

NEW HAMPSHIRE HUMAN RIGHTS COMMISSION

TIFFANY YOST

V.

HAIRCUTS USA, LLC

ES(H)(R) 0092 – 07

16D – 2007 – 00121

**COMMISSION FINDINGS AND RULINGS**

1. The Complainant, Tiffany Yost's ("Yost"), charge of employment sexual harassment was filed at the New Hampshire Human Rights Commission (the "Commission") on December 26, 2006. In it Yost alleged that she had been the object of unwelcome daily sexual comments about her looks and specific parts of her body made by James Libby ("Libby"), the owner of Respondent company for whom she worked as a hair stylist. Yost alleged Libby also made regular and frequent solicitations for sex from her which, on occasion, was to be accompanied by the use of cocaine Libby claimed he would supply. Yost also alleged that because she rebuffed these advances she was ultimately terminated.

2. Respondent Haircuts USA, LLC's ("Haircuts"), verified answer to the charge was filed at the Commission on February 9, 2007. In it Haircuts denied Yost's sexual harassment allegations and alleged that Yost had behavior problems causing her suspension, not termination.

3. An investigation of the charge resulted in a finding of probable cause on July 23, 2008, by the Investigating Commissioner. A Pre-hearing/Conciliation Conference was held on November 13, 2008, in accordance with Orders of Notice served on both parties. No representative from Haircuts was present.
4. A Public Hearing was held December 8, 2009. Commissioners Cole (Chair), Shirley, and Boynton were present for the Hearing. Attorney Kristin L. Clouser appeared as counsel for the Complainant. Tiffany Yost, and Tiffany Gamache, a witness for Yost were present. No representatives appeared or were present for Haircuts.
5. The Executive Director called the case to order at 1:40 pm and entered the following Commission exhibits in evidence: a) the original sworn Charge of Discrimination with a three page attachment; and b) the original sworn Charge of Discrimination with a typewritten statement, "I was subjected to sexual harassment by the owner/proprietor of Haircuts USA, Mr. James Libby. See Attached Verified Complaint for particulars." (Both Charges name only Haircuts USA, LLC as Respondent)<sup>1</sup> c) Haircut's Verified Answer to the Charge; d) the Investigator's Report of Investigation; e) the Commission's Pre-Hearing Conference Report/Order; f) Yost's Witness List; g) Yost's 2006 W-2s from Haircuts; h) Yost's Detailed Request for Relief; i) Yost's Conciliation Proposal; and

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<sup>1</sup> This Charge Form is for State only charges in which there are six (6) or more but less than fifteen (15) employees. It appears that Charging party filed both. Case investigation revealed the number of employees warranted either a State only charge or a dually filed State and Federal charge.

j) the Hillsborough County Sheriff's Department Return of Service of Orders of Notice delivered in hand to James Libby.

7. The Hillsborough County Sheriff's department served Libby Orders of Notice in hand regarding the Public Hearing at 777 South Willow Street, Manchester, NH by on August 14, 2008. As a result of Haircut's failure to attend the December 8, 2009, Public Hearing through any individual or to present any subsequent reason for its absence, Haircuts is defaulted as to liability. Hum. 315.02 (a)(1-2).

8. After examination of the Commission's file, nothing in the record indicates that Libby was named as a Respondent or served notice in his individual capacity.

9. At the December 8, 2009, Public Hearing, the Chair ruled that Yost's Counsel could present a Motion and Memorandum of law regarding whether Libby should be deemed a Respondent in this matter. Yost's Counsel timely filed that Motion.

10. At the request of the Chair, Attorney Clouser made a brief offer of proof on liability on Ms. Yost's behalf. Attorney Clouser highlighted Mr. Libby's sexually harassing comments about Yost's looks and body parts and his persistent demands for sexual intercourse which she stated occurred on an almost daily basis from her date of hire on or about June 3, 2006. Attorney Clouser stated the evidence would show that on at least one occasion Libby showed Yost an "eightball" of cocaine offering to

use it with her while they had sex. When Yost refused these advances and complained to the salon manager that they were unwelcome, Libby terminated Yost's employment on September 25, 2006.

11. Following Attorney Clouser's offer of proof, the Chair placed Yost under oath and asked if the statements made by her attorney in her offer of proof were accurate. Yost agreed that all of her counsel's representations were true.

12. A second witness was present at the Hearing, Tiffany Gamache (formerly Desmaris), operations manager at Haircuts Stop N Shop Plaza in Manchester, NH. An additional offer of proof was made by Attorney Clouser that Ms. Gamache would testify that Libby was flirtatious with women generally and that Yost came to her to complain about Libby's unwelcome sexually harassing acts toward her.

13. The Chair then placed Ms. Gamache under oath and asked Ms. Gamache if Attorney Clouser's statements were accurate. Gamache agreed that the representations were true.

#### Damages Testimony

14. Yost testified directly as to her damages, starting with her education and work history. Yost has an Associate's degree in Human Services and is a licensed cosmetologist in the State of New Hampshire, having graduated from Michael's School of Hair Design while working as a

Corrections Officer for the NH Women's Prison and successfully taken the state certification examination.

15. Yost was hired as a stylist at Haircuts in June 2006 and she was placed at Haircuts' Stop N Shop Plaza location on South Willow Street, Manchester, NH. Haircuts also operated a second Haircuts Salon on South Willow Street. Between the two store locations there were up to eighteen total employees. Under The Civil Rights Act of 1964, as amended, also known as Title VII, an employer of fifteen or more employees has a duty under federal law to prevent or act upon receiving knowledge of sexual harassment.

16. Yost testified she was hired full time, forty hours of work per week at \$9.00 per hour plus customer tips, commission of 40% on all "chemical products" (described as dyes, highlights, foils, etc.), and that upon her termination she suffered lost income, including wages, commissions, tips, and diminished earnings until her re-employment fifteen days later with a new employer, Supercuts. Yost also testified that Libby would cut her hourly pay following sexually harassing incidents she rebuffed.

17. Attorney Clouser entered a chart (Yost Exhibit 1) that outlines damages testified to by Yost. In addition, the Commission referred to Yost's 2006 W-2 issued to her by Haircuts which was submitted as an exhibit at Pre-Hearing and again at the December 8 Public Hearing.

18. Yost testified consistent with Yost Exhibit 1 that she suffered lost wages of \$1080.00 and tips of \$900.00 between her termination and her re-employment. Yost also claimed that her pay decreases following episodes of sexual harassment cost her an additional loss of \$120.00.

19. Yost also testified (again reiterated in Exhibit 1) that she sustained diminished earnings in the amount of \$2190.00 based on a \$1.00 less per hour starting hourly rate at Supercuts, a rate that only gradually increased over a two year period.

20. Yost also testified (again reiterated in Exhibit 1) that she suffered lost commissions in the amount of \$26,560.00 over a period of 166 weeks because her new employer does not offer commission earnings.

21. These damages total \$38,850.00. See Yost Exhibit 1.

22. In addition to her actual damages, Yost requested an award of ten times the amount of her lost and diminished earnings as a punitive damage award pursuant to Title VII, and emotional distress damages. The Commission, therefore, awards Ms. Yost \$10,000.00 in emotional distress damages for having endured daily unlawful discriminatory and harassing behavior in the workplace until her unlawful, retaliatory termination on September 25, 2006.

Decision

23. As stated above, based on its failure to attend the December 8, 2009, Public Hearing the Respondent, Haircuts USA, LLC is **defaulted as to liability**. Therefore, the Respondent is responsible for all acts alleged in the Charge of Discrimination against state and federal laws prohibiting sexual harassment in employment. These laws state in pertinent part:

**RSA 354-A:7 Unlawful Discriminatory Practices.** It shall be an unlawful discriminatory practice:

I. For an employer, because of the age, **sex**, race, color, marital status, physical or mental disability, religious creed, or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges or employment, unless based upon a bona fide occupational qualification. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.

(emphasis added).

Federal law authority:

**42 U.S.C. §2000e-2(a)**

It is unlawful for employers to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, **sex** or national origin.

(emphasis added).

24. Ms. Yost is awarded her damages of **\$38,850.00** in accordance with her testimony, Yost Exhibit 1, and the above rationale. These damages comprise her lost wages, commissions, tips, pay decreases, and diminished earnings.

25. Ms. Yost has requested 10 times her damages as an award of punitive damages. Under Title VII's remedies provision, 42 U.S.C. § 1981A(b)(4), there is no provision for an award of punitive damages by either the U.S. EEOC nor the N.H. Commission for Human Rights as a Fair Employment Practice Agency. Therefore, Ms. Yost's request for an award of punitive damages is **denied**.

26. The case of *Franklin Elks Club v. Marcoux*, 149 N.H. 581 (2003), establishes that emotional distress damages may be awarded by this Commission without an expert witness to support physical manifestations of emotional distress. *Cf. Thorpe v. State*, 133 N.H. 299, 305 (1990) (in Board of Claims prison claim brought under negligence theory expert proof necessary). In *Marcoux*, acts were intentional and emotional distress was evident. Yost testified that Libby's acts toward her caused her to suffer emotionally while she was subjected to his unlawful behavior.

27. Therefore, Yost is awarded **\$10,000.00** in compensatory damages for her mental distress caused by the nearly daily intentional and discriminatory acts of unlawful sexual harassment against her by Respondent Haircuts and its principal shareholder employee and agent James Libby.

28. Charging Party's total award is **\$48,850.00**.

29. The Commission also levies a **\$10,000.00** administrative fine against Haircuts pursuant to RSA 354-A:21 (II) (d) to vindicate the public interest for Haircuts' failure to follow state and federal law by publicly posting required anti-discrimination posters, including sexual harassment prevention and instructions for reporting illegal behavior in violation of an individual's civil rights. This fine is also based on vicarious liability for James Libby's unwelcome, sexually predatory conduct toward Ms. Yost as set forth in the Charge of Discrimination. Such fine is payable to the State of New Hampshire care of the New Hampshire Human Rights Commission.

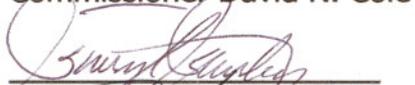
30. Counsel for the Charging Party shall notify the Commission within 5 business days of the date of the transmittal letter of this decision whether Yost collected unemployment benefits for any period of time during the three week gap in employment between Haircuts and Supercuts.

31. The decision in this case is unanimous.

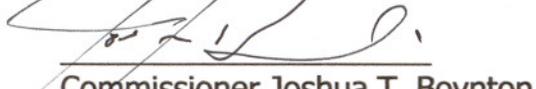
**IT IS SO ORDERED.**

  
Commissioner David N. Cole

2/22/2010  
Date

  
Commissioner Sheryl Shirley

2/4/10  
Date

  
Commissioner Joshua T. Boynton

2/4/10  
Date

cc. Suzanne Gorman, Esq.  
Senior Assistant Attorney General  
Attorney Kristin Clouser  
James Libby, Haircuts USA LLC