STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 11 ESH 080

In the matter of

Melissa B. Korsak
Complainant

v. DECISION AND ORDER

John Frigault, *alias*
Respondent

INTRODUCTION

On September 9, 2010, Melissa B. Korsak (hereafter referred to as the Complainant) filed a charge with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission). The charge alleged that the named parties, including "Jack Frigot", subjected the Complainant to disparate terms and conditions of employment, including sexual harassment, on the basis of her sex, and retaliated against her for opposing unlawful employment practices, in violation of the Fair Employment Practices Act, Title 28, Chapter 5 of the General Laws of Rhode Island (hereafter referred to as the FEPA). On December 2, 2010, the Complainant withdrew her charge against the parties other than Mr. Frigot. On February 28, 2011, the charge was amended to correct the spelling of "Jack Frigot" to John Frigault. Mr. Frigault (hereafter referred to as the Respondent) was named as the sole respondent in the amended charge. This amended charge was investigated. On May 24, 2011, 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 Section 28-5-7 of the General Laws of Rhode Island as alleged in the amended charge.

On September 1, 2011, a complaint and notice of hearing issued. The complaint alleged that the Respondent incited an unlawful employment practice and attempted to commit unlawful employment practices, that he subjected the Complainant to disparate terms and conditions of employment and sexual harassment because of her sex and retaliated against her because she opposed unlawful employment practices.

A hearing on the complaint was held on March 16, 2012 before Commissioner John B. Susa. The Complainant was represented by counsel. The Respondent did not appear or participate in the proceedings. On April 25, 2012, the Complainant submitted Melissa Korsak's Post-Hearing Proposed Findings of Fact and Conclusions of Law. The Respondent did not submit a written memorandum after the hearing.

JURISDICTION

The Respondent was alleged to have incited unlawful employment practices and to have attempted directly and indirectly to commit unlawful employment practices and thus is covered by the prohibitions of R.I.G.L. Section 28-5-7(6) and subject to the jurisdiction of the Commission.

FINDINGS OF FACT

1. The Complainant, a woman, began working for a franchise of Honey Dew Donuts in North Providence, Rhode Island (hereafter referred to as the employer) in July 2007. Her duties consisted of serving customers and cleaning the store. Originally her hours were limited, so she accepted a position at Dunkin' Donuts. Before she could begin her work there, the employer at the franchise of Honey Dew Donuts offered her a position as Manager. She accepted the offer and was promoted to the position of Manager in or around March 2008. Pam, who was the previous Manager, told the Complainant that she did not want the responsibility any more.

2. The Complainant made a number of changes to the dirty and disorganized store. She re-arranged the storage room to bring it up to fire code, she cleaned the entire store and she put up lists for all employees, explaining their responsibilities. The Complainant's husband saw her as happy and feeling good about her management of the store. Trans. pp. 101-102. The Complainant's sister also saw her as "bubbly" before her experiences with the Respondent. Trans. p. 98.

3. The store was receiving complaints from City Hall because there was no one on the staff who was certified by the Health Department to serve food. The Complainant took the necessary classes and became certified by the Health Department and ServSafe.

4. The local police were complaining about the store because the drive-through line was blocking traffic in the mornings. The Complainant started a policy that sandwiches would not be served from the drive-through window from 7-9:00 a.m. This resolved the traffic problem and a police officer stopped by the store to thank her and tell her that the complaints had stopped.

5. At the owner's instruction, the Complainant terminated the employment of an employee on her first day as Manager. Approximately three weeks into her tenure as Manager, the Complainant met the Respondent. He introduced himself as the "security guy". He told her that he reviewed the security tapes from the store to see if anything wrong was going on. He told her that she was wrong to fire an employee in the middle of her shift, that she should have waited until the end of the shift. He said that he would fire another employee in front of the Complainant so that she could see how to do it. When the Complainant offered some sympathy to the employee being fired, the Respondent criticized her. He told her that he could fire her or any of the other employees at the store or have them fired.

6. In the early days of the Complainant's tenure as Manager, the Respondent came in about once per month to review the security tapes and determine whether there were problems. He started making comments to the Complainant about her appearance, that her pants looked good in the tapes. He would give her tasks to do, such as scrubbing the donut case door, and then laugh and say that there were ways to make the tasks disappear. He told the Complainant that he had an agreement with his wife that he could do what he wanted as long as she did not hear about it and as long as he did not come home and touch her. The Complainant took his statements to mean that if she had sex with him, she would not have to clean the store. He continued to make comments about her pants and hair.

7. In December 2008, the Respondent called the Complainant and asked if she wanted to meet him for a drink. She refused. He told her that if she went out with him, things would be different, she would not have as much responsibility at the store. He mentioned his agreement with his wife again. The Complainant repeated that she was not interested and hung up.

8. Some of the tasks set by the Respondent seemed reasonable to the Complainant and some did not. He required her to try to remove intractable flood stains that had been in the store for two years. He told her to use a toothbrush to scrub the tiles in the bathroom near the toilet because the tiles had faded in color. He told her to use a toothbrush to scrub the gaskets around a five-foot-long milk cooler. He asked her to use a toothbrush to scrub under the expresso machine. He told her to take apart the ice machine and clean it. She turned off the security camera when she did this so that he would not have a tape of her contortions while trying to disassemble and clean the machine.

9. The staff at the store would, on occasion, sit on a shelf near the drive-through when they were not busy. The Respondent asked the Complainant to write up Amanda for sitting on that shelf. The Complainant told him that she would then have to write up herself as well as Jessica and Pam, the previous Manager, for the same thing. The Respondent told the Complainant that she could not write up Jessica and Pam – that they went out with him and they don't get written up.

10. In the fall of 2009, the store was due for its annual corporate inspection. The Complainant bought a power washer to wash the awnings and dumpster. The store passed the inspection with a score of 98 out of 100.

11. At the beginning of her employment as Manager, the Complainant was paid $8 per hour. Her employer raised her rate to $11 per hour. She received tips from customers. The tips were higher around holidays. In order to increase her hours, some days she worked at the North Providence store where she was Manager and then went to work at the employer's store in Johnston. Then she requested that she work solely at the North Providence store. The employer was going to require Pam, the previous Manager in North Providence, to work at the two stores in North Providence and Johnston, and gave some of the hours that Pam had worked at the North Providence store to the Complainant. In the spring of 2009,

the Complainant was working six to seven days per week - approximately 53--60 hours per week. In 2009, she received at least $23,419 in salary, which included a $500 holiday bonus and $2022 in additional bonuses.

12. Pam, the previous Manager, quit working for the employer. After she left, it appeared to the Complainant that the Respondent had a bad attitude. Although the store had just received a good score on its inspection, the Respondent took the Complainant around the store and made a list of problems that she needed to address. These included dust on outside windowsills, paint peeling on the dumpster, stains around the toilet and rust on a three-bay sink. Although the Complainant found these tasks to be unreasonable, she fixed all 19 items on the Respondent's list over the next two weeks. She was constantly cleaning at the store. She lost a noticeable amount of weight. The Complainant felt very uncomfortable around the Respondent.

13. The Complainant reported to the Respondent that the items he noted had been addressed. On December 12, 2009, the Respondent came to the store to review what the Complainant had done. He told her that it should take ½ hour to do the review, but he spent 3 hours at the store with her. He went around the store and noted additional tasks. He required her to pull the Pepsi cooler from the wall and wrote her up for dust on the back of the Pepsi cooler. He wrote her up for dust on the top of a sign on the wall, for dust on the air vent. He criticized her because the muffins were not lined up in a perfect line. The Respondent criticized the Complainant about these things in a loud voice in front of the customers. The Complainant began to cry during the inspection. He told her to get an SOS pad from the back and he would teach her how to scrub the floor stains left from the floods. He scrubbed the floor, leaving soap residue. The Complainant got down on the floor with a paper towel to dry the floor, and as she was drying the floor, the Respondent swung his swivel chair around and placed his legs on either side of the Complainant. At this point, the Complainant was drying the floor between the Respondent's legs in front of the customers. She asked him why she was doing all this, Pam was the Manager and she didn't do anything. The Respondent answered: "because she sleeps with me and you don't. … I respect the fact that you're married and you won't sleep with me, so you do all this extra work to make you a better Manager". He told her that there was a way to make the inspection disappear, that if she called him at home, he would meet her "to make the inspection disappear". When she said that she was all set, he told her that he would make her life miserable.

14. Within a week or two after Christmas 2009, the Respondent went to the North Providence store on a Sunday, on one of the few days when the Complainant was not working. The Respondent told the employer that the store was out of eggs and sausages and the customers were not getting sandwiches. The employer called the Complainant, yelled at her for being out of product, and told her to go out and get eggs and sausages for the store. She went out in the snow with her children and dropped the eggs and sausages at the store. When she returned to work at the store on Monday, the eggs and sausages that had been delivered on the previous Friday were still at the store, demonstrating that the store had been stocked with eggs and sausages when the Respondent told the employer that it was not stocked.

15. On January 5, 6 and 7, 2010, the Respondent came into the store at 6 a.m. It was unusual for him to come into the store in the morning and to come so often. On these occasions, he got a coffee and stood watching the Complainant and the other employee(s) work. He made comments about how he loved his job, standing around and watching beautiful women bend out a window. He said that an employee's shirt was blocking his view of her "bum".

16. The Complainant was afraid of the Respondent in late 2009 and early 2010. The Complainant was opening the store at 3 a.m., when it was still dark out and she was the only employee in the store.

17. In early January 2010, the Complainant set up a meeting with the owner of the employer to report the Respondent's actions. The Complainant told the owner about the inspections and the Respondent's comments about how she was not sleeping with him. The owner laughed, then answered a telephone call. The owner's wife walked in and asked why the Complainant was there. When the Complainant told her, the owner's wife said that the Respondent was like that with everybody, that the Complainant had to learn to let it roll off her shoulders. The Complainant started crying. The owner said that he would take care of it, that he would tell the Respondent not to talk to her like that, then continued on his telephone call. The Complainant walked out. She did not see the Respondent after that.

18. On January 13, 2010, the owner came to the store. When a customer complimented the Complainant, the owner rubbed her back and said that if he had a copy machine big enough, he would make more of her. The Complainant began shaking, feeling dizzy and having trouble breathing. She left work and went to Miriam Hospital. A member of the hospital staff gave her a note to stay out of work for 3 days due to stress. A member of the staff recommended that she receive treatment from a therapist. The Complainant notified the owner that she would be out. He asked if she would be able to return to work and she told him that she did not know. She never returned to work.

19. The Complainant began seeing a therapist, Amy Sweet, in the beginning of February 2010 and continued to see Ms. Sweet up to the date of the hearing. The Complainant began taking medications such as Lorazepam and Klonopin. She had never been on such medications before. The medications were at times making her pace, shake and sweat. When the dosage or medication was changed, the Complainant felt like a "zombie". She was acting out of character such as cutting her daughter's hair badly. Eventually, she stopped taking Lorazepam and Klonopin.

20. The Complainant's therapist diagnosed her as having anxiety and stress disorder. Ms. Sweet gave her opinion that the Complainant's condition was caused by the harassment to which she had been subjected by the Respondent and the Complainant's disability/incapacity was caused by that condition. In her treatment notes in 2010, 2011 and 2012, the Complainant's therapist notes, among other things, that the Complainant was hypervigilant, fearful, having decreased appetite and trouble sleeping and that she had panic when faced with anything related to her former employment. Complainant's Exhibit 5. Her

therapist notes in January 2012 that the Complainant reported that she was experiencing decreased appetite, shakiness, a racing heart, sweating, worrying, feeling on edge and a preoccupation with cleaning. Complainant's Exhibit 5, p. 25.

21. The Complainant felt that she was unable to work in 2010. She felt frightened a lot of the time. In April 2011, she bought an ice cream truck. She started operating the ice cream truck in June 2011. She sold the truck in July 2011 because she would meet former customers from the store and she felt unable to answer their questions as to why she was no longer with the employer. When she saw former customers at the ice cream truck or in a store, she felt that she had to leave rather than talk with them. As of the date of the hearing, former customers scared her; she did not want to answer their questions.

22. The Complainant went for an interview for a management position at a Dunkin' Donuts shop in early 2012. She was told that she would not be hired because she was too nervous.

23. The Complainant's lack of income was a factor in causing her family to move from a house to an apartment because the family could not afford the house payments. The Complainant has sold jewelry, tools, a truck and furniture to meet her family's financial needs.

CONCLUSIONS OF LAW

The Complainant proved by a preponderance of the evidence that the Respondent incited unlawful employment practices and attempted directly and indirectly to commit unlawful employment practices.

DISCUSSION

The Commission generally utilizes the decisions of the Rhode Island Supreme Court, the Commission's prior decisions, decisions of the federal courts interpreting federal civil rights laws and decisions of other states with laws similar to the FEPA 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).

THE RESPONDENT IS LIABLE UNDER THE FEPA FOR HIS SEXUAL HARASSMENT OF THE COMPLAINANT

The Commission's Guidelines on Sexual Harassment, which track the Guidelines on Sexual Harassment of the U.S. Equal Employment Opportunity Commission (EEOC), 29 C.F.R. Chapter XIV, Part 1604, Section 1604.11, provide as follows:

3001. Sexual Harassment

> 3001(A) Harassment on the basis of sex is a violation of the Fair Employment Practices Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) 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.

Sexual harassment constitutes a form of sex discrimination prohibited by civil rights laws. *See, e.g.,* Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 141 L.Ed.2d 662 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986); O'Rourke v. City of Providence, 235 F.3d 713 (1st Cir. 2001).

To prove a hostile environment sexual harassment claim, a complainant must show by a preponderance of the evidence:

> (1) that she (or he) is a member of a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was based upon sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of plaintiff's employment and create an abusive work environment; (5) that sexually objectionable conduct was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the victim in fact did perceive it to be so; and (6) that some basis for employer liability has been established.

O'Rourke, 235 F.3d at 728 (citing Faragher, 524 U.S. at 787-89; Harris, 510 U.S. at 20-23; Meritor, 477 U.S. at 65-73).

The Complainant is a member of a protected class. It is beyond dispute that civil rights laws prohibiting sexual harassment apply to male and female victims.

The Complainant was subjected to unwelcome sexual harassment. The complainant was subjected to unwanted verbal sexual comments and advances. In assessing the "welcomeness" of sexual conduct, the Commission looks at whether the sexual conduct at issue was "uninvited and offensive or unwanted from the standpoint of the employee". Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990). The record clearly establishes that the conduct to which the complainant was subjected was unsolicited and unwanted. The Complainant was very clear in rejecting the Respondent's advances.

The harassment of the Complainant was "based on sex". There can be no dispute that "discrimination 'because of … sex' includes 'requiring people to work in a discriminatorily hostile

or abusive environment.'" Gorski v. New Hampshire Dept. of Corrections, 290 F.3d 466, 471 (1st Cir. 2002) (quoting Harris, 510 U.S. at 21). As evidenced in the Findings of Fact, the conduct in question was sexual in nature. There is no evidence that men in the Complainant's workplace were subjected to this conduct. The conclusion that the harassment of the Complainant was "based on sex" is well supported by both the evidence and case law.

The harassment to which the Complainant was subjected was sufficiently pervasive and severe so as to alter the conditions of her employment and create an abusive work environment. There is no "mathematically precise test" to aid in this determination. Harris, 510 U.S. at 22. Rather, in order to conclude that a hostile environment exists, the fact finder must look at "the record as a whole and the totality of the circumstances", Meritor, 477 U.S. at 69 (internal citations omitted), and assess such factors as the frequency and severity of the conduct, whether the conduct is physically threatening or humiliating and whether it unreasonably interferes with an individual's work performance. Faragher, 524 U.S. at 787-88; Harris, 510 U.S. at 23. Simple teasing or offhand comments are not sufficient to constitute sexual harassment. Faragher, 524 U.S. at 788. In the instant case, there is sufficient evidence to satisfy the fourth requirement of a successful hostile environment claim.

The evidence establishes that the Complainant was subjected to repeated and frequent instances of verbal sexual comments and advances. The Respondent made comments about the Complainant's clothing and dress, talked about viewing the employees' backsides, discussed his arrangement with his wife and discussed that he was having sex with other employees. The Complainant's rejection of his advances led to humiliating and offensive conduct, including the Respondent loudly criticizing the Complainant in front of customers, the Respondent engineering a product shortage which required her to drive in the snow on her day off to supply a non-existent shortage, constant criticism and wiping up the floor between the Respondent's legs. The conduct was sufficiently severe and pervasive to create an abusive work environment. The Commission credits the Complainant's testimony with respect to Respondent's conduct which she described. She was visibly upset when she testified and her testimony appeared sincere. The Respondent did not testify or offer any testimony to contradict the Complainant. The evidence demonstrated that the Complainant was subjected to sexual harassment which created a hostile work environment.

The sexually objectionable conduct to which the Complainant was subjected was both objectively and subjectively offensive, such that a reasonable person would find it hostile or abusive and the Complainant did in fact so perceive the environment. A reasonable person would find sexual comments and overwhelming criticism when advances were rejected to be objectionable in the ordinary workplace. It is clear that the Complainant found the harassing conduct to be offensive.

The Complainant also proved that rejection of the Respondent's sexual advances was used as the basis for employment decisions affecting her. The Respondent on several occasions clearly informed the Complainant that his harsh requirements would "disappear" if she would "go out" (have sexual activities) with him.

A basis for liability has been established. The Respondent is liable under R.I.G.L. Section 28-5-

7(6), which provides that it is an unlawful employment practice:

> For any person, whether or not an employer, employment agency, labor organization, or employee, to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful employment practice, or to obstruct or prevent any person from complying with the provisions of this chapter or any order issued pursuant to this chapter, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful employment practice;

[Emphases added.]

The Respondent incited unlawful employment practices. Black's Law Dictionary (8th ed. 2004) defines "incite" as: "To provoke or stir up (someone to commit a criminal act or the criminal act itself)." The actions of the Respondent were designed to provoke unlawful harassment.[1]

It is also clear that the Respondent was attempting, directly and indirectly, to commit unlawful harassment. Therefore, he is liable under the FEPA. *See* Iacampo v. Hasbro, Inc., 929 F. Supp. 562, 573 (D.R.I. 1996) (the "FEPA reaches past employers to forbid discrimination by individual employees"); Wyss v. General Dynamics Corp., 24 F. Supp. 2d 202 (D.R.I. 1998) (individual defendants who were integral participants in harassment were liable under the FEPA); Evans v. R.I. Department of Business Regulation, 2004 WL 2075132 (R.I. Super. 2004) (an individual who participates in discrimination may be held individually liable under the FEPA). *See also* Morehouse v. Berkshire Gas Co., 989 F. Supp. 54 (D.Mass.1997), which provides that under a Massachusetts statute with language very similar to R.I.G.L. Section 28-5-7(6), individuals who commit sexual harassment are individually liable, and Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019 (D. Mass. 1995) (individuals who discriminated are individually liable under Massachusetts law).

In summary, the Complainant proved all the elements necessary to establish that the Respondent violated the FEPA.

The Respondent caused the Complainant's inability to work. The evidence from the Complainant's therapist was clear and uncontradicted that, in her opinion, the Respondent's harassment caused the Complainant's anxiety and stress disorder and that the Complainant's anxiety and stress disorder caused her incapacity. The Respondent's actions changed the Complainant from someone who was seen as "bubbly" and happy about managing the store (Trans. pp. 98, 101-102), to someone who was fearful, hypervigilant and panicked when faced with any connection to her former store. The Respondent caused the anxiety and stress disorder that led to the Complainant leaving the store. The Respondent destroyed the Complainant's ability to work for a considerable period of time.

[1] The employer is not a party to the complaint. The Complainant's complaint falls within employment discrimination in that the Respondent had authority to supervise and regulate the Complainant's employment and had authority to terminate employees.

THE RESPONDENT IS LIABLE UNDER THE FEPA FOR HIS RETALLIATION AGAINST THE COMPLAINANT

The Commission finds that the Respondent took adverse actions against the Complainant because she opposed unlawful employment practices. 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 because that individual has opposed unlawful employment practices 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), *abrogated on other grounds* (hereafter referred to as Quinn) and Gordon v. New York City Board of Education, 232 F.3d 111 (2nd Cir. 2000) (hereafter referred to as Gordon) set forth the standards used to evaluate evidence of retaliation. A prima facie case for proving unlawful retaliation can be made by demonstrating that:

1) The Complainant engaged in protected activity known to the Respondent;
2) The Respondent took adverse action against her;
3) There is a causal link between the protected activity and the adverse action.

The plaintiff'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).

The Commission finds that the Complainant engaged in protected activity known to the Respondent. The Respondent explicitly tied sexual favors to conditions in the workplace. The Complainant opposed this unlawful activity, she consistently and firmly rejected his attempts to use his authority in the workplace to obtain sexual favors.

The Respondent took adverse actions against the Complainant. He subjected her to excruciatingly detailed and bullying inspections, one of which lasted for three hours. He required her to attempt to correct incorrigible conditions using ineffective means. He told the employer that the store was out of product when it was not, causing the employer to rebuke her and to require her to bring more product to the store on her day off in a snow storm. He humiliated her by yelling at her in front of customers and by requiring her to scrub the floor between his legs in front of customers. *See* Burlington Northern & Santa Fe Ry. Co v. White, 548 U.S. 53, 126 S. Ct. 2405 (2006) (an action is adverse when a reasonable person would have found the respondent's conduct so adverse that it could well dissuade the person from protected activity).

The causal connection between the protected activity and the adverse action can be established by a number of factors. In this case, the Respondent was overt in his retaliation. He told her that if she went out with him, things at the store would be different. Trans. p. 40. He told her that he would

make her life miserable after she told him that she would not meet him outside of work. Trans. p. 67. He told her that he was requiring more of her than of the previous Manager because the previous Manager slept with him and the Complainant did not. Trans. p. 66. This testimony was unrebutted.

Once a complainant has made a prima facie case of retaliation, the respondent has the burden of presenting a legitimate, non-discriminatory reason for his actions. Gordon, *supra.*, Quinn, *supra*. In this case, the Respondent did not present any reason for his actions. The strength and credibility of the Complainant's evidence of retaliation and the Respondent's failure to offer any evidence on the reason for his actions, lead the Commission to find that the Respondent retaliated against the Complainant because she opposed his unlawful actions. As discussed above, the Respondent is liable under R.I.G.L. Section 28-5-7(6) for inciting an unlawful employment practice and for attempting to commit an unlawful employment practice.

DAMAGES

R.I.G.L. Section 28-5-24 sets forth the remedies that the Commission can award after finding that a respondent has committed an unlawful employment practice. It provides 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.
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> …
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> (3) In appropriate circumstances attorney's fees, including expert fees and other litigation expenses, may be granted to the attorney for the plaintiff if he or she prevails. Upon the submission of reports of compliance the commission, if satisfied with the reports, may issue its finding that the respondent has ceased to engage in unlawful employment practices.
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> (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 finds that the Respondent's impairment of the Complainant's ability to work makes him liable for her losses of salary, bonuses and tips. The Complainant was unable to work in 2010 and 2011. As of the date of the hearing, she was still unable to work. The Complainant established that she earned $23,419 in salary and a holiday bonus in 2009. She also established that she earned at least $2,022 in additional bonuses. The Commission awards these amounts for 2010 and 2011 as the Complainant was unable to work then. The Commission awards these amounts for 2012 and January of 2013, minus any interim earnings, tips and unemployment compensation. The Complainant also testified to additional bonuses and tips which she earned in 2009. The Complainant's testimony was not clear as to the amounts involved, therefore, the Commission orders the Complainant to provide that portion of her 2009 income tax return which reflects the tips and additional bonuses which she received in 2009. After receiving that information, if neither party requests a hearing on that portion of the damages, the Commission will calculate the additional amount owed in damages for lost tips and additional bonuses. The Commission will also calculate the interim earnings, tips and unemployment compensation received by the Complainant in 2012 and January 2013.

The Commission has awarded compensatory damages for pain and suffering in previous cases. The Commission has indicated that it will be guided by federal cases interpreting federal civil rights laws and the state case law on damages for pain and suffering. See R.I.G.L. Section 28-5-24(b) cited above.

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 (R.I. 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. Kelaghan v. Roberts, 433 A.2d 226 (R.I. 1981).

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); Howard v. Burns Bros., 149 F.3d 835, 843 (8th Cir. 1998) (upheld the propriety of an award of $1,000 compensatory damages to a plaintiff who proved that a co-worker "brushed" her on several occasions and made sexual remarks; the plaintiff and her husband had testified as to her emotional distress); 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).

The Complainant was subjected to sexual harassment and retaliation for a number of months. The Commission found, as set forth in the Findings of Fact 12, 13 and 16-21 above, that the harassment and retaliation caused the Complainant to cry at work, to shake, feel dizzy and have trouble breathing, to suffer from anxiety and a stress disorder, to have decreased appetite and trouble sleeping, to lose weight, to be fearful and hypervigilant, to have trouble adjusting to medications, to have a preoccupation with cleaning, to be unable to work, and to feel panic whenever she encountered anything connected to her work at the North Providence store. She and her family suffered financial difficulties due to her loss of income, including being unable to stay in a house that they bought and having to sell jewelry, furniture, tools and a truck. Taking all of the evidence into account, the Commission finds that the harassment and retaliation caused the Complainant severe distress, and awards her $75,000 as the appropriate compensation for her pain and suffering.

The Commission awards interest consistently with the rate used for tort judgments. *See* R.I.G.L. Section 9-21-10(a):

> In any civil action in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages interest at the rate of twelve percent (12%) per annum thereon from the date the cause of action accrued, which shall be included in the judgment entered therein…. [Emphasis added.]

COMPENSATION FOR FUTURE DAMAGES

The Complainant has asked the Commission to award her $114,853 to compensate her for the harm to her future career caused by the Respondent's actions The Commission has awarded the Complainant damages for loss of earning capacity up to the end of January 2013. Generally back pay damages are calculated up to the date of judgment and the Commission has essentially done

that. *See* Palasota v. Haggar Clothing Co., 499 F.3d 474, 483 (5th Cir. 2007) (generally back pay runs from the date the discrimination causes financial injury to the date of judgment). However, the Complainant has not justified awarding damages for future impairment of the ability to work. The Commission will not assume that the Complainant will be impaired in employment in the future and the evidence submitted did not establish the likelihood or extent of a future impairment.

OTHER RELIEF

The Commission also orders other relief in order to effectuate the purposes of the FEPA. The Respondent is ordered to undergo training on state and federal anti-discrimination laws.

ORDER

I. Violations of R.I.G.L. Section 28-5-7 having been found with respect to the Respondent, 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 the Respondent pay the Complainant $50,882 as compensatory damages for the Complainant's loss of wages and partial bonuses in 2010 and 2011 caused by his actions, together with statutory annual interest of 12% from the date the cause of action accrued, January 2010, until paid;

3. That the Respondent pay the Complainant $25,441, minus interim earnings, tips and unemployment compensation earned in 2012, as compensatory damages for the Complainant's loss of wages and partial bonuses in 2012 caused by his actions, together with statutory annual interest of 12% from the date the cause of action accrued, January 2010, until paid;

4. That the Respondent pay the Complainant $2,120, minus interim earnings, tips and unemployment compensation earned in January 2013, as compensatory damages for the Complainant's loss of wages and partial bonuses in January 2013 caused by his actions, together with statutory annual interest of 12% from the date the cause of action accrued, January 2010, until paid;

5. That the Respondent pay the Complainant the amount equal to her lost tips and additional bonuses for 2010, 2011, 2012 and January 2013 once the Commission calculates them at a later date;

6. That the Respondent pay the Complainant $75,000 as compensatory damages for pain and suffering together with statutory annual interest of 12% from the date the cause of action accrued, January 2010, until paid;

7. That the Respondent submit proof of payment to the Complainant in accordance with Paragraph I (2 and 6) within 75 days of the date of this Decision and Order;

8. That the Respondent submit proof of payment to the Complainant in accordance with Paragraph I (3, 4 and 5) within 30 days of the date that the amount is determined or agreed upon;

9. That the Respondent receive training on state and federal anti-discrimination laws and provide a certification to the Commission within six months of the date of this Order that the training has been completed, the name of the trainer and a copy of the syllabus;

10. That, within 45 days of the date of this Order, the Complainant submit to the Commission and the Respondent documents indicating any unemployment compensation or interim earnings and tips that she received in 2012 and January 2013;

11. That, within 45 days of the date of this Order, the Complainant submit to the Commission and the Respondent that portion of her 2009 tax return which documents tips and bonuses that she received in 2009, other than the bonus reflected in her 2009 W-2 form;

12. That either party may request a hearing on the issue of interim earnings and tips which the Complainant earned in 2012 and January 2013 and on the amount of tips and additional bonuses which the Complainant received in 2009. If neither party requests a hearing, the Commission will calculate the amounts based on the information received.

II. The attorney for the Complainant may file with the Commission a Motion and Memorandum for Award of Attorney's Fees no later than 45 days from the date of this Order. The Respondent may file a Memorandum in Opposition no later than 45 days after receipt of the Complainant's Motion. The parties' attention is directed to Banyaniye v. Mi Sueno, Inc. and Jesus M. Titin, Commission File No. 07 PPD 310 (Decision on Motion for Attorney's Fees 2009) for factors to be generally considered in an award of attorney's fees under the FEPA. Either party may choose a hearing on the issues involved in the determination of an appropriate award of attorney's fees by requesting it in his or her memorandum.

Entered this [28th] day of [January], 2013.

_____/S/_____

John B. Susa
Hearing Officer

I have read the record and concur in the judgment.

_____/S/_____

Rochelle Bates Lee
Commissioner

_____/S/_____

Alberto Aponte Cardona
Commissioner