass. 1976); 13 FEP Cases 804 (1st Cir. 1976).

FINDINGS AND RULINGS

The five incidents testified to by complainant involved unwelcome sexual conduct by his supervisor, the store manager.

The incidents of touching and sexual remarks to which O'Connell subjected complainant in the back room of the store created a hostile work environment for complainant and would have created an offensive environment for a reasonable person in complainant's position.

Complainant did not complain to higher management about his supervisor's behavior until he was terminated. However, his failure was not unreasonable because Computer Town, Inc. had no meaningful policy against sexual harassment and no grievance policy.

Complainant testified that he did not receive a copy of the Employee Handbook.

Furthermore, complainant had previously complained about the harassing behavior of O'Connell when complainant was sick. That complaint was never responded to, even though O'Connell had threatened to fire complainant. Complainant's fear that if he complained he would be fired, was not an unfounded fear.

There is no evidence that Computer Town, Inc. took reasonable measures to prevent this type of behavior from occurring in its workplace.

Complainant rejected the 5 sexual advances made by his supervisor and told him that they were unwelcome.

After the last incident, in August 1999, complainant's supervisor made a statement to the effect that he could make complainant's job a lot easier for him. The Commission finds this remark was tied to complainant's rejection of O'Connell's sexual behavior. Complainant was a good employee who did not need his job made "easier."

O'Connell recommended a very small raise to complainant in August 1999, after complainant rejected his sexual advances. O'Connell's explanation that the amount was all that upper management would allow, is contradicted by Jacobs' statement to complainant that the amount of the raise was based on what managers asked for.

In addition to giving complainant a smaller raise than warranted, O'Connell fired complainant after he rejected his sexual advances. Complainant's employment record shows no counseling. He received good evaluations, merit increases, and promotions. There is no credible evidence that at the time he was fired, complainant was viewed as a problem employee by Computer Town.

Complainant's performance evaluation dated August 18, 1999, is acceptable. There is no evidence of any event occurring between that date and September 22, 1999, which would explain complainant's termination.

Respondent did no investigation of complainant's allegations, even after his wife threatened to sue for "harassment." When they did do an investigation in April 2000, after complainant filed his charge with the Commission, respondent gathered information indicating that O'Connell had most likely harassed complainant.

Respondent made no attempt to remediate the harassment. Instead they filed an Answer denying discrimination and continued to oppose complainant's Charge. In their response to the Charge, Computer Town, Inc. stated that complainant never reported any discrimination of any kind to them until they received the charge of discrimination filed with the Commission. This statement of position was false. (Exhibit #8, Investigative Report)

The Commission finds that O'Connell retaliated against complainant for rejecting his unwanted sexual advances by giving him a small pay increase in August 1999 and by terminating his employment on September 22, 1999.

Computer Town, Inc. ratified the actions of O'Connell by doing nothing in response to complainant's telephone calls even though they had knowledge of a previous complaint of harassment from another employee, who had also been terminated by O'Connell. Thus, Computer Town, Inc. retaliated against complainant.

Computer Town also retaliated against complainant by giving him a bad reference to Boston Granite, which prevented complainant from being hired.

Respondent's reasons for terminating complainant are a pretext for retaliation. There is no information in the record to support them. Respondent's progressive discipline policy was not followed in complainant's case, although respondent was prepared initially to follow it in O'Connell's case.

CONCLUSION

The complainant was sexually harassed by his supervisor while employed by respondent, in violation of NH RSA 354-A:7,V(b) and (c). Respondent is liable for the harassment by O'Connell because O'Connell took tangible employment actions against complainant when he rejected the advances. Those tangible actions were: giving complainant a small raise and terminating his employment on September 22, 1999. Respondent is liable for the hostile work environment created by O'Connell's behavior because, as store manager, he was complainant's supervisor and Computer Town, Inc. is vicariously liable for his conduct as manager. The evidence fails to establish the respondent took reasonable steps to prevent and remediate sexual harassment in its workplace. Computer Town, Inc. knew of O'Connell's behavior from a previous complaint by another employee and from calls from complainant and his wife, yet it did nothing.

The Commission finds that Computer Town, Inc. retaliated against complainant for reporting sexual harassment and for his wife's statement that they were going to bring suit for harassment, in violation of NH RSA 354-A:19. Computer Town, Inc. ratified complainant's termination by O'Connell and gave him a poor reference, preventing him from gaining another job.

AWARD OF DAMAGES

Having determined that the respondent 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).

A. Lost Wages

The Commission finds that the complainant has suffered lost wages as a result of the discrimination by respondent. But for the actions of O'Connell, complainant would have remained employed at respondent. Complainant's earnings from respondent for 1997 were $39,356.79; his earnings for 1998 were $45,847.83; and his earnings from respondent for 1999 were $30,853.83. (Exhibit #22) The Commission accepts complainant's computation of his average weekly earnings rate of $21.30 per hour, based on his combined 1998 and 1999 earnings, given the cyclical nature of sales. (Exhibit #25)

Complainant earned $23,538.51 in 2000 from Torromeo Trucking Co. He is currently employed by them as a driver at $16.00 per hour. The Commission adopts the statement of lost wages prepared by complainant's counsel in Exhibit #25, which takes into account periods of unemployment during the winter, and finds that complainant suffered lost wages in 1999 of $8,441. In 2000, complainant suffered lost wages in the amount of $14,444.49. For the year 2001, complainant's lost wages will come to $8,477.95

Complainant's total lost wages for 1999, 2000, and 2001, come to $31,367.00.

B. Front Pay

Complainant is 45 years old and because of respondent's retaliation has had no chance to start over in his area of skill: sales. The Commission adopts the complainant's lost wage computation for year 2002 and thereafter, as set forth in Exhibit #25.
The Commission awards complainant two years front pay @ $7176.00. per year, for a total front pay award of $14,352.00.

C. Benefits

Complainant has lost benefits as a result of respondent's discrimination. He testified that he has three fewer paid holidays at Torromeo Trucking, has lost 10 days paid vacation, and 4 sick days, for a total of 17 days @ $170.40 per day ($21.40 x 8 hours = $170.40 per day). The total value of complainant's lost benefits is therefore 17 x 170.40 = $2,896.80 per year, since May 22, 2000. [There was no request for lost benefits for the period 9/22/99 through 5/21/00, and no testimony.] Total value of lost benefits awarded for May 2000 through May 2002 is $5,793.60.

D. Medical Insurance Premiums

The Commission finds that there is not enough evidence to make a finding regarding the cost of premiums or the amount of co-pays.

E. Compensatory Damages

Respondent's discrimination caused the complainant emotional harm, distress, embarrassment, and humiliation. Complainant received no professional help, although his wife urged him to go, because he could not afford help. Complainant is now driving a truck, not his chosen field of work. Complainant and his wife testified to the disruption of his professional life, the loss of economic opportunities, the effect his termination and resulting depression had on his marriage and his children, caused by respondent's discrimination. The Commission orders the respondent to pay the sum of $150,000.00 to compensate the complainant for emotional harm.

F. Administrative Fine

The respondent filed an Answer to this charge in which respondent stated that complainant never reported any discrimination of any kind to them until they received the Charge of discrimination filed with the Commission. This statement, which was filed under oath, was false. The Commission experienced a lack of cooperation from respondent once a probable cause finding was made. This lack of cooperation made the Commission's job more difficult, for example, by requiring service of the Order of Notice by the Sheriff. Finally, the Commission finds that, with respect to sexual harassment, the respondent was grossly irresponsible in its lack of regard for the welfare of its employees, especially Joseph Thomas.

Based on the above and in order to vindicate the public interest, the Commission hereby assesses an administrative fine of $10,000.00 pursuant to RSA 354-A:21,II(d)(1).

G. Attorneys Fees

The complainant has prevailed on his claims of sexual harassment and retaliation. The Commission may exercise its discretion to award attorney's fees to a complainant who prevails. 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 Decision, and the Commission will then issue a final order.

TOTAL DAMAGES

Respondent is ordered to pay complainant the sum of $201,512.60, plus interest on the amount of back pay. Respondent shall pay complainant's reasonable attorney's fees and costs. Respondent shall pay $10,000.00 to the State of New Hampshire.

So Ordered.

29 November 2001
Date

John J. Coughlin, Esq.
Chair for the Hearing Commission

Commissioner Richard A. Hesse, Esq.
Commissioner Nancy C.R. Allen