Before the
STATE OF RHODE ISLAND
COMMISSION FOR HUMAN RIGHTS

RICHR NO. 07 EAO 185 EEOC No. 16J-2006-01365

In the matter of

Edwin Sanchez
Complainant

v. DECISION AND ORDER

Wayne Carvalho
Respondent

INTRODUCTION

On February 12, 2007, Edwin Sanchez (hereafter referred to as the complainant) filed a charge with the Rhode Island Commission for Human Rights (hereafter referred to as the Commission) against Wayne Carvalho (hereafter referred to as the respondent). The complainant alleged that the respondent discriminated against him because of his ancestral origin in violation of R.I.G.L. Section 28-5-7. The charge was investigated. On May 30, 2008, Preliminary Investigating Commissioner Alberto Aponte Cardona 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 charge.

On October 2, 2008, a complaint and notice of hearing issued. The complaint alleged that the respondent discriminated against the complainant with respect to harassment and disparate treatment because of his ancestral origin. A hearing on the complaint was held on January 30, 2009 before Commissioner John B. Susa. The complainant was present and represented by counsel. The respondent did not appear. Neither party submitted a memorandum.

JURISDICTION

The respondent is a person as defined under R.I.G.L. Section 28-5-6(13), and the events in question occurred in Rhode Island and thus the respondent is subject to the jurisdiction of the Commission.

FINDINGS OF FACT

1. The complainant is of Hispanic ancestral origin.

2. The complainant had experience as a welder when he was hired in the position of welder at American Eagle, Inc. in Warwick, Rhode Island in or around 2005. He was the only Hispanic employee employed at that location.

3. The complainant had a good work record.

4. The respondent was a co-worker of the complainant at American Eagle, Inc. He was also the union representative at American Eagle, Inc.

5. The respondent treated the complainant differently from the other, non-Hispanic employees. He used derogatory language about the complainant, he made an adverse remark about Mexicans, he exercised his influence to isolate the complainant from the other employees and he took other steps to disturb the complainant.

6. The respondent called the complainant a "lowlife", a "scab", a "faggot" and a "baby". The respondent, in the complainant's hearing, would say things to other employees such as that the complainant was a "rat" or that the complainant would "kiss the boss' ass". The complainant was subjected to these derogatory comments on an almost daily basis at lunchtime.

7. In the punch-out line, the respondent once said, in the complainant's earshot, that Mexicans should all be shot and brought back to the border.

8. The respondent used his influence to isolate the complainant from other workers. He told other workers to stay away from the complainant. When another employee would talk with the complainant, the respondent would stop what he was doing and stare at them until the other employee stopped. When the employee went away from the complainant, the respondent would go to the employee and tell him to stay away from the complainant.

9. The respondent took actions to disturb the complainant. On a daily basis, he would stare at the complainant and flex his muscles. He took the complainant's food out of the microwave and told other employees to use the microwave before the complainant used it. He told the complainant that one of the microwaves was his and that the complainant should take his food out of that microwave. On one occasion when the complainant's newspaper was touching a co-worker's lunch bag, the respondent asked the complainant to move it, saying that he was disturbing the co-worker.

10. The system at American Eagle, Inc. was that the staff would rotate responsibility for shipping and receiving during the lunch hour and if a truck driver came in during the time the employee was responsible, that employee would receive extra pay. When it was the complainant's turn in the rotation, on two occasions the respondent called the truck driver over and signed the slip so that the respondent would get paid instead of the complainant.

11. The complainant confronted the respondent on two or three occasions to ask him to stop the harassment. The respondent told the complainant that the complainant was the problem. On one occasion, he laughed at the complainant.

12. The complainant reported the harassment to the President of American Eagle, Inc., who warned the respondent on multiple occasions to stop the harassment. The complainant also reported the harassment to the President of the union. These efforts did not stop the respondent from harassing the complainant. The respondent continued to harass the complainant until the respondent left the employment of American Eagle, Inc. in the summer of 2007.

13. The respondent's harassment caused the complainant great distress. The complainant felt that he had to keep his job in order to support his family. The complainant felt miserable and depressed when he went to work. At times, he would sweat uncontrollably and start shaking. On occasion, he had headaches. A number of times at work, after he was harassed, he had to go to the men's room to cool off. He had many sleepless nights. He found it hard to be isolated from the other employees. When he wasn't at work, he felt depressed. He stayed home and thought about how to counteract the respondent instead of doing family activities like taking his family out to dinner or to the mall. During the time period when the respondent harassed him, the complainant often did not interact with his family, at times he exploded at them.

CONCLUSIONS OF LAW

The respondent discriminated against the complainant on the basis of his ancestral origin with respect to inciting unlawful employment practices, obstructing an employer from complying with the Fair Employment Practices Act and attempting directly and indirectly to commit an unlawful employment practice.

DISCUSSION

The Fair Employment Practices Act, Title 28, Chapter 5 of the General Laws of Rhode Island (hereafter referred to as the FEPA) prohibits employment discrimination on the basis of ancestral origin. *See* R.I.G.L. Section 28-5-7 (1), which 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, …or country of ancestral origin;
>
> (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. …

R.I.G.L. Section 28-5-7(6) 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.

In establishing its standards for evaluating evidence of discrimination, the Commission utilizes the decisions of the Rhode Island Supreme Court, the Commission's prior decisions, the decisions from other states whose statutory language is similar to the language in the FEPA and decisions of the federal courts interpreting federal civil rights laws. 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 standards for evaluating evidence of racial or ancestral origin harassment generally track the standards for sexual harassment. *See* Faragher v City of Boca Raton, 524 U.S. 775, 786 – 787, 141 L.Ed.2d 662, 118 S. Ct. 2275, 2283 (1998); AMTRAK v. Morgan, 536 U.S. 101, 116, 122 S. Ct. 2061, 153 L.Ed.2d 106 (2002); Boutros v. Canton Regional Transit Authority, 997 F.2d 198, 202 - 203 (6th Cir. 1993).

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.

This regulation, if adapted for ancestral origin harassment, would provide that conduct would be

ancestral origin harassment if it were verbal or physical conduct relating to ancestral origin that had the purpose or effect of unreasonably interfering with the complainant's work performance or creating an intimidating, hostile or offensive working environment.

To prove a hostile environment harassment claim, a complainant must show:

> (1) that she (or he) is a member of a protected class; (2) that she was subjected to unwelcome … harassment; (3) that the harassment was based upon [a protected class status]; (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 … 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 … liability has been established.

O'Rourke v. City of Providence, 235 F.3d 713, 728 (1st Cir. 2001) (citing Faragher, 524 U.S. at 787-89; Harris v. Forklift Sys., Inc., 510 U.S. 17, 20-23, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993), Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-73, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986)). *See also* Billings v. Town of Grafton, 515 F.3d 39 (1st Cir. 2008).

The Commission credited the complainant's testimony – it was clear and believable. The respondent did not appear and therefore the complainant's testimony was uncontradicted.

The complainant is a member of a protected class. The complainant is in a protected class; he is of Hispanic ancestral origin.

The complainant was subjected to unwelcome harassment based on his ancestral origin. The complainant was subjected to verbal and other harassment based on his ancestral origin. The complainant was the only Hispanic employee in the workplace and he was the only one subjected to the daily assault of insults. Further, the respondent made one very hostile and violent comment about Mexicans, an indication of his discriminatory bias.

The harassment to which the complainant was subjected was sufficiently pervasive and severe so as to alter the conditions of his 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 787-788. Simple teasing or offhand comments are not sufficient to constitute harassment. Faragher, 524 U.S. at 788. Conduct that is not explicitly discriminatory can be considered in determining whether a hostile environment was created. *See* Landrau-Romero v. Banco Popular De Puerto Rico, 212 F.3d 607, 614 (1st Cir. 2000), which discussed the matter as follows:

> Alleged conduct that is not explicitly racial in nature may, in appropriate circumstances, be considered along with more overtly discriminatory conduct in assessing a Title VII harassment claim. *See* DeGrace v. Rumsfeld, 614 F.2d 796, 800 (1st Cir.1980) (evidence of equipment sabotage and co-workers' "silent treatment" considered along with racially explicit notes)…. [other cites omitted].

See also Kang v. U. Lim America, Inc., 296 F.3d 810 (9th Cir. 2002) in which the Court denied summary judgment on the issue of harassment when the plaintiff had submitted evidence that Koreans were subjected to harsher treatment, including insults, physical abuse and extended working hours, than Hispanics or other non-Koreans.

The uncontroverted evidence establishes that the respondent subjected the complainant to almost daily insults in front of his co-workers. The harassment occurred over a time period of approximately two years. The respondent isolated the complainant from his co-workers by telling his co-workers to stay away from the complainant and by staring at anyone who talked to the complainant. The respondent's frequent stares at the complainant while flexing his muscles were hostile acts. The respondent demonstrated his contempt for the complainant by saying that the complainant could not use the respondent's microwave and by telling other employees that they could use the microwave first. The respondent embarrassed the complainant in front of his co-workers by telling him to move his newspaper because it was touching the lunch bag of a co-worker. The respondent intercepted lunchtime work from the complainant so that the respondent would get the money. The respondent made a comment in the complainant's hearing that Mexicans should be shot. The harassment was frequent, occurred over a long period of time and had elements of intimidation. The complainant's isolation from his co-workers, and the need to deal with the harassment and his reaction to it, unreasonably interfered with his work. There is sufficient evidence to satisfy the fourth requirement of a successful hostile environment claim.

The 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 have found the continuous use of these insulting words and actions to be hostile and abusive. While an occasional offensive remark might not rise to the level of illegal harassment, the complainant was subjected to this conduct on an almost daily basis for a prolonged period of time. It was clear that the complainant found the conduct offensive and that a reasonable person would also find it to be so.

A basis for liability has been established. The respondent in this case is a co-worker of the complainant, not the employer. With respect to harassment by co-workers, an employer is liable if the complainant shows that the employer failed to take immediate and appropriate corrective action after it had notice of the harassment. Faragher, *supra.* In the instant case, the complainant reported the harassment to management, but the respondent's harassment of the complainant continued until the respondent left the company.

As noted previously, R.I.G.L. Section 28-5-7(6) 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 is liable under this Section of the FEPA.

The respondent incited an unlawful employment practice. 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 respondent's actions were designed to provoke unlawful harassment.

The respondent's actions in ignoring the warnings of his employer and continuing to harass the complainant obstructed the employer's attempts to comply with the FEPA.

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.

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.

COMPENSATORY DAMAGES

R.I.G.L. Section 28-5-24(b) provides that:

> (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.

In previous cases, the Commission has awarded compensatory damages for nonpecuniary losses such as pain and suffering. 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.

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). 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).

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); O'Rourke (reinstating a jury award of $275,000 where the plaintiff had endured years of sexual harassment causing insomnia, severe weight gain, depression, panic attacks and likely permanent disability); White v. New Hampshire Dept. of Corrections, 221 F.3d 254, 262 (1st Cir. 2000) (affirming district court jury's award of $45,000 in damages to plaintiff who was sexually harassed on the job, retaliated against after filing a complaint and constructively discharged); 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).

In the circumstances of the instant case, the Commission finds that $25,000 is a fair amount in compensation for the complainant's pain and suffering.[1] The Commission was persuaded by the complainant's testimony that he felt he could not leave his job, that the harassment caused him to feel miserable, isolated and depressed when he was at work and sleepless and depressed at home and that it affected his relationship with his family. He testified that at times he sweated uncontrollably, shook and had headaches. Trans. pp. 22 – 24. The complainant suffered the harassment for two years. The Commission finds that $25,000 adequately compensates the complainant for the emotional distress and suffering caused by the respondent's discrimination. The Commission also awards 12% annual interest on the award from the date the cause of action accrued until it is paid. *Cf.* R.I.G.L. Section 9-21-10(a).

EQUITABLE RELIEF

The Commission orders equitable relief in order to remedy discrimination and to prevent discrimination in the future. See R.I.G.L. Section 28-5-24(a) which provides that, upon finding a violation of the FEPA, the Commission shall issue an Order requiring the respondent "to take any further affirmative or other action that will effectuate the purposes of this chapter". The respondent must undergo training on the state and federal anti-discrimination laws.

ORDER

I. Violations of R.I.G.L. Section 28-5-7 having been found, the Commission hereby orders:

A. That, within forty-five (45) days of the date of this Order, the respondent undergo training on the Rhode Island and federal laws which prohibit employment discrimination and that within sixty (60) days of the date of this Order, the respondent send to the Commission a certification that the training has been completed, the name of the trainer, the date of the training and a copy of the syllabus of the training;

B. That, within thirty (30) days of the date of this Order, the respondent pay the complainant $25,000 as compensatory damages for pain and suffering together with interest at a rate of 12% per year from June 30, 2005 until paid in full;

[1] This amount also includes compensation for the two occasions when the respondent diverted to himself the complainant's compensation for work at lunch.

C. That the respondent submit a cancelled check indicating remuneration of the complainant in accordance with the Paragraph I (B) within sixty (60) days of the date of this Decision and Order.

II. The attorney for the complainant may file a Motion and Memorandum For Award Of Attorney's Fees no later than thirty (30) days from the date of this Order, with a copy mailed to the respondent. The respondent may file a Memorandum in Opposition no later than thirty (30) days after the complainant's attorney files his Motion and Memorandum with the Commission. The parties' attention is directed to Morro v. Rhode Island Department of Corrections, Commission File No. 81 EAG 104-22/02 (Decision on Attorney's Fees 1982) for factors to be generally considered in an award of attorney's fees under the FEPA. Either party may elect a hearing on the issues involved in the determination of an appropriate award of attorney's fees by requesting it in the memorandum.

Entered this [3rd] day of [September], 2009.

_____/S/_____

John B. Susa.
Hearing Officer

I have read the record and concur in the judgment.

_____/S/_____ _____/S/_____

Alton W. Wiley, Jr. Rochelle B. Lee
Commissioner Commissioner