STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 08 ERT 204 EEOC No. 523-2008-00153

In the matter of

Paula M. Gulley
Complainant

v. DECISION AND ORDER

NATIONAL WHOLESALE LIQUIDATORS
Respondent

INTRODUCTION

On March 4, 2008, Paula M. Gulley (hereafter referred to as the Complainant) filed a charge with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission) against NATIONAL WHOLESALE LIQUIDATORS (hereafter referred to as the Respondent). The Complainant alleged that the Respondent discriminated against her with respect to terms and conditions of employment because of her sex, because she opposed unlawful employment practices and because she had filed a previous charge of discrimination, in violation of R.I.G.L. Section 28-5-7. This charge originally was assigned to the U.S. Equal Employment Opportunity Commission (hereafter referred to as the EEOC) for investigation pursuant to a work-sharing agreement between the Commission and the EEOC. The EEOC closed its case on March 18, 2009 based upon the Respondent's purported bankruptcy. Thereafter, the Commission conducted an investigation of the Complainant's allegations. On March 2, 2010, the Commission issued a Complaint and Notice of Hearing in order to allow the parties to continue to present evidence on the allegations of the charge. The investigation continued. On March 30, 2012, Preliminary Investigating Commissioner Camille Vella-Wilkinson assessed the information gathered by a staff investigator and ruled that there was probable cause to believe that the Respondent violated the provisions of the Fair Employment Practices Act, Title 28, Chapter 5 of the General Laws of Rhode Island (hereafter referred to as the FEPA) as alleged in the charge.

On June 20, 2012, an Amended Complaint and Notice of Hearing/Notice of Rescheduling of Hearing issued. The Amended Complaint alleged that the Respondent discriminated against the Complainant with respect to terms and conditions of employment because of her sex, in retaliation for opposing unlawful employment practices and in retaliation for filing a previous charge of discrimination.

A hearing on the Amended Complaint was held on January 30, 2013 before Commissioner Rochelle Bates Lee. The Complainant represented herself at the hearing. The Respondent did not appear at the hearing.

Following the hearing, the Commission sent a letter to the attorney for the Respondent in bankruptcy, giving the Respondent until March 4, 2013 to provide a reason for the Respondent's absence. The letter further provided that if the Respondent did not provide a reason for its absence, or if the Commission decided that the reason given did not justify the absence, the Commission would decide the case based on the evidence presented at the hearing. The Commission did not receive a reply to its letter.

JURISDICTION

The Respondent was a corporation that employed four or more employees within the State of Rhode Island and thus it was an employer within the definition of R.I.G.L. Section 28-5-6(7)(i) and is subject to the jurisdiction of the Commission.

FINDINGS OF FACT

1. The Complainant is a female who worked for the Respondent in Rhode Island. She was working in the maintenance department.

2. Bobby Thibodeau was the Assistant Manager of Respondent's store where the Complainant worked in 2007 and 2008. In or around early October 2007, Mr. Thibodeau called a store meeting and announced that only the male employees could lift anything over ten pounds. If anything weighed over ten pounds, female employees would have to get a man to lift it for them. This interfered with the Complainant's ability to perform her maintenance duties, cleaning in the Receiving Department.

3. The Complainant complained about this division of labor to Respondent's Director of Human Resources, Robert Pidgeon, who came to the store and gave Mr. Thibodeau a verbal warning, stating that he could not divide work tasks by sex. However, the Complainant was not given back her work of cleaning the Receiving Department. The Complainant was allowed to clean the bathrooms, but was not allowed to clean Receiving, which cut down on her hours. Mr. Pidgeon did not restore the Complainant's cleaning duties in the Receiving Department. This practice continued until shortly before the store closed in or around December 2008.

4. At one point in her employment, the Complainant came in to work on a Saturday. Mr. Thibodeau told her that the bathroom was a mess and that she needed to take care of it immediately. She cleaned the bathroom and he then sent her home. The reason given by Mr. Thibodeau was that "I don't want you here".

5. The discriminatory division of labor which was implemented by Mr. Thibodeau and not remedied by Mr. Pidgeon made it hard for the Complainant and distressed her. She could never figure out why the Respondent treated her the way it did.

CONCLUSIONS OF LAW

The Respondent discriminated against the Complainant because of her sex with respect to terms and conditions of employment.

The Respondent retaliated against the Complainant for opposing unlawful employment practices.

The Complainant did not prove by a preponderance of the evidence that the Respondent discriminated against her because she had filed a previous charge of discrimination, as alleged in the Amended Complaint.

DISCUSSION

The Commission utilizes the decisions of the R.I. Supreme Court, the Commission's prior decisions and decisions of the federal courts interpreting federal civil rights laws in establishing its standards for evaluating evidence of discrimination. The Rhode Island Supreme Court has utilized federal cases interpreting federal civil rights law as a guideline for interpreting the FEPA. "In construing these provisions, we have previously stated that this Court will look for guidance to decisions of the federal courts construing Title VII of the Civil Rights Act of 1964. *See* Newport Shipyard, Inc., 484 A.2d at 897-98." Center for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998) (hereafter referred to as Barros).

I. THE COMPLAINANT PROVED THAT THE RESPONDENT DISCRIMINATED AGAINST HER WITH RESPECT TO TERMS AND CONDITIONS OF EMPLOYMENT BECAUSE OF HER SEX

Section 28-5-7(1)(i and ii) of the General Laws of Rhode Island provides in relevant part that:

> It shall be an unlawful employment practice:
>
> (1) For any employer:
>
> (i) To refuse to hire any applicant for employment because of his or her race or color, religion, sex, …;
>
> (ii) Because of those reasons, to discharge an employee or discriminate against him or her with respect to hire, tenure, compensation, terms, conditions or privileges of employment, or any other matter directly or indirectly related to employment….

The Complainant presented credible testimony that the Respondent's supervisor, Mr. Thibodeau,

subjected her to overt sex discrimination by prohibiting all female employees from performing job duties involving lifting over ten pounds. Since the Respondent failed to attend the hearing, it did not present evidence contradicting the Complainant's testimony and it did not prove that being male was a bona fide occupational qualification[1] for performing those jobs duties. The Complainant proved that Mr. Thibodeau segregated job duties by sex and reduced the Complainant's hours after prohibiting her from performing the maintenance tasks she had done previously. This is overt sex discrimination. *See* Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991) (employer's refusal to allow female employees (except those who proved they were sterile) to work on jobs that exposed workers to lead was explicit sex discrimination in violation of anti-discrimination laws; the employer's policy was overt discrimination and the employer did not prove that being male was a bona fide occupational qualification for the jobs).

II. THE COMPLAINANT PROVED THAT THE RESPONDENT RETALIATED AGAINST HER FOR OPPOSING UNLAWFUL EMPLOYMENT PRACTICES BUT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE RESPONDENT RETALIATED AGAINST HER FOR FILING A PREVIOUS CHARGE OF DISCRIMINATION

Section 28-5-7(5) of the General Laws of Rhode Island provides that it is an unlawful employment practice:

> (5) For any employer … to discriminate in any manner against any individual because he or she has opposed any practice forbidden by this chapter, or because he or she has made a charge, testified, or assisted in any manner in any investigation, proceeding or hearing under this chapter.

Discrimination against an individual by an employer because that individual has opposed unlawful employment practices or has filed a previous charge of discrimination is often referred to as "retaliation". Federal cases interpreting evidence in retaliation cases generally use the method of proof used to evaluate evidence of discrimination. Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2nd Cir. 1998) (hereafter referred to as Quinn). Quinn sets forth the standards used to evaluate

[1] An employer can prove a bona fide occupational qualification (BFOQ) for sex by proving that sex is "reasonably necessary to the normal operation of that particular business or enterprise". 42 U.S.C. § 2000e-2(e). "The BFOQ defense is written narrowly, and this Court has read it narrowly". Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 201, 111 S. Ct. 1196, 1204, 113 L. Ed. 2d 158 (1991). "We also required in Dothard [Dothard v. Rawlinson, 433 U.S. 321, 97 S. Ct. 2720, 53 L.Ed. 2d 786 (1977)] a high correlation between sex and ability to perform job functions and refused to allow employers to use sex as a proxy for strength…" *Id.* 499 U.S. at 202, 111 S. Ct. at 1205.

evidence. The prima facie case for proving unlawful retaliation can be made by demonstrating that:

1) The complainant engaged in protected activity (such as opposing unlawful employment practices or filing a charge of discrimination) known to the respondent;
2) The respondent took adverse action against the complainant;
3) There is a causal link between the protected activity and the adverse action.

The Complainant opposed unlawful employment practices and this was known to the Respondent. The causal connection between the protected activity and the adverse action can be established by a number of factors. The Complainant complained to the Director of Human Resources, Mr. Pidgeon, about Mr. Thibodeau's segregation of job duties. Mr. Thibodeau knew of her complaint to Human Resources because Mr. Pidgeon gave Mr. Thibodeau an oral warning on that subject. After that occurred, the Complainant was deprived of work hours with Mr. Thibodeau's explanation being that he "just didn't want [her] here". The adverse action of deprivation of hours, tied with the adverse comment and no further explanation, provides a causal link between her opposition and the adverse action. The complainant's "prima facie burden [in a retaliation case] is not onerous." Fennell v. First Step Designs, Ltd., 83 F.3d 526, 535 (1st Cir. 1996). Therefore, the Complainant made a prima facie case of retaliation. She engaged in protected activity known to the Respondent, the Respondent reduced her compensable hours and the timing of the deprivation of hours and the comment by Mr. Thibodeau support a causal link between the protected activity and the adverse action.

Once the complainant has made a prima facie case of retaliation, the respondent has the burden of presenting a legitimate, non-discriminatory reason for its actions. The burden of persuasion remains with the complainant at all times. *See* Fennell, *supra*; Quinn, *supra*. The Respondent did not meet its burden. Since the Respondent failed to attend the hearing, it provided no reason for its adverse actions. Therefore, the Complainant has proved retaliation because she opposed unfair employment practices.

The Complainant did not prove that the Respondent retaliated against her for filing a previous charge of discrimination. She did not testify about filing a previous charge of discrimination, nor did she present evidence that Mr. Thibodeau knew about any previous charge of discrimination. Therefore, the Complainant's allegation that the Respondent retaliated against her for filing a previous charge of discrimination is dismissed.

III. DAMAGES

R.I.G.L. Section 28-5-24 sets forth the remedies that the Commission can award after finding that the respondent has committed an unlawful employment practice. R.I.G.L. Subsections 28-5-24(a)(1) and 28-5-24(b) provide as follows:

> **§ 28-5-24 Injunctive and other remedies – Compliance. –** (a) If upon all the testimony taken the commission determines that the respondent has engaged in or is engaging in unlawful employment practices, the commission shall state its findings

> of fact and shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful employment practices, and to take any further affirmative or other action that will effectuate the purposes of this chapter, including, but not limited to, hiring, reinstatement, or upgrading of employees with or without back pay, or admission or restoration to union membership, including a requirement for reports of the manner of compliance. Back pay shall include the economic value of all benefits and raises to which an employee would have been entitled had an unfair employment practice not been committed, plus interest on those amounts.
>
> …
>
> (b) If the commission finds that the respondent has engaged in intentional discrimination in violation of this chapter, the commission in addition may award compensatory damages. The complainant shall not be required to prove that he or she has suffered physical harm or physical manifestation of injury in order to be awarded compensatory damages. As used in this section, the term "compensatory damages" does not include back pay or interest on back pay, and the term" intentional discrimination in violation of this chapter" means any unlawful employment practice except one that is solely based on a demonstration of disparate impact.

The Commission has awarded compensatory damages for pain and suffering in previous cases. The Commission is guided by federal cases interpreting federal civil rights laws (*see* Barros) and the state case law on damages for pain and suffering.

The EEOC has issued Enforcement Guidance on "Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991", 1992 WL 1364354 (EEOC Guidance 1992) (hereafter referred to as the Enforcement Guidance). The Enforcement Guidance provides that it is EEOC's interpretation that compensatory damages are available for pecuniary and non-pecuniary losses caused by discriminatory acts. Non-pecuniary losses include damages for pain and suffering, inconvenience and loss of enjoyment in life. "Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown." Enforcement Guidance, p. 5. While "there are no definitive rules governing the amounts to be awarded," the severity of the harm and the time that the harm has been suffered are factors to be considered. Enforcement Guidance, pp. 7, 8.

In Rhode Island, the determination of the appropriate amount of compensatory damages should not be influenced by sympathy for the injured party nor should the damages be punitive. Soares v. Ann & Hope of R.I., Inc., 637 A.2d 339 (1994). The decision makers should determine the damages for pain and suffering by the exercise of judgment, the application of experience in the affairs of life and the knowledge of social and economic matters. Quince v. State, 94 R.I. 200, 179 A.2d 485 (1962). There is no particular formula to calculate damages for pain and suffering, although lawyers are free to argue that the damages should be calculated at a certain amount per day. Worsley v. Corcelli, 119 R.I. 260, 377 A.2d 215 (1977).

Awards for damages for the pain and suffering which result from discrimination fall within a wide range. *See, e.g.*, Quiles-Quiles v. Henderson, 439 F.3d 1 (1st Cir. 2006) (reinstating a jury award of $950,000 [reduced to the statutory cap of $300,000] when there was evidence that the plaintiff was subjected to such constant ridicule about his mental impairment that it required him to be hospitalized and eventually to leave the workforce); Ledbetter v. Alltel Corporate Services, Inc., 437 F.3d 717 (8th Cir. 2006) (upheld award of $22,000 in compensatory damages to plaintiff who proved that delay in being classified as a manager was caused by racial discrimination; the plaintiff's own testimony about his humiliation, demoralization and diminished confidence was sufficient to prove damages for pain and suffering; medical or expert testimony was not required); American Legion Post 12 v. Susa, 2005 WL 3276210 (R.I. Super. 2005) (compensatory damages of $25,000, $15,000 and $5,000 for pain and suffering awarded to complainants who proved that the respondent discriminated against them upheld; the complainants were distraught and reduced to tears on multiple occasions).

In the circumstances of the instant case, the Commission finds that $5,000 is the appropriate award of damages. The Respondent's discrimination consisted of overt and explicit sex discrimination, failure of Respondent's Human Resources Director to stop the discrimination and retaliation for the Complainant's opposition to the discrimination, resulting in the reduction of her compensation. The Complainant's hours were reduced due to the Respondent's segregation of duties by sex, starting in October 2007 and ending approximately two weeks before the store closed in early December 2008. The Commission found that the Respondent's discriminatory treatment distressed the Complainant, based on her testimony and demeanor while testifying. The Complainant's posture, expressions and tone of voice made it evident that the injustice of the discrimination distressed her. See McKinnon v. Kwong Wah Rest., 83 F.3d 498, 507 (1st Cir. 1996) (trial court determination of damages for emotional distress upheld in sex discrimination case; the trial court's opportunity to observe demeanor evidence could factor into the determination of the amount awarded). The Complainant testified that the discrimination made it "hard for me" (Trans. p. 4), and that she could never understand why the Respondent took the actions it did (Trans. p. 6). The acts of discrimination and retaliation caused the Complainant pain and suffering. The Commission finds that $5,000 is the proper amount to compensate her for enduring the Respondent's discriminatory treatment.

The Commission awards interest consistent with the method used for tort judgments. See R.I.G.L. Section 9-21-10.

ORDER

I. Having reviewed the evidence presented on January 30, 2013, the Commission, with the authority granted it under R.I.G.L. Section 28-5-25, finds that the Complainant failed to prove the allegations of the Amended Complaint with respect to allegations that she was retaliated against because she filed a previous charge of discrimination and hereby dismisses that portion of the Amended Complaint.

II. Violations of R.I.G.L. Section 28-5-7 having been found with respect to Complainant's allegations of sex discrimination and retaliation for her opposition to unlawful employment practices, the Commission hereby orders:

1. That the Respondent cease and desist from all unlawful employment practices under R.I.G.L. Section 28-5-7;

2. That, if the Respondent is currently conducting, or in the future conducts, business in Rhode Island within the next five years that it:
   a. Post the Commission anti-discrimination poster prominently in all of its Rhode Island facilities; and
   b. Train all of its Rhode Island supervisors yearly on state and federal employment anti-discrimination laws and provide a certification to the Commission within two months of the date of the training that the training has been completed, a list of the people who were trained and the name of the trainer;

3. That the Complainant is awarded $5,000 in back pay and compensatory damages;

4. That the Complainant is awarded 12% annual interest on the amounts in Paragraph II (3) above, commencing on the date the cause of action accrued, October 1, 2007, and ending when the amount set forth in Paragraph II (3) is paid.

Entered this [11th day of [July], 2013.

_____/S/_____

Rochelle Bates Lee
Hearing Officer

I have read the record and concur in the judgment.

_____/S/_____ _____/S/_____

Iraida Williams
Commissioner

John B. Susa
Commissioner