

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

**MARY FRANCES KEUSAL &
PATTI K. KELLER**

Complainants

and

**D. M. LOWE & COMPANY, INC.
D/B/A DANIEL MARKS COMPANY**

Respondent

COMPLAINT #8021
(COL) E1012296 (23591) 062796

COMPLAINT #8025
(COL) E1020896 (23625) 071096

**HEARING EXAMINER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATIONS**

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HEARING EXAMINER'S REPORT BY:

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INTRODUCTION AND PROCEDURAL HISTORY

Mary Francis Keusal (Complainant Keusal) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on June 27, 1996. Patti K. Keller (Complainant Keller) filed a sworn charge affidavit with the Commission on July 10, 1996.

The Commission investigated and found probable cause that D. M. Lowe & Company, Inc. d/b/a Daniel Marks Company (Respondent) engaged in unlawful discriminatory practices in violation of Revised Code § (R.C.) 4112.02(A).

The Commission attempted and failed to resolve this matter by informal methods of conciliation. The Commission issued two Complaints on August 21, 1997.

Both Complaints alleged that Complainants were subjected to a hostile work environment and were constructively discharged because of their sex.

Respondent filed timely Answers to the complaints, admitting certain procedural allegations but denying that it engaged in any unlawful discriminatory practices.

A public hearing was held on February 17-19, 1998 and March 13, 1998 at the Commission's central office in Columbus, Ohio.

The record consists of the previously described pleadings; the transcript consisting of 818 pages of testimony; exhibits admitted into evidence at the hearing; and the post-hearing briefs filed by the Commission on July 31, 1998 and by Respondent on August 24, 1998.

FINDINGS OF FACT

The following findings are based, in part, upon the Hearing Examiner's assessment of the credibility of the witnesses who testified before him in this matter. The Hearing Examiner has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He considered whether a witness

was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. He further considered the opportunity each witness had to observe and know the things discussed; each witness's strength of memory; frankness or the lack of frankness; and the bias, prejudice, and interest of each witness. Finally, the Hearing Examiner considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant Keusal filed a sworn charge affidavit with the Commission on June 27, 1996. Complainant Keller filed a sworn charge affidavit with the Commission on July 10, 1996.

2. The Commission determined on May 8, 1997 that it was probable that unlawful discriminatory practices had been engaged in by Respondent in violation of R.C. 4112.02(A).

3. The Commission attempted to eliminate the alleged unlawful discriminatory practices by conciliation. The Commission issued its complaint after conciliation failed.

4. Respondent is a corporation doing business in Ohio and an employer. Respondent is an executive recruiting firm which specializes in recruiting for manufacturing operations and recruiting engineering professionals. Daniel Lowe started the company in January 1994 after having been in the recruiting business since 1978. Lowe has always been the principal operating officer and president of the company.

5. Lowe hired two male recruiters shortly after January 1994. Lowe hired Complainant Keller, female, who was in her early 20s, as an executive recruiter in May 1994. He hired Nikki Asseff, female, who was in her 20s, as an executive recruiter around September 1994. Another male employee was hired shortly thereafter.

6. In the spring of 1995, Asseff approached Lowe and asked him if she could act as team leader so he could free up some of his time to sell their services. She acted as team leader until September or October 1995. She had no management responsibilities. Her primary responsibility was to be a resource person for the other recruiters.

7. While she was employed by Respondent, she met Mark Welsh, who was hired by Lowe as an executive recruiter in June 1995. He started dating Asseff in the fall of 1995 and maintained a relationship with her throughout his employment. His employment ended in March or April 1996.

8. Shortly after Asseff started, Lowe make a remark to her that she interpreted as a sexual advance.¹ On another occasion during the summer of 1995, Lowe threw water on Asseff's blouse and remarked about having a wet tee-shirt contest. Lowe also made occasional remarks about her anatomy.

9. Complainant Keusal, female, was hired by Lowe as an executive recruiter in June 1995. She was in the process of getting a divorce and was a single parent. A few months after she had been employed, Complainant Keusal asked Welsh to switch cubicles with her because she felt uncomfortable being in a cubicle that was directly across from Lowe's office. She told Welsh that Lowe had made a few comments about her legs that made her feel uncomfortable and that is why she wanted to move. Lowe also told her she looked nice in short skirts. Lowe granted them permission to

¹ He told her he wished that she was married because then they would both be married and both would have something to lose if they had a relationship. Apparently, she

change cubicles, which was not uncommon. After Complainant Keusal moved, Lowe stopped making comments about her legs.

10. Throughout the period from January 1994 to December 1995 the Respondent's office atmosphere was very informal. Their recruiters were not closely supervised by Lowe. They reacted freely with each other and generally

the atmosphere was friendly and congenial. On occasion someone would tell an off-color joke. Lowe told off-color jokes in the break room or in the smoking area which was not part of the office. Lowe also made remarks on occasion about Complainant Keller's breasts. On one occasion he asked her what size her bra was.

11. On various occasions, some of the employees socialized together outside of work. Lowe and Cheryl Geiger, the office manager, socialized at a bar and restaurant called Olde Summit Towne. Everyone in the office attended OSU's Seniors Night and went on a Christmas tree hunt.

rejected his overture.

12. In addition to occasionally telling off-color jokes, some of the employees, including Lowe, used sexual innuendo and vulgar language. Both Complainants stated they gave “good phone” referring to their abilities to speak to prospects on the telephone.

13. One of the clients who was successfully placed by Complainant Keller was Bruce Monteith. When Complainant Keller spoke to Monteith over the telephone, which she did frequently, she engaged in sexual bantering and used sexual innuendo. She spoke to him about problems in her personal life and an intimate relationship she was having with a younger man. She invited him to Columbus to visit the office. When he told her he could not make it, she became upset and cried. Monteith reported this to Lowe who spoke to her about it.

14. In April 1995, Lowe came up behind Complainant Keller and threw a penny over her shoulder which went down her shirt.

15. During Labor Day weekend in 1995, Lowe rented a houseboat and a speedboat at Cumberland Lake State Park and invited all of the employees

to a Labor Day weekend on the boat. He also invited them to bring a guest of their choice. Geiger attended with her husband; Asseff attended; Mike Chizever, a recruiter, attended; Complainant Keller and her husband attended; and Complainant Keusal and her boyfriend attended. Lowe's wife did not attend because she was pregnant and because she had hay fever which Lowe thought would be exacerbated by the environment.

16. During the weekend, there was excessive consumption of alcoholic beverages. Everyone was drinking. Lowe went skinny-dipping under cover of darkness. While he was in the hot tub, someone pulled off his swimming trunks and caused him to bolt from the tub and run to cover himself. While he was sleeping, Complainant Keller, Geiger and others came to his cabin, uncovered him, and took a Polaroid snapshot of him naked. The picture only captured his leg.

17. On the last day of the trip, Complainant Keusal, who had been swimming, removed her bathing suit in her cabin, covering her top with only a sweatshirt. She and her boyfriend were in the kitchen area. Lowe said, "M.F., show us your tits!" Simultaneously, he came up behind her and flipped

up her sweatshirt, momentarily exposing her breasts. She pulled it down and he flipped it up again. Complainant Keusal and her boyfriend left the area. She was very upset and the incident bothered her for the remainder of the trip.

18. After the Lake Cumberland trip, Lowe's presence made Complainant Keusal feel uncomfortable. She avoided him as much as possible. She was reluctant to come to work. It made her sick. She hated her job.

19. During the fall of 1995, the office atmosphere remained the same. The social interactions continued. Complainants attended a Christmas party at Lowe's residence where gifts were exchanged by the employees. Lowe was given a calendar that was put together by Geiger and Complainants that contained pictures that were taken on the Cumberland Lake boat trip.

20. In late December 1995, Gary Weltlich became a partner in the business and came on board as the new vice president. He was hired to motivate the recruiters to increase production. He required the recruiters to

produce weekly production activity reports and plans of action. He took a more formalized approach to management. The recruiters resisted this and complained to Lowe about it. They complained about Weltleisch's demeanor and rigidity.

21. Sometime after Weltleisch was employed, Complainant Keller and Lowe were drinking at Olde Summit Towne. Complainant Keller thought Lowe was inebriated and told him that he should not drive. He insisted that he was all right, that he had only had two drinks and left to go home. After he left he noticed that she was following him in her car. Complainant Keller followed him home. When they got to his residence, she asked him if she could come in to use the bathroom and telephone her husband. Lowe asked her if she wanted something to eat because he was concerned that she had too much to drink. He made her something to eat, she watched television, and then she left after about 1 ½ hours.

22. In January 1996, Complainant Keusal and Lowe were riding together in the back of a van on their way to an office luncheon. They were discussing business. Lowe asked her if she was interested in dating the

person she was trying to place and she said she did not think so. He replied, "Oh, that's right you don't like older men, that's why you won't do me." (Tr. 42)

23. Complainant Keusal resigned on January 24, 1996 after securing other employment. She left that job after a few days because her father died. She was grieving and unable to work.

24. Complainant Keller returned to work on February 6, 1996 after being ill and was still sick from an inner ear infection. During a staff meeting, Lowe noticed she was not paying much attention and looked unhappy. He questioned all of the other recruiters about their plans for the week and questioned her last. He referred to her as "Sad Sack". She began to reply to him. He interrupted her and using a vulgarity told her to leave the room and go back to her office. Complainant Keller burst into tears and left the room. She resigned on February 8, 1996.

25. Lowe terminated Asseff's employment in February or March 1996.

26. Subsequently, Complainants and Asseff formed a company called YMH, a recruiting company which Lowe believed conflicted with a non-competition agreement they had signed with him. Lowe sued YMH. Complainants filed their charge affidavits with the Commission shortly after they were deposed in the lawsuit. Ultimately, the lawsuit was settled. YMH ceased as a business, and Complainants pursued other employment.

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.²

² Every Finding of Fact may be deemed a Conclusion of Law and every Conclusion of Law may be deemed a Finding of Fact.

1. The Commission alleged in each Complaint that Complainants were subjected to a hostile work environment and forced to resign (constructively discharged) because of their sex.

2. These allegations, if proven, would constitute violations of R.C. 4112.02, which provides in pertinent part that:

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the . . . sex, . . . of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) and (I) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Federal case law applies to alleged violations of R.C. Chapter 4112. *Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm.*, (1991), 61 Ohio St.3d 607. Therefore, reliable, probative and substantial evidence means

evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

SEXUAL HARASSMENT

5. Sexual harassment is sex discrimination and prohibited by R.C. Chapter 4112. Ohio Admin. Code (O.A.C.) 4112-5-05(J)(1); *Cf. Meritor Savings Bank v. Vinson*, 40 FEP Cases 1822 (1986) (sexual harassment is sex discrimination under Title VII). There are two forms of sexual harassment: *quid pro quo* and hostile work environment. *Id.*, at 1826. The latter form of sexual harassment, which the Commission appears to allege in this case, recognizes that employees have the “right to work in an environment free of discriminatory intimidation, ridicule, and insult.” *Id.*

6. O.A.C. 4112-5-05 defines sexual harassment based on a hostile work environment, in pertinent part:

- (J) Sexual harassment.
- (1) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
 - (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.

Whether the alleged conduct constitutes sexual harassment is determined on a case-by-case basis by examining the record as a whole and the totality of the circumstances. O.A.C. 4112-5-05(J)(2).

7. In order to create a hostile work environment, the conduct must be “sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.” *Harris v. Forklift Systems, Inc.*, 63 FEP Cases 225, 227 (1993), quoting *Meritor, supra* at 1827. The conduct must be unwelcome. *Meritor, supra* at 1827. The victim must perceive the work environment to be hostile or abusive, and the work environment must be one that a reasonable person would find hostile or abusive. *Harris, supra* at 227-28.

8. To determine whether a work environment is hostile or abusive, the factfinder must examine “all the circumstances.” *Id.*, at 228.

A hostile environment claim is a single cause of action rather than a sum total of a number of mutually distinct causes of action to be judged each on its own merit, making it improper to examine each alleged incident of harassment in a vacuum.

Mendoza v. Borden, Inc., 78 FEP Cases 1507, 1509 (11th Cir. 1998) (citations and quotations within a quotation omitted).

The relevant factors include:

. . . the frequency of the discriminatory 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, supra at 228.

The effect on the employee's psychological well being is also relevant in determining whether the employee found the work environment abusive. *Id.*

All of these factors should be considered, but “no single factor is required.” *Id.*

9. Title VII, and likewise Chapter 4112, does not prohibit *all* verbal or physical harassment in the workplace.

Title VII is not designed to “purge the workplace of vulgarity” but to “protect working women from the kind of male attentions that can make the workplace hellish for women. A merely unpleasant working environment even that which includes occasional vulgar banter tinged with sexual innuendo is simply not actionable.”

Mart v. Dr. Pepper Co., 71 FEP Cases 478, 482 (D.C. Kansas 1996) (quotes within a quote omitted) (citations omitted).

We have never held that work place harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations. The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms and conditions of employment to which members of the other sex are not exposed.

Oncale, infra at 223, 224 (citations and quotations within a quotation and ellipses omitted).

Title VII is not designed to rectify every unpleasant aspect of one's co-workers' or supervisors' behavior. However, it comes into play before harassing workplace conduct induces a nervous breakdown . . . [R]ecognition of [an] employee[s] dignity might require standards higher than those of the street, . . . reasonable people can take justifiable offense at comments that the vulgar among us, even if they constitute a majority, would consider acceptable . . . Today, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment . . .

Wal-Mart Stores, Inc. v. Davis, 78 FEP Cases 278, 289 (Texas Court of Appeals, 1998) (federal case citations omitted).

. . . [The] standards for judging hostility are sufficiently demanding to ensure that [the statute] does not become a "general civility code." Properly applied, they will filter out complaints attaching "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing . . . We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Court of Appeals have heeded this view.

Faragher v. City of Boca Raton, 77 FEP Cases 14, 18, 19 (1998), *reversing and remanding* 111 F.3d 1530 (11th Cir. 1997) (*quoting Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22-23).

10. Incidents that occur outside of the workplace may be considered in determining whether a hostile work environment existed at the workplace. Therefore, the factfinder may consider incidents which occurred off site. *McGuinn-Rowe v. Foster's Daily Democrat*, 74 FEP Cases 1566 (D.N.H. 1997); *Cf. Warnell v. Ford Motor Co.*, 78 FEP Cases 1500 (N.D. Ill. 1998) (videotape of Christmas party attended off site by employees was discoverable because it was relevant to their sexual harassment claims).

11. However, these incidents must be put in context. The objective standard

requires careful consideration of the social context in which particular behavior occurs and is experienced by its target . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. *Oncale v. Sundowner Offshore Servs., Inc.*, 76 FEP Cases 221, 224 (1998).

12. While the frequency of the conduct is relevant and can be crucial, a single incident, such as a sexual assault, can be actionable, if it could sufficiently alter the conditions of employment and create a hostile work environment. *Quinn-Rowe, supra*.

13. The alleged sexually harassing conduct must be unwelcome.

. . . unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive . . .

In deciding what the court should consider to determine if a plaintiff has been subjected to unwelcome conduct, the Supreme Court has pointed out that the “EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of ‘the record as a whole’ and ‘the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.’” . . . As part of the context in which the alleged incidents occurred, such things as the plaintiff’s sexually provocative speech or dress could be relevant.

Nuri v. PRC, Inc., 77 FEP Cases 1451, 1454 (D. Ala. 1998) (citations and quotations within a quotation omitted).

14. The sexually harassing conduct can be unwelcome, even if the employee has told off-color jokes or engaged in sexual banter.

However, it cannot be overemphasized that a plaintiff’s “use of foul language or sexual innuendo in a consensual setting does not waive her ‘legal protections against unwelcome harassment.’” . . . Furthermore, a plaintiff’s use of vulgar language does not necessarily mean that she invited or welcomed what would otherwise be considered sexual harassment.

Nuri, supra at 1454.

15. When credibility is an issue in a sexual harassment case, corroboration or the lack of corroboration of the alleged victim's testimony, is often crucial.

We note that in a case of alleged sexual harassment which involves close questions of credibility and subjective interpretation, the existence of corroborative evidence or the lack thereof is likely to be crucial.

Henson v. City of Dundee, 29 FEP Cases 787, 800, n.25 (11th Cir. 1982) (citations omitted).

16. However, there is no explicit corroboration requirement in Chapter 4112 or Title VII.

The credibility determinations are for the finder of fact. The finder of fact may credit either side's version of disputed facts whether or not there is corroboration if they find one witness's version more credible than the other witness's version.

Durham Life Insurance Co. v. Evans, 78 FEP Cases 1434, 1440, fn.2 (3d Cir. 1999).

CONSTRUCTIVE DISCHARGE

17. Normally, employees who are subjected to unlawful discrimination must remain on the job while they seek legal redress. *Brooms v. Regal Tube Co.*, 50 FEP Cases 1499 (7th Cir. 1989). However, an employee may be compelled to resign when confronted with an “aggravated situation beyond ordinary discrimination.” *Id.*, at 1506 (citation omitted); See also *Yates v. AVCO Corp.*, 43 FEP Cases 1595, 1600 (6th Cir. 1987) (“proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other aggravating factors”) (citation omitted). This is known as a constructive discharge.

18. When there is an allegation of constructive discharge, the factfinder must examine “the objective feelings of [the] employee and the intent of the employer.” *Wheeler v. Southland Corp.*, 50 FEP Cases 86, 88 (6th Cir. 1989), quoting *Yates, supra* at 1600. To meet the objective standard, the Commission must show that the “working conditions . . . [were] so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.” *Yates, supra* at 1600, quoting *Held v. Gulf Oil Co.*, 29

FEP Cases 837, 841 (6th Cir. 1982). To meet the intent requirement, the Commission must show that a “reasonable employer would have foreseen that a reasonable employee (or this employee, if facts peculiar to her are known) would feel constructively discharged.” *Wheeler, supra* at 89.

DISCUSSION

PATTI KELLER

19. I credited Complainant Keller’s testimony that there were occasions when Lowe made comments about her anatomy in her presence. I also credited her testimony and the testimony of others that he occasionally told off-color jokes. I credited her testimony and the testimony of others regarding the incidents that occurred outside of the workplace to the extent they are set out in my Findings of Fact. I also credited her testimony regarding the occasion where Lowe threw a penny down her shirt, and the occasion where he made a grabbing gesture, as set out in my Findings of Fact.

20. However, I did not find that these incidents, taken as a whole, created a hostile work environment for Complainant Keller. As far as

Complainant Keller was concerned, the work atmosphere was not permeated with conduct of a sexual nature. While the conduct that occurred was inappropriate, it did not objectively rise to a level that would affect a term or condition of Complainant Keller's employment in my opinion.

21. Nor did it affect a term or condition of her employment using a subjective standard. She was able to continue to function and be a productive employee up until her resignation. She continued to interact with Lowe, although she might have felt uncomfortable on occasion. The incident that occurred in January when she followed him home is strong evidence that Lowe's behavior had not negatively affected her ability to relate to him. I also considered her conduct as it related to Monteith. I credited his testimony that she readily engaged in sexual banter with him and discussed her intimate personal life. Based on these factors, it is my conclusion that Complainant Keller was not subjected to a hostile work environment.

MARY FRANCES KEUSAL

22. I credited Complainant Keusal's testimony regarding remarks that she overheard or remarks that were directed to her by Lowe to the extent they are set out in my Findings of Fact. I credited her testimony about the incidents that occurred on the boat trip to the extent they are set out in my Findings of Fact. Prior to the incident at Lake Cumberland, the facts as I find them did not create a hostile work environment for Complainant Keusal. The work atmosphere was not permeated with verbal or physical conduct of a sexual nature to the extent it would affect the terms and conditions of employment of a reasonable person. Nor did the evidence support the conclusion that subjectively Complainant Keusal's performance was affected to the extent necessary to create a hostile work environment. However, that changed after the Cumberland Lake boat trip.

23. I credited Complainant Keusal's testimony that the sweatshirt incident on the Lake Cumberland boat trip affected her ability to relate to Lowe to the extent that she avoided him as much as possible thereafter. I also credited her testimony that she did not want to come to work after that

incident. As set out in my Conclusions of Law, a reasonable person would tend to avoid someone who physically assaulted them, even within the context of the Cumberland Lake boat trip. In my opinion, this one incident was enough to create a hostile work environment for Complainant Keusal.

24. The same reasoning that leads to the conclusion that Complainant Keusal was subjected to a hostile work environment after the Lake Cumberland incident, also supports the conclusion that Complainant Keusal was justified in terminating her employment with Respondent in January 1996.

The boat trip incident and other incidents that occurred prior and subsequent thereto culminated in January when Complainant Keusal could no longer face the prospect of working in the same office with her harasser who was the president of the company and her immediate supervisor. She should not be penalized for holding onto the job as long as she did. In other words, merely because she did not resign in October does not, in my opinion, make the situation less egregious.

JURISDICTIONAL ISSUE

25. In its brief Respondent claims that the Commission lacks jurisdiction in this matter because none of the incidents that constitute the claim of sexual harassment occurred within six months of the date the Complainants filed their charge affidavits. I disagree.

26. By its very nature, a hostile work environment must be viewed as a series of continuing events or as the courts have put it, “a continuing violation”. It is in effect, a pattern and practice of discrimination. The statute of limitations is satisfied if Complainant Keusal was subjected to sexual harassment on at least one occasion during the statutory period. *Jensen v. Eveleth Taconite Co.*, 75 FEP Cases 852 (8th Cir. 1997) Complainant Keusal filed her charge affidavit on June 27, 1996 which was within six months of the “do me” remark which occurred sometime in January 1996.

RELIEF

27. When the Commission makes a finding of unlawful discrimination, the victims of such practices are entitled to relief. R.C. 4112.05(G)(1). Title VII standards apply in determining the appropriate relief under R.C. 4112.05(G)(1). *Ohio Civil Rights Comm. v. Ingram*, (1994), 69 Ohio St.3d 89, reaffirming *Plumbers & Steamfitters Apprenticeship Comm. v. Ohio Civil Rights Comm.*, (1981), 66 Ohio St.2d 192.

28. Like Title VII, one of the purposes of R.C. Chapter 4112 is to make “persons whole for injuries suffered through past discrimination.” *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 10 FEP Cases 1181, 1187 (1975).

The attainment of this objective requires that:

. . . persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

Franks v. Bowman Transportation Co., 424 U.S. 747, 763, 12 FEP Cases 549, 555 (1976) (footnotes omitted).

29. In providing a “make whole” remedy, there is strong presumption in favor of awarding back pay:

[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes eradicating discrimination throughout the economy and making persons whole for injuries suffered for past discrimination.

Albemarle Paper Co., *supra* at 421, 10 FEP Cases at 1189.

This presumption “can seldom be overcome.” *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 719, 17 FEP Cases 395, 403 (1978).

There must be “exceptional circumstances” to deny an award of back pay. *Rasimas v. Michigan Dept. of Mental Health*, 32 FEP Cases 688, 696 (6th Cir. 1983).

30. The difficulty in calculating back pay does not constitute an exceptional circumstance. *Id.* The Commission should award back pay “even where the precise amount of the award cannot be determined.” *Id.*, at 698. The calculation of back pay does not require “unrealistic exactitude”, only a reasonable calculation is required. *Salinas v. Roadway Express, Inc.*, 35 FEP Cases 533, 536 (5th Cir. 1984). The Commission should resolve any ambiguity in the amount of back pay against the discriminating employer. *Rasimas*, *supra* at 698; *Ingram*, *supra* at 94.

31. To be eligible for back pay, victims must attempt to mitigate their

damages by seeking substantially equivalent employment. *Rasimas, supra* at 694. A substantially equivalent position affords the victim “virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status.” *Id.*, at 695.

32. The discriminating employer has the burden of proving that the victim failed to mitigate damages. To meet this burden, the discriminating employer must establish that: (1) there were substantially equivalent positions available, and (2) the victim failed to use reasonable diligence in seeking such positions. *Id.*, at 695.

33. Besides proving lack of mitigation, the discriminating employer also has the burden of proving that the victim had interim earnings. *Id.*, at 694. Interim earnings are deducted from the back pay award. R.C. 4112.05(G)(1).

34. Complainant Keusal found comparable employment before she left Respondent. However, she left that employment for personal reasons and was unable to work for a short period of time. Complainant Keusal worked at YMH from April to September 1996. After that she worked at a sub shop as

an assistant manager until January or February 1997. In May 1997, she obtained a position with Corporate Research Consulting as an account executive which was substantially equivalent to the position she had with Respondent.

35. Based on the foregoing, Complainant Keusal is entitled to back pay from the day she began working at YMH in April 1996 to the day she started at Corporate Research Consulting in May 1997, less interim earnings.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint #8021 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;
2. The Commission order Respondent to revise its sexual harassment policy to provide for an independent outside source that can be contacted

regarding complaints of sexual harassment. In addition to providing a copy of the revised sexual harassment policy to all employees, the policy must be specifically explained to each employee;

3. The Commission order Respondent to submit to the Commission within 10 days of the Commission's Final Order a certified check payable to Complainant Keusal for the amount that she would have earned had she been employed as an executive recruiter in April 1996 and continued to be so employed up until the first day she became employed by Corporate Research Consulting, less her interim earnings, plus interest at the maximum rate allowable by law;³ and

4. The Commission issue a Dismissal Order in Complaint #8025.

FRANKLIN A. MARTENS
CHIEF HEARING EXAMINER

March 26, 1999

³ Any ambiguity in the amount that Complainant Keusal would have earned during this period or benefits she would have received should be resolved against Respondent. Similarly, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent. Complainant Keusal's back pay should be at least equal to her draw.