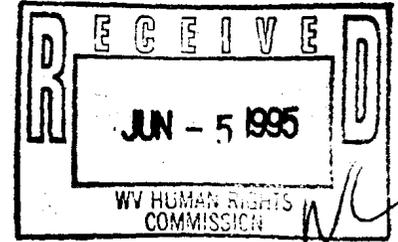


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Gino's Pizza & Spaghetti House
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Nitro, WV 25143

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Charleston, WV 25301
Counsel to the Commission

J. David Cecil
3972 Teays Valley Road
Hurricane, WV 25526
Counsel for Respondent

NOTICE OF FINAL DECISION

PLEASE TAKE NOTICE that pursuant to W. Va. Code §5-11-8(d) and 6 WVCSR §77-2-10, any party aggrieved by the attached final decision shall file with the executive director of the West Virginia Human Rights Commission, **WITHIN THIRTY (30) DAYS OF RECEIPT OF THE DECISION**, a petition of appeal setting forth such facts showing that the party is aggrieved, stating all matters alleged to have been erroneously decided herein, the relief to which the party believes they are entitled and any argument in support thereof.

The filing of an appeal to the Commission from the final decision shall not operate as a stay of the decision unless specifically requested by the appellant in a separate application for the same and approved by the Commission or its executive director.

All documents shall be directed to:

Executive Director
West Virginia Human Rights Commission
1321 Plaza East, Room 104-106
Charleston, WV 25301

Dated this 1st day of June, 1995.

WV HUMAN RIGHTS COMMISSION

BY: Mike Kelly
MIKE KELLY
Administrative Law Judge
Post Office Box 246
Charleston, West Virginia 25321
(304) 344-3293

cc: Norman Lindell, Acting Executive Director
West Virginia Human Rights Commission

BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION

CRYSTAL D. MILLER,

Complainant,

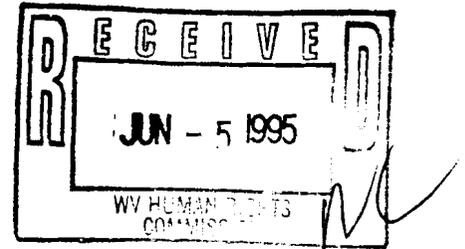
v.

Docket No. ES-256-93

**GINO'S PIZZA AND
SPAGHETTI HOUSE,**

Respondent.

**FINAL DECISION OF THE
ADMINISTRATIVE LAW JUDGE**



THIS MATTER matured for public hearing on 26 October 1994. By agreement of the parties, the hearing was held at the West Virginia Human Rights Commission, 1321 Plaza East, Charleston, Kanawha County, West Virginia. The complainant appeared in person and her case was presented by the West Virginia Human Rights Commission and its counsel, Assistant Attorney General Leah Q. Griffin. Ms. Griffin was assisted by Deputy Attorney General Mary Catherine Buchmelter. The respondent appeared by its designated representative, Rebecca J. Lies, and by its counsel, J. David Cecil.

I. ISSUES TO BE DECIDED

1. Whether respondent violated W.Va. Code §5-11-9(1) by discriminating against complainant because of her sex by creating or tolerating a hostile sexual environment at her workplace.

2. Whether respondent violated W.Va. Code §5-11-9(7)(c) by engaging in any form of reprisal or otherwise discriminating against Ms. Miller because she opposed, resisted, rejected, or reported acts which she reasonably believed constituted unlawful sexual harassment.¹

¹ Both prior to and during the hearing, respondent sought to dismiss the reprisal claim from the amended complaint, arguing that the reprisal claim was added more than 180 days after the alleged act of retaliation. Upon argument of counsel, the motion was denied. Ms. Miller's original complaint form, while not clearly and conspicuously identifying a reprisal cause of action by placement of an "X" next to the term "REPRISAL ____", as is the customary practice, nonetheless states a cause of action for reprisal by alleging as follows:

[Paragraph 3]

- b. The Respondent began to harass me with unfair work assignments after I had complained about sexual harassment to management.
- c. I feel that my termination was due to my complaints about a sexually hostile working atmosphere.

HRC Procedural Rule §77-2-3.10 permits a complaint to be amended for the purpose of clarifying the factual allegations contained therein, provided that the amendments relate back to the original filing date. Such was the case here. Also, any fair reading of the original or amended complaint would have placed the employer on notice that unlawful reprisal was an issue to be addressed at hearing.

II. FINDINGS OF FACT

Based upon the credibility of the witnesses, as determined by the Administrative Law Judge, taking into account each witness' motive and state of mind, strength of memory, and demeanor and manner while on the witness stand; and considering whether a witness' testimony was consistent, and the bias, prejudice and interest, if any, of each witness, and the extent to which, if at all, each witness was either supported or contradicted by other evidence; and upon thorough examination of the exhibits introduced into evidence and the written recommendations and argument of counsel, the Administrative Law Judge finds the following facts to be true:²

A. Preliminary Facts

1. Complainant Crystal D. Miller is a white female who filed a complaint in a proceeding under the West Virginia Human Rights Act, W.Va. Code §5-11-1 et seq. ("HRA") and is a person protected by the HRA.

² To the extent that the findings, conclusions and arguments advanced by the parties are in accordance with the findings, conclusions and discussion as stated herein, they have been accepted, and to the extent that 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 issue as presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

2. Respondent, Gino's Pizza and Spaghetti House (hereinafter "Gino's") is a person and employer as those terms are defined by W.Va. Code §§ 5-11-3(a) and (d), respectively.

3. Ms. Miller was employed by the Gino's from July 1989 until September 1992. She was discharged from her employment with respondent on 28 September 1992, but was paid through 3 October 1992.

4. After her termination, Ms. Miller filed a complaint with the West Virginia Human Rights Commission (hereinafter "Commission") alleging that she had been sexually harassed on the job while employed at Gino's and that she had been discharged in reprisal for rejecting, opposing and reporting the sexual harassment. An amended complaint was filed on 27 August 1993.

B. Ms. Miller's Work History Prior to June 1992

5. Ms. Miller began working for Gino's in July 1989, when she was 17 years old and still in high school. She was hired by Ms. Pat Parker, wife of James Parker. Ms. Parker was the manager of the Gino's outlet at the Mercer Mall. Mr. Parker was Gino's area supervisor for its Mercer County stores.

6. Due to illness and resignations, Ms. Miller became "acting manager" of the Mercer Mall Gino's in July 1990. She remained in that position until 15 January 1992. Though "acting

manager", and performing a manager's duties, complainant continued to be paid on an hourly basis and was not eligible for the benefits afforded supervisory employees.

7. On 15 January 1992, after almost 18 months as "acting manager", Ms. Miller was demoted. Mr. Parker gave her written notice that she "was not terminated, but was moved from management to regular employee at the same hourly rate of pay, reason was Mr. Craig said we needed a more mature person to keep volume at an acceptable level." Oshel Craig is the chief executive officer of Gino's. Despite the demotion, Mr. Parker gave complainant a favorable evaluation, rating her as follows:

Quantity -- Above Average

Quality -- Above Average

Reliability -- Outstanding

Attitude -- Above Average

8. Under Ms. Miller's leadership, the Mercer Mall store had made a net profit of under \$2,500 in 1991.

9. Ms. Miller was replaced as manager by Yvonne Cooper. Complainant worked at the store as a regular employee for about two weeks and then transferred to the Bluewell, West Virginia Gino's.

9. Again due to illness and resignations, Mr. Parker asked Ms. Miller to serve as "acting manager" of the Bluewell store until he could find a replacement manager. Ms. Miller accepted. Once again, she remained an hourly employee and was not afforded the various fringe benefits made available to managers. On the other hand, she was paid time and a half for overtime, a benefit she would not have received had she taken a manager's position. Ms. Miller testified that as "acting manager" she always worked in excess of forty hours per week. Managers are required to work a minimum of 48 hours per week.

C. The Alleged Sexual Harassment

10. In June 1992, Mr. Parker became seriously ill and went on sick leave. Yvonne Cooper, who replaced Ms. Miller as manager of the Mercer Mall store, was promoted to take his place as area supervisor.

11. Harry Lucas, a longtime Gino's employee and the supervisor of a Gino's in Boone County, was sent by Mr. Craigo to train Ms. Cooper. He was in Mercer County for approximately one week.

12. As part of her training, Mr. Lucas and Ms. Cooper visited each of the three Gino's in Mercer County. At the Bluewell store, he met complainant for the first time. The date of this first meeting between Mr. Lucas and complainant is unclear.

13. Ms. Miller testified credibly that Mr. Lucas, after Ms. Cooper had left the store, asked her if she would have a drink with him after work. When she said that she was not old enough to legally consume alcoholic beverages, he asked "Well, would you like to come back to my motel room?" She said "No". They then finished working.

14. At the end of the work day, Mr. Lucas asked complainant if she was sure that she didn't want to go out. She said "Yes". Mr. Lucas then left the store. Ms. Miller testified that Mr. Lucas, while on the job, had been drinking from a bottle that was in a brown paper bag.

15. Shortly after Mr. Lucas left, he called complainant several times, each time asking her to go out with him. She continued to refuse. On one occasion, she asked another employee, Julia Ratliff, to answer the phone so that she wouldn't have to talk to Mr. Lucas.

16. On the next day, Mr. Lucas again visited the Bluewell's Gino's and again invited Ms. Miller for a drink after work. She, again, refused. Later that evening, she testified that he called her four or five times from his motel. She refused to meet him for drinks and refused to go to his motel room.

17. After refusing his overtures on two successive nights, Ms. Miller did not have to deal with Mr. Lucas for another week. At that time, she testified, "He had a really bad attitude, hostile. He didn't put my work down but he was a whole lot more bad tempered from the week before. He just wasn't as pleasant." He did not engage in any inappropriate behavior. After their third and final

encounter, Mr. Lucas returned to Boone County and the two did not meet again until this matter was heard in October 1994.

18. Complainant admitted that Mr. Lucas never touched her, or even attempted to touch her, in a sexual or inappropriate manner, nor did he direct any vulgar language toward her: "He didn't talk filthy-mouthed".

19. Julia Ratliff testified that she recalled that Mr. Lucas, when present in the Bluewell store, asked both her and Ms. Miller to have a drink with him. After he left, she recalled, he called for Ms. Miller several times. Ms. Miller, on one occasion, asked her to answer the phone. It was Mr. Lucas. He asked to speak to Ms. Miller. Ms. Ratliff also recalled that Ms. Miller, contemporaneous with the phone calls, stated that Mr. Lucas wanted her to come to his motel room and that she did not want to go.

20. Mr. Lucas testified that he has been employed by Gino's Pizza for approximately 19 years. He is employed as a supervisor in Boone County. In June 1992, he was asked to go to Mercer County to evaluate each of Gino's operations.

21. Mr. Lucas recalled meeting Ms. Miller during his second visit into Mercer County. He admitted that he probably asked her to have a drink with him, but qualified his answer by stating: "I would have asked everybody there at the store, it may have just been her that I said it to, but it would

have been, you know, 'you guys want to go have a drink when you get done work?'" He alleged that similar invitations were extended to employees at other stores.

22. When he was asked if it was possible that he could have asked Ms. Miller out more than one time, Mr. Lucas stated "It's possible, I could have asked them, yes, more than one day, yes, I don't know." He denied, however, that he ever asked complainant to come to his motel room, and he also denied that he called her at the store and repeated his invitation for drinks.

23. Generally, Mr. Lucas' testimony on his actions and behavior in regard to Ms. Miller and the invitations to have drinks was not credible. This assessment of credibility is based on his demeanor on the witness stand and a comparison of his testimony to the testimony of Ms. Miller and Ms. Ratliff, both of whom were more forthright and credible as to this issue.

24. I also find as fact that Mr. Lucas' overtures to complainant were unwelcome by her and that her refusal to meet with him was made clear to him or, if not clear to him in fact, would have been obvious to an average male supervisor of common intelligence and experience in the workplace, not under the influence of alcohol.

25. While the testimony was unclear, the hearing examiner adopts the recommendation of the Commission and finds as fact that Mr. Lucas' invitations to complainant were made over one weekend, on a Friday and Saturday night.

D. Ms. Miller Reports the Incident

26. Ms. Miller testified credibly that on the first night that Mr. Lucas repeatedly asked her to meet him for drinks, she reported his invitations to Mr. Parker, who, she understood, remained her supervisor while he was on sick leave.

27. Ms. Miller further testified that in reporting what she felt to be sexual harassment to Mr. Parker, she believed that she was following Gino's accepted procedure and the established chain of command.

28. Mr. Parker testified credibly that complainant informed him of Mr. Lucas' advances on the first night they occurred, and that he promptly called Kenny Grant, the president of Gino's. Mr. Parker testified that he told Mr. Grant that "Harry was fixin' to get us sued, that he was up there continuing to ask the help out and stuff. Mr. Grant told me he'd take care of it right then . . . he said he would call Mr. Craigo right then and get everything worked out, that they didn't want those problems."

29. Mr. Parker testified that he recalled a previous occasion when he heard that employees walked out of the Danville, West Virginia Gino's, which Mr. Lucas supervised, because "He came in drinking and grabbed hold of a girl." He stated that it was Mr. Craigo who related this event to him.

30. Ms. Miller alleged that she also told the acting area supervisor, Yvonne Cooper, about Mr. Lucas' overtures. Ms. Cooper credibly denied this allegation.

31. While respondent was inconsistent in its pre-hearing representations as to whether or not Ms. Miller reported the incident to a managerial employee, Mr. Lucas testified that Mr. Craigo had asked him if he had sexually harassed her. He replied that he had not. Mr. Lucas did not recall speaking to Mr. Grant about it.

32. I find as fact that Ms. Miller reported the incident to Mr. Parker, who, in turn, reported it to Mr. Grant, who reported it to Mr. Craigo. I further find as fact that Mr. Craigo confronted Mr. Lucas with the allegations of sexual harassment and that, after Mr. Lucas denied harassing complainant, the matter was dropped and no disciplinary action was taken against Mr. Lucas and Ms. Miller was never informed as to what upper management did or did not do in that regard.

E. Alleged Repercussions and Retaliation

33. Complainant alleged that after she reported Mr. Lucas to Mr. Parker she was treated differently by her supervisors. She alleged that her paperwork went from taking 20 minutes per night to complete to more than 45 minutes. She was also required to do her own ordering, to wear a hat, to work alone on "slow" evenings, and to sweep the parking lot after closing. She summarized the

alleged difference in treatment as ". . . just things. Nit-picking at me to try to make me quit, and I wouldn't quit. I just kept working, you know, I needed the job, I couldn't quit. And I just felt like I was being treated badly, different."

34. On cross-examination, Ms. Miller stated that the difference in treatment, which also coincided with Ms. Cooper replacing Mr. Parker as her immediate supervisor, was not necessarily inconsistent with company policy. She stated that her complaint about her new duties or requirements was "Not necessarily that I didn't think [they were] right, that I thought [they were] unfair."

35. It was not disputed that Mr. Parker, complainant's previous supervisor, performed many of the duties that would normally fall to a manager. He completed all forms regarding production and volume, made up the employee schedule and assigned hours to be worked, did all inventory and ordering of food, checked daily sales volume and checked daily to assure that the store was clean.

36. Ms. Cooper, who replaced Mr. Parker, testified credibly that after she became supervisor a number of changes were made in the duties of a manger which increased their workload. None of the managers, including Ms. Miller, liked the changes. She further testified that Ms. Miller's performance during the period of June to September 1992 was about the same as that of the other mangers under her supervision.

37. Ms. Miller admitted that Ms. Cooper would visit the store about every day and that Ms. Cooper informed complainant that the store's sales volume had to be increased.

38. Ms. Miller also admitted that both Rebecca Lies and Mr. Craig had visited the store when the outside signs were not in proper working order. Mr. Craig, she said, "got real upset with me" when he arrived at the store one evening and found that the outside sign was not on.

39. Rebecca Lies, is, and was in 1992, the district supervisor for Gino's. She has held this position for more than ten years. She is responsible for the operation of 18 stores, including the three Mercer County stores which came under her supervision in June 1992. Ms. Lies testified credibly that Ms. Cooper lodged several complaints with her regarding Ms. Miller, including accusations that Ms. Miller removed knobs from stoves, kept a dirty store and that customers had complained about service and product quality. Ms. Lies recalled receiving several written reprimands directed to Ms. Miller from Ms. Cooper, though she could not produce copies and copies were not among complainant's personnel file.

40. Ms. Lies testified credibly that near the end of August 1992, she and Ms. Cooper met with complainant to review the Bluewell store's profit and loss statement. She said that "Crystal was then informed that if there wasn't changes made in particular areas in this P&L statement that she will no longer hold the position as manager."

41. Ms. Lies also testified credibly that it appeared to her that Ms. Miller "resented" Ms. Cooper being promoted to area supervisor. Ms. Cooper, it should be remembered, replaced complainant as manager of the Mercer Mall store.

F. Complainant's Discharge

42. On or about 28 September 1992, Mr. Craig and Ms. Lies discharged Ms. Miller. Ms. Miller testified that when they and Ms. Cooper came into the Bluewell store they asked her to meet in a private area. Mr. Craig, according to the complainant, then "told me that he appreciated the work I had done and I wasn't a bad person, but I wasn't doing what he wanted me to do, I had poor managerial skills, and he was terminating me but he would pay me through that following Saturday."

43. Ms. Miller was given a written termination notice which listed the following as the reasons for her discharge:

- (a) "decrease in [sales] volume";
- (b) "unauthorized use of company phone";
- (c) "failure to use zipper (locked) bank bags";
- (d) "high labor cost";
- (e) "high food cost"; and
- (f) "high retail".

44. Ms. Cooper credibly testified that she and Ms. Lies decided to terminate Ms. Miller because "something had to be done just because of how things on paper, how it looked, everything was wrong, food cost was too high, labor was ridiculous, the store was not making any money at all. And I know that we had met with her at some point with all of the papers to show her. And it wasn't a written understanding or anything, but she knew the month before that she was gone, that something was going to happen if things didn't change, and that's what happened." She added that she had informed Ms. Miller about these problems by "meeting with her, talking with her". At the time complainant was fired, Ms. Cooper said, it appeared that she had expected to be terminated.

45. Ms. Lies offered similar credible testimony that Ms. Miller was fired because she did not have the skills necessary to address the store's continued loss of money: "I was getting no response from Crystal. And when they give me the stores, I'm held ultimately accountable for these stores. I was not getting any response from Crystal, and I made a decision with Yvonne Cooper. After making the decision, I called Mr. Craigo and informed of my decision. And I asked Mr. Craigo to be there to join us. And we met, Mr. Craigo, myself, Yvonne Cooper and Crystal met in Bluewell. We then informed Crystal -- which at that time Crystal knew why we were coming -- we then informed Crystal what was going on, of her termination. She didn't question it, she didn't seem upset, she didn't ask to be demoted, which in some occasions they'll say 'please don't fire me, demote me and I'll continue on working', not anything, she accepted it."

46. The Commission produced some evidence that complainant was innocent of, or not wholly culpable for, some of the accusations made against her, such as failure to use the authorized

bank bags for cash deposits. However, it was clear from the testimony of the witnesses, and I so find as fact, that respondent's concern was primarily with the sales volume of the store and the continued loss of money. On those points, the facts are not seriously disputed. Commission Exhibit 5, a sales and profit comparison between the Bluewell Gino's and the Mercer Mall store from January 1991 to December 1993, shows that during the months of June through September 1992:

(a) sales at the Bluewell store were at their lowest levels since January 1991, falling to less than \$11,000 per month in three out of four months; and

(b) net losses at the Bluewell store were at their highest levels since January 1991, exceeding \$4,000 in June and over \$3,000 in July, August and September.

47. Comparing complainant's best sales volume month at Bluewell to the month prior to her becoming acting manager (May 1992), sales were off 12%. A similar profit/loss comparison shows an increased loss of \$913 when comparing May 1992 to Ms. Miller's best months as manager and an additional loss of \$2,031 when comparing May 1992 to complainant's worst month.

48. While Commission Exhibit 5 verifies that the Bluewell store as a whole was not a profitable operation for respondent, it also affirms that under Ms. Miller's leadership the store's position continued to erode. It should go without saying that Gino's is in business to make a profit and that continued and increased losses are legitimate grounds for making changes in management personnel.

49. After Ms. Miller was discharged, respondent hired Ms. Liz Wagner to manage the Bluewell store. Ms. Wagner was removed as manager when she was unable to run the store at a profit. Rather than being fired, Ms. Wagner was simply demoted to an hourly position.

50. While complainant was discharged and Ms. Wagner was only demoted, for arguably the same offense, i.e. failure to turn a profit at the Bluewell store, a comparison of the discipline meted out to those two women does not give rise to an inference of discrimination since they are not similarly situated. Ms. Wagner's demotion was the first time that she had been removed from a management position. Complainant's discharge came after her second failed attempt at management. When Ms. Miller was removed as manager of the Mercer Mall store in January 1992, she, just like Ms. Wagner, was merely demoted to a staff position and was not fired.

III. DISCUSSION OF EVIDENCE AND APPLICABLE LAW

This case was heard on two theories of liability: hostile sexual harassment and unlawful reprisal. Under the West Virginia Human Rights Act (HRA), and the regulations promulgated pursuant thereto, sexual harassment is considered an unlawful discriminatory practice. *Westmoreland Coal Company v. WVHRC*, 181 W.Va. 368, 382 S.E. 2d 562 (1989); 6 W.Va. C.S.R. §77-4-1 et seq. The HRA's broad prohibition against retaliation is set forth, in part, at W.Va. Code §5-11-9(7)(c), which makes it unlawful "For any person [or] employer . . . to":

* * *

(C) Engage in any form of reprisal or otherwise discriminate against any person because he had opposed any practices or acts forbidden under this article or because he has filed a complaint, testified or assisted in any proceeding under this article.

(Emphasis added).

This case having been heard in its entirety, with all evidence submitted and considered, it is not necessary to address whether the Commission established *prima facie* cases of sexual harassment and/or unlawful retaliation. Once all the evidence has been heard, and the "defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether plaintiff really did so is no longer relevant." *U.S. Postal Service v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 1482 (1983). The job of the factfinder at this point is to address "the ultimate question of discrimination *vel non*". 103 S.Ct. at 1481.

A. Sexual Harassment

The Commission has put on a case of "hostile environment" sexual harassment and has not argued that the facts of this matter warrant a finding of "quid pro quo" sexual harassment. Under established case law, therefore, in order to prevail, it was necessary for the Commission to establish each of the following elements by a preponderance of the evidence:

- (1) The employee as a member of a protected group;
- (2) The employee was subject to unwelcome harassment;

- (3) The harassment complained of was based on the employee's gender;
- (4) The harassment complained of affected the term, condition or privilege of employment;
- (5) Respondeat superior.

See, e.g., Burns v. McGregor Electronic Indus., Inc., 955 F.2d 559 (8th Cir. 1992); *Wyerick v. Bayou Stell Corp.*, 887 F.2d 1271 (5th Cir. 1989); *Stanton v. Maries County*, 868 F.2d 996 (8th Cir. 1989); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

As the U.S. Supreme Court made clear in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986) and *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), the civil rights laws were not intended to make unlawful words or conduct which merely generate hurt or offended feelings. To be actionable, the harassment must affect the terms or conditions of employment, or, in other words, must be "severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive". *Harris*, at 370. Additionally, the receiver of the harassment must "subjectively perceive the environment to be abusive". *Ibid*. If she does not personally perceive the environment to be hostile, ". . . the conduct has not actually altered the conditions of the victim's employment" and there is no violation of the HRA. *Ibid*.

In determining whether the objective/subjective test has been met, the *Harris* Court instructed that:

Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may 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. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

114 S.Ct. at 371.

The federal standard enunciated in *Harris* is, in part, reflected in the legislative rules adopted by the State of West Virginia and the Human Rights Commission to assist in the interpretation of the HRA's prohibition against unlawful sexual harassment. The rules, codified at 6 W.Va. C.S.R. §77-4-1 *et seq.*, provide as follows:³

2.3 In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis, but in all cases the harassment complained of must be sufficiently severe or pervasive.

2.4 In determining whether alleged sexual harassment in a particular case is sufficiently severe or pervasive, the Commission will consider:

2.4.1 Whether it involved unwelcome physical touching;

³ Series 4 of the Human Rights Commission's rules become effective on April 29, 1992, more than one month prior to Mr. Lucas' visit to the Mercer County Gino's store.

2.4.2 Whether it involved verbal abuse of an offensive or threatening nature;

2.4.3 Whether it involved unwelcome and consistent sexual innuendo or physical contact;

2.4.4 The frequency of the unwelcome and offensive encounters; and

2.4.5. A person who has been harassed on an isolated basis may offer evidence of harassment suffered by other employees as proof that the harassment was pervasive or severe.

Applying the federal and state standards to the facts of this case, there is really only one issue in dispute: did Mr. Lucas' behavior go beyond being merely offensive and boorish and rise to the level of being so severe and pervasive as to alter the terms, conditions or privileges of Ms. Miller's employment.

1. **The Subjective Test**⁴.

Here, there is no doubt that Ms. Miller, who was barely out of her teenage years in June 1992, subjectively perceived Mr. Lucas's invitations to have a drink with him after work and to come to his

⁴ In applying a subjective test, as required by *Harris* when interpreting Title VII, I do not intend to suggest that such a standard is mandated by West Virginia state law. Neither the legislative rules nor Court decisions require that a victim of sexual harassment "subjectively perceive the environment to be abusive", *Harris* at 370, in order for liability to attach. At least one leading jurisdiction in civil rights law has found that a purely objective test as to liability is more consistent with the remedial purpose of anti-discrimination laws. *Lehman v. Toys 'R' Us*, 63 FEP Cases 241 (N.J. Supreme Ct. 1993). Whether the victim was subjectively injured, said the *Lehman* Court, goes to the issue of damages and "is not an element of a hostile work environment sexual harassment cause of action". 63 FEP Cases at 252.

hotel room to be sexually hostile and abusive. Not only did she try to avoid contact with Mr. Lucas, a supervisor who appeared to be in his mid-40's to 50's, but she promptly reported him to Mr. Parker, who she perceived to be her continuing immediate supervisor. Based on these actions, and her demeanor on the witness stand, it is beyond cavil that Mr. Lucas' behavior altered complainant's conditions of employment to the extent that, for the first time, she was afraid to answer the phone, had to invoke respondent's internal policy and procedures regarding sexual harassment, and felt pressure to meet expectations that were wholly unrelated to her job duties.

2. The Objective Test⁵

The behavior complained of in this case did not involve unwelcome physical touching or vulgar language and did not continue beyond one weekend. Nonetheless, I find that a reasonable woman would perceive Mr. Lucas' conduct to be severe and pervasive to the point of constituting a sexually abusive and hostile work environment.

Viewing Ms. Lucas' conduct "in the context in which . . . [it] occurred", 6 W.Va.C.R.S. §77-4-2.3., it is beyond dispute that Mr. Lucas, a supervisor, wanted to have, or at the least, wanted to have the opportunity to attempt to have, a sexual relationship with Ms. Miller. An invitation from

⁵ *Harris* left unanswered the standard to be applied in determining whether a particular environment is "objectively" hostile or abusive. For reasons set forth in *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) and *Lehman v. Toys 'R' Us*, 63 FEP Cases 241 (N.J. Supreme Ct. 1993), the "reasonable woman" standard is adopted and applied in this case. However, the result in this case would not be different if the alternative "reasonable person" test was applied.

a middle-aged supervisor to a very young subordinate to meet him in his motel room, when repeated between ten and twenty times over two days, gives rise to no other reasonable interpretation.

Had Mr. Lucas ceased his invitations after the first refusal, the outcome of this portion of the case might have been different. However, when he persisted, in the face of Ms. Miller's clear and unequivocal rejection of his advances, his conduct became actionable sexual harassment in that a reasonable woman in West Virginia in the 1990's would have viewed his conduct as sufficiently severe or pervasive to create an abusive working environment. In other words, a reasonable woman would have perceived that Mr. Lucas was demanding a sexual liaison and that rejection of his overtures carried unknown, but quite possibly adverse, consequences. Mr. Lucas' behavior was sufficiently extreme to cause Ms. Miller to no longer know what to expect next and to be reasonably concerned that her job performance would be judged by him on the basis of whether or not she went to his motel room. It should not be forgotten that Mr. Lucas was in Mercer County on a special assignment from the CEO and a reasonable employee would have perceived, rightly or wrongly, that he was personally close to the CEO and could affect that employee's job status.

While verbal comments occurring over a two day period are usually considered not frequent enough to constitute "severe and pervasive" conduct, the frequency with which Mr. Lucas made his invitations, five to ten times per night on both Friday and Saturday night, overcomes the fact that his comments were generally "isolated" over complainant's three years of employment with Gino's. Additionally, it was clear from the testimony that he did not make his comments in a joking, coy, playful or flirtatious manner. While he was not crude, the clear implication from his comments was

that he wanted female companionship for the evening and that his companion of choice was Ms. Miller.

Applying the subjective test enunciated in *Harris*, and the objective test of *Harris* and the applicable legislative rules, I find that under the particular facts of this case complainant was subjected to an abusive and hostile work environment because of her sex.

B. Reprisal

In order to prove a case of unlawful retaliation, the Commission had to show that:

(1) that Ms. Miller engaged in protected activity, (2) that her employer was aware of the protected activities, (3) that she was subsequently discharged and (absent other evidence tending to establish retaliatory motivation) (4) that her discharge followed her protected activities within such period of time that the court can infer retaliatory motivation.

Syllabus Point 4, *Frank's Shoe Store v. WVHRC*, 179 W.Va. 53, 365 S.E.2d 251 (1987).

In addition to filing a court action or an administrative complaint with the West Virginia Human Rights Commission, a complainant engages in protected activity when she resists an advance, *Boyd v. James S. Hayes Living Health Care Agency*, 671 F. Supp. 1155 (W.D. Tn. 1987), when she informally complains to a superior, *Rollins v. Florida Dep't of Law Enforcement*, 868 F.2d 397, 400

(11th Cir. 1989), or when she invokes an internal grievance procedure, *Ferguson v. E.I. du Pont de Nemours & Co.*, 560 F.Supp. 1172, 1200 (D.Del. 1983).

In making out a case of unlawful reprisal, it is not necessary for the Commission to litigate or prove the merits of the original claim. *Davis v. State University of New York*, 802 F.2d 638 (2nd Cir. 1986); *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041, 1043, (7th Cir. 1980); *Rogers v. McCall*, 488 F. Supp. 689, 697, (D.D.C. 1980); *Slotkin v. Human Dev. Corp.*, 454 F. Supp. 250, 257, (E.D.Mo. 1978). Moreover, the Commission can even proceed to hearing and lose on the underlying sexual harassment claim, but still prevail on the claim of retaliation. *Drinkwater v. Union Carbide Corp.*, 904 F.2d 853 (3rd Cir. 1990). As long as the Commission or the complainant had a reasonable basis to believe that respondent had engaged in an unlawful employment practice, the fact that it is ultimately found that it did not do so is not dispositive of the reprisal claim. As stated succinctly in *Drinkwater*:

In sum, there is not enough evidence that defendants' behavior constituted sexual harassment, but there is enough evidence to support a finding that plaintiff was harassed for complaining about what she thought was discriminatory atmosphere. UC is not free to retaliate against plaintiff simply because she has failed to build her sex discrimination claim properly.

904 F.2d at 866.

Finally, in a reprisal case the ultimate burden on the Commission is to prove by a preponderance of the evidence that a retaliatory motive played a part in an employment decision adverse to Ms. Miller. *Davis, supra*; *Womack v. Munson*, 619 F.2d 1292 (8th Cir. 1980), *cert.*

denied. 101 S.Ct. 1513 (1981); *Mitchell v. Visser*, 529 F.Supp. 1034 (D.Kan. 1981). As the Second Circuit stated in *Davis*, an anti-reprisal provision is "violated if a retaliatory motive played a part in the adverse employment actions . . . even if it was not the sole cause." 802 F.2d at 642.⁶

Viewing the evidence from the perspective of the question of retaliation *vel non*, I must conclude that the Commission failed to show by a preponderance of the evidence that a retaliatory motive played a part in the decision to discharge Ms. Miller. The evidence, as a whole, indicated that Ms. Miller was given a fair opportunity to show her skills as a manager and that she simply failed to deliver to an objectively reasonable and adequate degree. Under her leadership, the Bluewell Gino's continued to lose money and, in fact, the amount of the monthly loss increased. Her failure as a manager to boost the "bottom line" was the real reason for her discharge and was not a pretext to cover a discriminatory motive. To the extent that the demands of management changed after June 1992, the respondent was successful in showing that the adjustments were due to the replacement of Mr. Parker and his style of leadership by Ms. Cooper and Ms. Lies and were not due, in any part, to an unlawful retaliatory motive.

⁶ The Commission does not argue that respondent committed an independent violation of the HRA by failing to take adequate remedial measures once Ms. Miller reported Mr. Lucas' conduct to management personnel. Therefore, that issue is not addressed. *See, Summer v. Goodyear Tire & Rubber Co.*, 427 Mich. 505, 398 N.W.2d 368 (1986).

IV. SUMMARY OF FINDINGS OF FACT

1. The Administrative Law Judge finds as fact that the Commission has proved by a preponderance of the evidence that complainant was subjected to an unlawful hostile and abusive work environment because of her sex in violation of W.Va. Code §5-11-9(1).

2. The Administrative Law Judge finds as fact that as a result of respondent's unlawful discriminatory act, Ms. Miller suffered embarrassment, humiliation, annoyance and mental and emotional distress.

3. The Administrative Law Judge finds as fact that respondent did not engage in any act of reprisal or retaliation against Ms. Miller.

V. CONCLUSIONS OF LAW

1. The respondent is an employer within the meaning of W.Va. Code §5-11-3(d), and a person within the meaning of §5-11-3(a) and is subject to the jurisdiction of the West Virginia Human Rights Commission.

2. The complainant is a citizen of the State of West Virginia and a person within the meaning of W.Va. Code §5-11-3(a).

3. Complainant was subjected to a sexually hostile work environment because of her sex and in violation of W.Va. Code §5-11-9(1). Given Mr. Lucas' position as a supervisory employee, respondent is responsible for his acts and may be held liable to complainant. 6 W.Va. C.S.R. §77-4-3.1.

4. Respondent did not in any way or form retaliate against Ms. Miller because of her opposition to Mr. Lucas' acts of sexual harassment.

5. The Commission having proven a case of sexual harassment by a preponderance of the evidence in regard to the claim of sexual harassment, Ms. Miller is entitled to an award of incidental damages in the amount of \$2,500.00 for the humiliation, embarrassment and loss of personal dignity suffered by her as a result of the respondent's unlawful acts.

6. A cease and desist Order should be, and is hereby, directed against Gino's to cease and desist from engaging in acts of sexual harassment in violation of the West Virginia Human Rights Act.

7. The Commission is awarded costs in the amount of \$888.00.

8. The Commission's claim of unlawful sexual harassment is **SUSTAINED** to the extent of the relief stated above. The Commission's claim of unlawful retaliation or reprisal is **DENIED**.

Decided this 1st day of June, 1995.

Mike Kelly

MIKE KELLY
Administrative Law Judge
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