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NEW HAMPSHIRE COMMISSION FOR HUMAN RIGHTS

Karen Ewell v. First Savings Bank of NH
and Chittenden Corporation

ES(H) 5367-94
EEOC: 16D940758

DECISION

This charge of employment discrimination based on sex was filed with the Commission for Human Rights on September 23, 1994. Probable cause was found by investigating Commissioner Hesse on November 15, 1999. Conciliation having failed, a hearing was scheduled and took place on February 8 & 14, March 7, and April 6, 2001. Commissioners Manning, Lown, and Palmer sat as the hearing panel.

The following witnesses presented testimony during the hearing: Karen Ewell, the complainant; Amber Chasse, complainant's daughter; George Price, former co-worker of complainant; Marilyn Barton, former branch supervisor at First Savings; Carol Cross, former human resources manager for respondent; Sarah Griffin, former supervisor in bookkeeping department at respondent; Michael Kandle, Ph.D., complainant's psychologist; and Brenda Dolan, former commercial banking manager for First Savings.

The complainant was represented by Attorney Jon Meyer. The respondent was represented by Attorney Mark Broth.

Based on the documentary evidence and the testimony presented, the Commission finds in favor of the complainant.

Background

The incidents that form the basis of this complaint occurred at First Savings Bank in 1992, 1993 and 1994. First Savings operated independently in New Hampshire until approximately 1995, when it merged with Vermont Federal Bank. In the years since the charge was filed, the Bank has been repurchased, and is now owned and operated by the Chittenden Bank, which runs the operation in New Hampshire under the trade name "First Savings."

In approximately 1992, First Savings purchased Seacoast Savings Bank, where the complainant, Karen Ewell, worked. After a short absence from employment, complainant was re-hired by respondent in December 1992 as a part-time switchboard operator. She worked noon to 5 p.m. and every other Saturday at their Dover branch office. Complainant was a good employee and loved her job. She received good evaluations throughout her employment, and her hours and duties expanded. She was moved from the back of the office to the front, where she became the switchboard operator/receptionist and handled the mail. Then she began to assist customer service, typing mortgage applications and working on NOW account statements. Ultimately she began to assist in purchasing supplies.

At the time her employment with the respondent terminated in April 1994, complainant was earning \$6.75 per hour and averaged 42 hours per week.

Among those working at the Dover office with complainant were the following: Chris Vezaris, branch manager; Nancy Hilpert, assistant manager; Kim Alty, branch supervisor; Marilyn Barton, head teller; David Bentley, building services manager; and George Price, mailroom. Along with some of the other employees, Vezaris, Barton and Price and previously worked at Seacoast. Barton and complainant were good friends.

During the time in question, Brenda Dolan was vice-president for retail banking at First Savings, the senior administrative officer for human relations. Carol Cross was promoted to human resources manager at First Savings in early 1994, reporting to Dolan. Marge Starkey was operations officer and then operations manager, a vice-presidential position.

The respondent had nine offices at the time, with its headquarters in Exeter. It had a policy on sexual harassment but had conducted no training with either its employees or supervisors and managers. Cross testified that she gave a copy of the policy to all new employees during their orientation. The complainant admitted receiving the manual that contained a copy of the policy.

The complainant alleges that during her employment she endured a hostile work environment at First Savings because of the actions of her co-worker Price. She also alleges that she routinely had to handle pornographic material addressed to the former bank president when she sorted and opened the mail. Price's conduct was both verbal and physical, and although she tried to be friendly at first, she later became distraught as a result of this

behavior. Although she indicated to Price that his behavior was unwelcome, he did not stop.

Complainant reported Price's behavior to his supervisor, David Bentley. Bentley promised to take care of it, but it continued. After mentioning it to Bentley numerous times, with no apparent effect, and, after particularly egregious behavior by Price on April 19, 1994 (poking complainant in the back with his genitals), complainant advised Carol Cross of Price's conduct in a meeting on April 21, 1994, in which she also complained of work overload. Cross asked complainant to put her complaint in writing, which complainant did in a letter dated April 23, 1994. (Complainant's Exhibit 5)

Cross talked with Barton, who confirmed that Price had engaged in unwelcome physical sexual behavior with her as well. Cross then reported the harassment to Dolan, who initiated an investigation. From then on, all interviews were conducted with Dolan and Cross present, with Dolan and Cross taking notes. Price was interviewed, informed that Ewell had filed a complaint, and, before Dolan finished questioning him, resigned from his position with the Bank. According to Dolan's testimony, Price "pretty much acknowledged" the allegations, but denied following complainant around, whispering in her ear, or touching her. He blamed complainant and others for "provoking him."

Bentley was interviewed as part of the Bank's investigation. He confirmed that Ewell had complained to him about Price's behavior approximately six times in the previous six months. Bentley admitted to Dolan that he had told no one of Ewell's complaints.

After her first meeting with Cross, complainant was called to a second meeting with Dolan and Cross. Complainant testified that during this meeting Dolan told her she had shown complainant's letter to Price. Price had admitted some of the behavior, and Dolan and Cross knew from Barton that Price had pinched Barton's breast. Nevertheless, Dolan questioned complainant as to whether she had provoked Price by smiling at him, blowing him kisses, or showing him pornographic material. Complainant denied showing material to Price, finally revealing that it was Barton who had done so.

During the second meeting with complainant, Dolan transferred her from her position in Dover to the Exeter branch. Her job duties and hours were considerably reduced as a result, and she was separated from her co-workers. The respondent brought some Dover employees to the Exeter office to conduct interviews as part of its investigation however, so there was some contact between them and complainant. Barton, who had known about Price's behavior but had not reported it, was threatened with a reprimand. She was angry at being involved with the complaint. After telling complainant that she wished complainant had not reported the harassment and that she held complainant responsible for the investigative activities, Barton never spoke to complainant again.

Complainant tried to speak with her manager, Chris Vezaris, about her job, as Vezaris left the Exeter branch. Vezaris indicated to complainant that she wouldn't talk to complainant about her work until after the Bank dealt with her complaint. Complainant was

distraught over this apparent retaliation.

The respondent did not inform complainant that Price had resigned, nor did it offer to move her back to Dover after he did so.

On the morning when Vezaris indicated that she would not talk to complainant, complainant became distraught and asked to take a break. Cross found her in the ladies room of the Exeter office and had someone find Dolan and bring her to a meeting. Dolan and Cross testified that complainant was obviously distraught, but Dolan informed Ewell that the bank had further questions for her that needed answering. Dolan and Cross deny that Dolan became angry during the meeting.

Complainant alleges that during this third meeting, Dolan at first seemed "compassionate" to her, but then changed, asking complainant again whether she had provoked Price, demanding repeatedly to know why complainant had reported Price's behavior to Bentley, and asking complainant to demonstrate how Price poked her in the back with his genitals. Complainant alleges that Dolan was angry and raised her voice during this meeting, and told complainant that what she described had not happened.

Complainant became totally distraught and asked to be allowed to go home. She left work that day April 26, 1994, suffered an emotional breakdown, and was never able to return to work. Respondent terminated complainant's employment on August 5, 1994.

The respondent did not prepare a written report of its investigative findings with regard to Price's alleged harassment and no record regarding the harassment complaint was placed in Price's personnel file. Neither Barton nor Bentley received any discipline for failing to report sexual harassment of which they were aware, although on May 24, 1994, Bentley was given a written warning for several issues, including "failure to manage George Price's inappropriate behavior, i.e. frequent verbal outbursts to tenants of the Dover office." (Complainant's Exhibit 14) Nor was any other management employee disciplined. Dolan and Cross testified that at the time, although they knew Price acted inappropriately, they "reached no conclusion" regarding sexual harassment and therefore prepared no report. The bank conducted sexual harassment training after these events.

Issues

Karen Ewell alleges that the behavior of Price constituted sexual harassment and that the Bank is liable because it knew or should have known of the behavior prior to her report in April 1994, yet did nothing to stop it. Further, she alleges that when she reported the behavior to Cross on April 21, 1994, the Bank subsequently conducted an accusatory investigation involving repeated interviews with her about what she might have done to provoke Price, moved her to another position at a different office where her hours and duties were reduced, and did not take any remedial action. Thus, its actions were untimely and inadequate.

Although it does not attempt to argue that Price did nothing wrong, the Bank states that it had a policy against sexual harassment, that the complainant had a copy of the policy, and that the Bank was not informed of the harassment until April 21, 1994. Upon receiving notice, the Bank argues, it took appropriate remedial action by conducting a prompt investigation which resulted in Price's resignation less than a week after it received notice of the harassment.

The Bank argues that it was appropriate to conduct a thorough investigation, including inquiring whether complainant may have "provoked" Price through her own behavior and what she was doing at the Bank after hours with Bentley, as reported by another Bank employee. The Bank argues that complainant was hypersensitive and as a result was traumatized by an investigation which reasonable persons would not have found offensive; thus, the Bank should not be held liable for the full amount of complainant's emotional distress, if any. In the alternative, the Bank argues that complainant had multiple emotional stressors in her life which actually caused some, if not all, of her injuries. The Bank argues that it is entitled to an apportionment of any damages.

Findings

Whether complainant was sexually harassed by Price:

New Hampshire RSA 354-A:7,V prohibits sexual harassment as a form of sex discrimination. It provides:

"Unwelcome sexual advances, requests for sexual favors, and other verbal, non-verbal or physical conduct of a sexual nature constitute sexual harassment when:

- (a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
- (b) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- (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."

The language of RSA 354-A:7,V is nearly identical to the language of regulations under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2, as amended) prohibiting sexual harassment as a form of sex discrimination. See: 29 C.F.R. §1604.11 Because RSA 354-A:2.XV defines "unlawful discriminatory practices" to include practices prohibited by the federal Civil Rights Act of 1964, as amended, it is appropriate for the Commission to look to federal case law in construing relevant portions of state law, if necessary.

For sexual harassment to state a claim under Title VII or NH RSA 354-A, it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. Whether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well being of employees is a question to be determined with regard to the totality of the circumstances. Henson v. City of Dundee, 682 F.2d 897 [29 FEP Cases 787 (11th Cir. 1982) See also: Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) The totality of the circumstances to be examined includes the frequency of the conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).

The preponderance of the evidence establishes that Price engaged in unwelcome sexual conduct toward the complainant over a period of at least six months and probably for the entire time they worked together after 1992, and that his behavior created an abusive work environment. Ewell's written complaint to the Bank (Complainant's Ex. #5) is detailed and clear. The Commission found her testimony credible and consistent with her written statement of 4/23/94.

A few examples of Price's behavior as established by the evidence will show its nature: constant invitations to go away for the weekend and out to dinner; whispering sexual comments in complainant's ear while she was trying to answer the phone; suggestive remarks regarding the size of his genitals; exposing himself and holding his genitals in front of complainant; slapping complainant on the behind daily; grabbing her beneath her behind daily; unzipping his zipper and stating to complainant when she bent over, "While you're down there"; staring at complainant's breasts. On one occasion Price touched complainant's breast in front of a customer (he reached for the mail which complainant had in her hand and touched complainant at the same time). On April 19, 1994, Price pushed his penis into complainant's back while she was answering phones.

Price stated that he slapped complainant on the behind with folded paper as a greeting, but denied doing so with his hand. Price's denial of much of the alleged behavior was not found to be credible, given the testimony of Barton confirming that he had pinched her nipple (which Price denied) and the investigation notes and testimony of Cross which demonstrate that other employees confirmed his sexual behavior. Although Barton testified at the hearing that she did not recall the incident, notes from the Bank's interview with Barton indicate that to them she confirmed that Price patted his crotch and asked complainant and Barton to touch him. (Complainant's Ex.#15, Dolan notes of interview with Barton)

Respondent tried to suggest that complainant "provoked" Price's conduct by calling him "Georgie Porgie," by showing him pornographic materials, and by blowing him kisses. Complainant testified that she did call Price "Georgie Porgie" at first, but that she stopped doing that when he responded with a vulgar verse. There was no credible evidence offered that complainant ever showed Price pornographic material, or that complainant blew kisses to Price. Complainant did not incite or encourage Price's behavior.

Complainant's statement to the Bank and her testimony indicated that the behavior escalated, as did her feelings about it. At first she put up with the behavior and made excuses to Price, just trying to be friendly. But as Price became more persistent and physical, complainant was more often upset, sometimes in tears. Complainant found the openness of the behavior, especially in front of customers, distressing and humiliating. The Commission finds that the behavior was unwelcome to complainant.

The Commission finds that a reasonable person in complainant's position would have found Price's conduct offensive and that the complainant actually did so. The evidence established that Price's conduct was both severe and pervasive. Complainant testified not only that Price physically harassed her, but often expressed impatience and anger at her for rejecting his advances. At least once he threatened to bring a ladder to complainant's home and climb to her bedroom window. Shortly after the incident when Price poked his penis into complainant's back, Price exclaimed angrily to her, "Are you going away with me this weekend and don't give me any more of those F---- excuses, I want you to go!" The behavior occurred over at least six months, and most likely from November 1992 through April 1994. The offensive behavior which occurred while complainant was trying to answer the switchboard or serve customers unreasonably interfered with complainant's ability to perform her job.

When the Bank knew or should have known of Price's conduct:

"When an employee seeks to hold the employer responsible for the hostile environment created by the plaintiff's supervisor or co-worker, she must show that the employer knew or should have known of the harassment in question and failed to take prompt remedial action. [cite omitted] The employee can demonstrate that the employer knew of the harassment by showing that she complained to higher management of the harassment, [cite omitted] or by showing the pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge [cite omitted]." Henson v. City of Dundee, 682 F.2d 897 [29 FEP Cases, 787, 794] (11th Cir. 1982).

Although the Supreme Court has since established a different standard of liability for hostile work environment harassment by a **supervisor**, the standard enunciated in the Henson case for liability for co-worker harassment still stands: an employer is liable for sexual harassment of an employee by a co-worker when the employer knew or should have known of the harassment and failed to take appropriate remedial action. ¹

¹ Five days after the close of the record in this case, respondent filed a "Supplemental Citation of Authority." Respondent argues that, because the Commission's administrative rules expired in 1990 and were not re-adopted until 1998, its rules regarding liability for sexual harassment were not in effect during the time of this action. The rule in question is Hum 403.02(e), which states the "knew or should have known" rule on liability for co-worker

The evidence shows that starting in December 1993, complainant notified David Bentley, Price's supervisor, of Price's offensive conduct. Complainant testified that she first told Bentley about the behavior around the holidays in 1993, telling Bentley that he had a "pervert" for an employee and that when she was trying to work Price was grabbing and touching her on the butt. Complainant testified that she had approximately six discussions with Bentley. She asked him to stop Price from doing this, and Bentley stated he would talk to Price and for her to stay away from him. Dolan testified that when she interviewed Bentley during her investigation, he confirmed that complainant had complained to him about Price six times in the last six months but that he had not communicated it to anyone else.

Bentley told complainant that he would talk to human resources. Complainant testified that Bentley told her that she could report it, but he also told her it would make problems and might cost her her job.

On his November 1993 evaluation, Bentley is referred to as Building Services Supervisor. On his November 1994 evaluation, Bentley is referred to as Building Services Manager. He was a salaried employee. (Complainant's Exhibit #19, Bentley Evaluations) Although Dolan agreed that Bentley had supervisory duties with respect to maintenance, she denied that he was a manager. She confirmed that Bentley reported to the treasurer of the Bank, a vice-president. She confirmed that Bentley was in charge of nine buildings, worked nine to five, performed the purchasing function for the Bank and was in charge of repossessed property.

Bentley also supervised at least three employees: Price, Pomerleau, and Call. Although Dolan denied it, the evidence shows that Bentley was responsible for conducting performance evaluations on his subordinate employees and was expected to correct inappropriate conduct.

harassment. The Commission's earlier rule on this issue was identical. See Hum 402.2(d) (Adopted 11-84, updated 1987, expired) Respondent dislikes this interpretation of law and argues that respondent is not liable, even if its supervisory employees knew or should have known of the conduct, because the complainant initially did not follow respondent's harassment policy to the letter.

The complainant objects to respondent's late raising of this issue. This charge has been pending since 1994 and this is the first time that the respondent has raised this issue. Secondly, complainant points out that the respondent's argument misperceives the role of Hum 403.02 in the proceeding, since the rule is not necessary for the Commission to carry out what the statute in question authorizes on its face. Petition of Smith, 139 N.H. 299, 307 (1994); Appeal of Morgan, 144 N.H. 44, 51 (1999). The Commission agrees with the complainant. The issue was raised after the record was closed. The Commission's application of the law is consistent with long-standing federal case law on the issue of employer liability for harassment by co-workers, and has been widely published.

A warning to Bentley on May 12, 1994 cites his failure to manage Price's work hours, failure to manage Price's behavior toward other tenants in the Dover building, and direct violation of the company's policy on evaluations because he had failed to do evaluations of his three employees. (Complainant's Ex. #14)

Respondent had a policy against sexual harassment in effect in 1993 and 1994. Although employees were advised of the existence of the policy at the time of their hiring, respondent had not conducted any sexual harassment training with employees. The policy provides the following regarding complaints of harassment:

"Any employee who has a complaint of sexual harassment at work by anyone, including managers, supervisors, co-workers or visitors, is urged to bring the matter to the attention of **bank officials** so that the bank may investigate and deal with the problem. Employees **may** bring their complaint to their manager or directly to the Personnel Officer. If the complaint involves someone in the employee's direct line of command, or if the employee is uncomfortable discussing the matter with his or her direct manager, the employee is urged to go to the Personnel Officer." [emphasis added]

"Bank official" is not defined in the policy. Complainant testified that she thought Bentley was a bank official and that she believed as Price's supervisor, Bentley could stop Price's behavior.

The Commission finds that Bentley was a supervisor/manager sufficiently high in the organization to be expected to correct his subordinate's behavior. Under the above policy, Bentley was a manager designated to receive the complaints of the employees he supervised. Thus, if Call, Price, or Pomerleau were being harassed, they could reasonably be expected to report such harassment to Bentley, not to Bentley's supervisor, the Treasurer of the Bank. Upon receipt of such notice, Bentley had either a duty to correct the harassment or to report it to higher management so that steps could be taken to stop it.

If Bentley was a manager with a duty to report harassment to higher management or to correct it, then that duty existed whether it was one of his own subordinates reporting, or another employee reporting to him about one of his subordinates. If he had a duty to report, then Bentley's knowledge can be imputed to the Bank. See: RESTATEMENT (SECOND) AGENCY §272, 275. Also: Torres v. Pisano, 116 F.3d 625 (2nd Cir. 1997)

Further supporting that Bentley was an employee with a duty to report is evidence that the Bank was disturbed that Bentley had not reported complainant's concerns regarding sexual harassment by Price to anyone higher in the Bank. Dolan testified that when she questioned Bentley and learned that complainant had complained six times to him in last six months regarding Price, she was "shocked and hugely disappointed. He didn't have an answer and I was puzzled a great deal by that." In later questioning she referred to Bentley's "failure to report" and the fact that the Bank did not "get an answer to that." On re-direct Dolan characterized Bentley's failure to report as "a violation of company policy."

Being shocked and questioning Bentley regarding his failure to report Price's conduct makes little sense if Bentley had no duty to report such behavior or deal with it himself.

The Commission also finds that the respondent should have known of Price's conduct prior to April 21, 1994, because it was openly practiced and was observed by persons in supervisory positions on more than one occasion, giving rise to constructive knowledge. Henson, at 905. Employers usually will be deemed to know of sexual harassment that is openly practiced in the workplace or well-known among employees. This often may be the case when there is more than one harasser or victim. Lipsett v. University of Puerto Rico, 864 F.2d 881, 906 (1st Cir. 1988).

Complainant testified that before she reported Price's behavior to Cross, many people who worked in the Bank were aware of his behavior because they saw or heard it. Vezaris, for example, came out of her office on one occasion just as Price made a "low" joke. Vezaris said, "George," in a disapproving or shocked tone, and Nancy Hilpert, whose desk was nearby, chuckled. Complainant testified that "they were all aware that he grabbed my butt every morning - on the day he didn't do it we knew he was ill." Dolan's notes of interviews with subordinate employees confirmed that some of them had been offended by Price's sexual remarks.

Sara Griffin, former supervisor in respondent's bookkeeping department from 1992 to December 1994, testified that she learned that Price was showing a photo of his wife in her underwear to employees at the bank. Griffin notified Marge Starkey and asked her to stop Price's behavior. She believed they had stopped it that day.

Dolan's notes of her investigation confirm that Hilpert, the assistant manager, corroborated suggestive comments by Price. Barton, the teller supervisor, confirmed that Price had pinched her nipple and had patted his crotch and requested that she and Ewell touch him. (Complainant Ex. #15) Barton testified that she had informed Kim Alty, the branch supervisor (and her supervisor at the time), about Price pinching her nipple. Barton testified that Alty thought they should tell someone, but she did not know if Alty actually did. Barton testified on cross-examination that in her deposition she recalled complainant telling her that Price had exposed himself to her. Complainant testified that when she discussed with Barton what Price was doing, Barton said, "He does that to everyone."

Complainant's letter of April 23, 1994, describes a particularly embarrassing incident when Price actually touched her breast in front of a customer. "I was holding his mail and when he went for his mail he also went for me. I felt horrible, became very shaky and teared up. I had to regain my composure and continued servicing my customer. . . . The customer appeared to be uncomfortable and asked me, "Did that man do what I think he did?" . . . The woman was upset and said, "You poor girl you." (Complainant's Ex. #5)

The Bank also received regular mailings of sexually explicit material addressed to one of its former officers. Complainant was instructed to throw the material away, but had to open

it in order to know what it was. More than once complainant asked about the lewd mail, but bank managers did nothing about insuring that she did not have to handle it.

Finally, the respondent knew or should have known once complainant formally complained to Cross in April 1994.

Did the respondent take appropriate remedial action?

The Commission finds that the respondent failed to take any remedial action to prevent Price's harassment from the time it should have been aware of it, probably as early as November or December 1993, until April 1994. At least Bentley, Vezaris, Barton, and Hilpert, knew of the behavior and should have known that Price's behavior was inappropriate. None of them took steps to stop it or to report it to higher management.

The Commission finds that once complainant notified Cross of Price's conduct, the respondent failed to provide an adequate remedy. The Bank states that it moved complainant to another bank during the investigation to protect her from Price, however it apparently gave no thought to moving Price. Complainant testified that respondent's actions suggested that she had done something wrong and made her feel as if she was being punished. Complainant's hours were reduced and her job, which she loved, was changed. Nothing was done to prevent other employees from retaliating against complainant for filing her complaint, and thus, other employees did blame her. Although Price resigned, no one informed complainant or made an attempt to move her back to her old job.

Complainant requested that her name be kept confidential. Cross testified that it was the Bank's policy not to use a complainant's name unless the individual said the Bank could. But she also testified that no promise had been made to complainant. Although the bank learned of offensive behavior by Price toward women other than Ewell, and therefore could have investigated without providing her name, Dolan and Cross informed Price that Ewell had made a complaint. Everyone knew that complainant was the one who had complained, even though evidence from many sources confirmed the problem.

Dolan conducted an accusatory investigation, which caused injury to the complainant. Even though Price had obviously quit his job in order to avoid discipline, Dolan continued to question complainant, accusing her of "provoking" him. (Ironically, Dolan accused complainant of provoking Price by showing him the pornographic material which complainant had to open when she sorted the mail, and which no one in the bank seemed to think would offend complainant.) Hilpert provided information that complainant was seen at the bank after hours with Bentley, and Dolan indicated that she needed to question complainant about that, although Ewell had made no complaint about Bentley's behavior. At their third meeting, when complainant was obviously distraught, Dolan required complainant to demonstrate how Price had poked her in the back with his genitals. Complainant testified that Dolan also required her to describe what Price's genitals looked like (presumably in connection with a separate incident when Price exposed himself to Ewell. Complainant

testified that Dolan then shouted at her, "That never happened."

The respondent states that it took what remedial action it could by immediately starting an investigation, taking a statement from complainant the next day, speaking to witnesses, accepting Price's resignation, and doing training. It also argues that it had to try to "get to the bottom" of the matter in order to protect other employees.

The evidence tends to show, however, that the respondent continued to investigate only complainant's behavior, whether she had provoked Price, and information about complainant given to them by Barton and Hilpert. Much of the information later sought by respondent appeared to relate to problems complainant might have had which could explain her distress, rather than whether complainant was harassed. For example, Barton called Dolan on her own initiative and provided personal information regarding complainant's family situation. After the third meeting with complainant the respondent essentially ceased investigating, and only resumed its "investigation" after complainant filed her charge with the Commission for Human Rights. Respondent employees did testify that sexual harassment training was something that had been planned. Nevertheless, no training was conducted until after complainant filed her charge with the Commission.

Limited notes were taken by Dolan and Cross and no investigative report was prepared. Although it produced no witness statements prepared during its original investigation on behalf of complainant, the respondent obtained many witness statements once complainant filed her charge. No disciplinary action was taken with respect to Bentley for failure to report harassment of which he was aware. At no time in his subsequent evaluation was he taken to task for this, and he did receive a pay increase. (Complainant's Exhibit #19) No disciplinary action was taken with respect to Price. The Commission does not agree that these actions show that the Bank was resolving these issues for all employees.

Conclusion

The complainant was sexually harassed by a co-worker while employed by respondent. The Bank knew or should have known of Price's conduct in December 1993 and after because complainant had notified Price's supervisor. The Bank further should have known of the behavior because it was practiced openly and other employees, including managers and supervisors, had observed it or been informed of it. The Bank admits it had knowledge as of April 1994. Nothing happened as a result of Bentley's knowledge or the knowledge of supervisors and managers.

The Commission finds that the respondent failed to take appropriate remedial action, resulting in further harassment of complainant after the bank was on notice of Price's conduct. The Commission further finds that the bank's actions in April 1994 did not provide an appropriate remedy because no investigation was completed, no disciplinary action was taken, complainant was moved from her job after she reported sexual harassment, and the investigation focused in an accusatory manner on complainant, rather than the harasser.

Based on the above, the Commission finds that respondent discriminated against Karen Ewell based on her sex.

Award of Damages

Having determined that the respondent engaged in an unlawful practice, 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. Compensatory Damages

The Commission finds that complainant suffered severe emotional harm, distress, embarrassment, humiliation, and trauma as a result of the actions and inaction of respondent. The testimony of Dr. Kandle, complainant, and her daughter established that complainant suffered a complete emotional breakdown in April 1994 for which she required medical treatment at Wentworth Douglas Hospital. Since then she has had panic attacks, ongoing depression and suicidal thoughts, headaches, and has endured stomach problems because of the medications she takes for her emotional problems. Her condition has required ongoing treatment from Dr. Kandle and medication. Dr. Kandle testified that complainant will probably require antidepressant medications for the rest of her life. Accordingly, the Commission orders the respondent to pay the sum of \$225,000.00 to compensate the complainant for emotional harm.

Respondent's defense to damages is that complainant was emotionally and psychologically troubled already because of marital abuse, physical ailments, family matters, and other sexual assaults, and that the harm she claims is not related to any action by Mr. Price. The Commission finds that there is a causal link between the violation of complainant's rights by the Bank and the injuries shown. Although fragile, complainant was functioning, working essentially full time, and running a household. But for the actions of respondent, complainant would not have suffered the breakdown which occurred on April 26, 1994 and the resulting harm. The actions of respondent were a substantial factor in the causation of complainant's injuries.

B. Back Pay

But for the actions of respondent, complainant would have remained employed at First Savings, and the wages she would have earned are appropriate affirmative relief which can help to make the complainant "whole." Complainant was earning \$6.75 at the time of her termination and averaged 42 hours per week. She testified that in the first four months of 1994 she earned \$4881.96 from the bank. Thus, her yearly earnings, not even counting future wage increases or promotions, were and would have been \$14,646.00.

Dr. Kandle testified in February that complainant was probably ready to go back to work and in fact in 2000 had attended beauty school for that purpose, but had had to take time off because of surgery on her hip and leg. Complainant testified that she had one surgery (hysterectomy) within two years of leaving the bank, and had two surgeries on her leg and hip, one in June and the other in December 1999. In the interim, complainant has received approximately \$500.00 per month in Social Security Disability.

An award of back pay should be such as will, in the discretion of the Commission, effectuate the purpose of the chapter. RSA 354-A:21,II(d) The Commission awards complainant back pay in the amount of \$92,758.00, which represents six and one-third years when she has been unable to work since April 1994.

Medical Bills

As a result of the respondent's actions, the complainant has required medical and psychological treatment. She has presented evidence from her psychologist and documentary evidence showing expenses for prescriptions and doctor and psychologist visits. These amounts have not been rebutted by the respondent. The Commission awards complainant the amount of \$51,539.53 in medical costs.

The testimony of Dr. Kandle established that complainant will need future treatment and medication. The Commission awards complainant \$10,000.00 in future medical bills.

Home Equity

Complainant requested \$50,000.00 to cover the equity in her home which was lost as a result of foreclosure after she terminated her employment with the bank. The Commission denies this request because there was insufficient evidence proving the alleged loss or its causal relationship to this action.

Attorney's Fees

The complainant has prevailed on her claim of sexual harassment. 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 order. Respondent is granted 10 days from the filing of the statement to object. The Commission will then enter a final order.

Motion to Amend

Complainant's Motion to Amend the Charge of Discrimination to add Chittenden

Corporation as an additional respondent is granted.

Total Damages

Respondent is ordered to pay complainant the sum of \$379,297.53. Respondent shall pay complainant's reasonable attorney's fees and costs.

So Ordered.

June 25, 2001

Date



Maureen Raiche Manning, Esq.
Chair for the Hearing Commission

Commissioner Elizabeth Lown
Commissioner Philip Palmer

COMPLAINANT'S REVISED REQUEST FOR FINDINGS OF FACT
AND RULINGS OF LAW

A. Findings of Fact

1. Granted
2. Granted
3. Granted, but amended to read: "The complainant's hours and job duties were expanded during the course of her employment, until her transfer to the Exeter branch."
4. Granted
5. Granted
- 6a. Granted
- 6b. Granted
- 6c. Granted
- 6d. Granted
7. Granted
8. Granted
9. Granted
10. Granted
11. Granted
12. Granted
- 13a. Granted
- 13b. Granted
- 13c. Granted
- 13d. Granted
- 13e. Granted
- 13f. Granted
- 13g. Granted
- 13h. Granted
- 13i. Granted
- 13j. Granted
- 13k. Granted
- 13l. Granted
- 13m. Granted
- 13n. Denied
14. Granted
15. Granted
16. Granted
17. Granted
18. Granted
19. Granted
20. Granted
21. Granted
22. Granted

23. Granted
- 24a. Granted
- 24b. Granted
- 24c. Granted
- 24d. Granted
- 24e. Granted
- 24f. Denied
- 24g. Granted
25. Granted
26. Granted
27. Granted
28. Granted
29. Granted
30. Granted
31. Granted
32. Granted, as to Marilyn Barton; Denied as to Nancy Hilpert
33. Granted
34. Granted
35. Granted
36. Granted
37. Granted
38. Granted
39. Granted, to read as follows: "Barton was threatened with a reprimand for allegedly encouraging the sexual harassment by showing Price a sexually explicit mailing."
40. Granted
41. Granted
42. Granted
43. Granted
44. Denied
45. Granted, to read as follows: "The Bank did not protect Ewell's confidentiality as its policy indicates it will endeavor to do, including showing Price complainant's letter."
46. Granted
47. Granted
48. Granted
49. Granted
50. Granted
51. Granted
52. Granted
53. Granted
54. Granted
55. Granted
56. Granted
57. Granted
58. Granted
59. Granted
60. Granted

61. Granted
62. Granted
63. Granted
64. Granted
65. Granted
66. Granted
- 67a. Granted
- 67b. Granted
68. Granted
69. Granted
70. Granted
71. Granted
72. Granted
- 73a. Granted
- 73b. Granted
- 73c. Granted
- 74d. Granted
- 73e. Granted
- 73f. Denied
- 73g. Denied
- 73h. Granted
74. Denied

Damages

75. Granted
- 76a. Granted
- 76b. Granted
- 76c. Granted
- 76d. Granted
- 76e. Granted
- 76f. Granted
- 76g. Granted
- 76h. Granted
- 76i. Granted
77. Granted
78. Granted
79. Granted
80. Granted
81. Granted
82. Granted
83. Granted, but amount should read "\$14,646."
84. Denied
85. Denied
86. Granted
87. Granted
88. Granted, but amount should read "\$51,539.53."

89. Granted

90. Granted

B. Rulings of Law

a. Granted

b. Granted

c. Granted

d. Granted, but with reference to Commission rule deleted.

e. Granted, as to Bently, Hilpert, Banton, Starkey, Alty.

f. Granted, with reference to Commission rule deleted.

g. Granted, with reference to Commission rule deleted.

h. Granted, with reference to Commission rule deleted, as follows: "The respondent is liable for the injury caused to complainant because:

i. Granted

ii. Granted

iii. Granted

i. Granted, see also: Maxfield v. Maxfield, 102 NH 101 (1959): ("...negligent conduct is a proximate or legal cause of harm, if the actor's conduct is "a substantial factor in bringing about the harm" and if no rule of law relieves the actor from liability because of the manner in which his negligence has resulted in the harm." Restatement, Torts § 431 (a), (b).")

j. Granted

k. Granted

l. Granted

RESPONDENT'S REQUESTS FOR FINDINGS OF FACT
AND RULINGS OF LAW

Findings of Fact

1. Granted (date was Dec. 28 or 30)
2. Granted
3. Granted
4. Granted
5. Granted
6. Granted
7. Granted
8. Granted, but with the following sentence added: "Bentley was also referred to as Building Services Manager (Nov. 1994 evaluation) and Building Services Supervisor (Nov. 1993 evaluation)."
9. Granted
10. Denied
11. Denied
12. Denied
13. Granted
14. Granted
15. Granted
16. Granted
17. Granted
18. Granted
19. Granted
20. Granted
21. Granted
22. Denied
23. Granted
24. Granted
25. Denied
26. Granted
27. Granted
28. Granted
29. Granted
30. Granted
31. Granted
32. Granted
33. Granted
34. Denied
35. Granted
36. Granted
37. Granted
38. Granted

- 39. Denied
- 39. (misnumbered) Granted
- 40. Granted
- 41. Granted
- 42. Granted
- 43. Granted

Rulings of Law

- 44. Granted, with reference to Commission rule deleted.
- 45. Granted
- 46. Denied. Case cited does not mention NH RSA 354-A.
- 47. Denied
- 48. Granted
- 49. Granted
- 50. Denied
- 51. Denied
- 52. Granted
- 53. Denied
- 54. Denied. Respondent did not remove Price.
- 55. Denied
- 56. Denied
- 57. Granted
- 58. Denied
- 59. Denied