Commission on Human Rights and Opportunities, ex rel. Kathleen M. Shea, Complainant : CHRO # 9640243

v

David M. Spruance, et al., Respondents : October 26, 1999

FINAL DECISION

Kathleen M. Shea ("complainant") filed a complaint dated December 12, 1995 with the Commission on Human Rights and Opportunities ("commission") in which she alleged that she was illegally discriminated against by David M. Spruance and Spruance & Associates, P.C. (collectively, "respondent"). She alleged that she was terminated, less trained, retaliated against, sexually harassed, and discriminated against in the terms and conditions of her employment on the basis of her sex and her opposition to the respondent's discriminatory employment practices in violation of General Statutes §§ 46a-58(a), 46a-60(a)(1), 46a-60(a)(4), and 46a-60(a)(8).

For the reasons stated herein, the complainant has not established by a preponderance of the evidence that the respondent created a sexually hostile work environment in violation of General Statutes § 46a-60(a)(8). The complainant has, however, established by a preponderance of the evidence that the respondent retaliated against her for her opposition to a discriminatory employment practice in violation of General Statutes § 46a-60(a)(4) and relief is ordered as set forth herein.

I PARTIES

The complainant is Kathleen M. Shea. Her address at the time of the filing of the complaint was 188A Broad Street, Windsor, CT, 06095. The Commission on Human Rights and Opportunities is located at 21 Grand Street, Hartford, CT, 06106. The respondents are David M. Spruance and Spruance & Associates, P.C. At the time of the filing of the complaint their address was 112 Spencer Street, Suite 302, Manchester, CT, 06040.

II PROCEDURAL HISTORY

The complaint was filed with the commission and assigned to an investigator. The investigator found reasonable cause for believing that a discriminatory practice was committed as alleged in the complaint. On December 17, 1996, he certified the complaint and the results of his investigation to the executive director of the commission and the Attorney General. Upon certification of the complaint, John F. Daly, III was appointed as the presiding officer to hear the complaint. On September 12, 1997, Hearing Officer Daly voluntarily recused himself and Ruben Acosta was designated as the successor presiding officer. On July 17, 1998, the public hearing was held with Hearing Officer Acosta presiding. Subsequently, the parties filed briefs. Pursuant to P.A. 98-245, codified as General Statutes § 46a-57(e), the undersigned Human Rights Referee was appointed on October 5, 1999 as presiding officer in substitution of Hearing Officer Acosta.

III PARTIES' POSITIONS

The commission and the complainant argue that the complainant was subjected to a sexually hostile working environment during her employment with the respondent.

They further allege that she made complaints regarding such treatment and was discharged in retaliation for her opposition to the respondent's alleged mistreatment.

The respondent denies the existence of a hostile work environment. The respondent also maintains that the complainant was terminated from employment because of the respondent's financial difficulties.

IV FINDINGS OF FACT

Based upon a review of the pleadings, exhibits, and transcript, the following facts relevant to this decision are found:

1. All procedural and jurisdictional prerequisites have been satisfied and this matter is properly before this presiding officer to render a decision.
2. The complainant is a member of a protected class in that she is a female and because she has opposed respondent's alleged discriminatory employment practice.
3. The respondent employs three or more people.
4. On or about August 23, 1995 through September 6, 1995, the complainant was in contact with the respondent concerning an opening for an associate attorney position with the law firm of Spruance & Associates, P.C., formerly Spruance & Chmielecki, P.C.
5. On September 7, 1995, David Spruance requested that the complainant meet him at his residence, rather than the law office, to discuss the terms of her employment with the firm. The complainant agreed to the request.
6. On September 8, 1995, the complainant went to David Spruance's residence. Also at the residence, in another room, was a female employee of the

respondent's who was processing paper work. Because the complainant intended to move from her parent's home in Bristol to a rental in Manchester, she was trying to negotiate for moving expenses with David Spruance when he said that he had an extra bedroom in his residence where the complainant could live. The complainant found the comment "weird" and did not accept the offer.

7. On September 11, 1995, the complainant began working for the respondent at the annual salary of $27,000. The respondent and complainant had agreed that when she successfully passed the Connecticut bar examination her salary would be increased to $30,000 per year.

8. At the time of the complainant's hire, and throughout her employment with the respondent, David Spruance was a partner in the firm and her direct supervisor. He had the authority to hire and fire the staff and associate attorneys, including the complainant.

9. During the relevant time period, the respondent had no employee policy or procedure, employee handbook, or sexual harassment policy or poster.

10. The complainant accompanied the other attorneys in the respondent firm to court.

11. The complainant borrowed $800 from David Spruance. At the time of the public hearing, a balance of $750 remained.

12. On or about September 21, 1995 at approximately 8:00 p.m., David Spruance telephoned the complainant at her home to tell her he had found a copy of the case decision that he had previously assigned her to find. The complainant

found the conversation to be “bizarre”, “strange”, “weird”, “unprofessional and juvenile”. David Spruance did not talk about sex or ask for a date.

13. On September 25, 1995, at the request of David Spruance, the complainant accompanied him to the Willimantic Juvenile Court. During the trip, David Spruance told the complainant, who had a sore throat, that if she were contagious he would not catch it unless he kissed her on the cheek. The complainant found the comment “weird”. He asked her if she had any hot dates, a comment she found “really weird”, commented on her being a pretty girl with no date, and asked her about her boyfriend and her dating practices. The complainant became uncomfortable with, and intimidated by, the conversation. She kept trying to change the subject but did not raise any objections to the questions. David Spruance also invited the complainant to go camping with the rest of the office staff on Columbus Day weekend. Columbus Day would not be a paid holiday for any staff member who did not attend the camping trip

14. On September 26, 1995, the complainant accompanied David Spruance to the Hartford Superior Court. Upon returning to their automobile after the hearing, they discovered that a police cruiser was blocking their car. David Spruance asked the complainant to find the police officer and ask him to move his car. After the complainant returned with the officer, who relocated his vehicle, the respondent remarked to the complainant that it always helps to be pretty. The respondent further remarked that he had been a FBI agent and always liked the pretty girls. On the return trip to the office, the

complainant commented on how the judge at the hearing was kind of tough. David Spruance remarked that perhaps the judge, a female, was not getting enough sex. The complainant responded that that kind of remark was not an appropriate comment to make about a judge.

15. Also on September 26, 1995, after the complainant and David Spruance had returned to the office, the complainant was sitting at her computer typing. The complainant coughed and saw that David Spruance was about to pat her on the back. The complainant told him not to touch her; however, he patted her back anyway. Shortly thereafter, when another employee put her hand on the complainant's shoulder, David Spruance remarked that the complainant did not like to be touched. The complainant replied that it was just Spruance who was not allowed to touch her. Other than this one incident, the respondent engaged in no physical contact that the complainant considered offensive contact.

16. After September 26, 1995, David Spruance did not allow the complainant to accompany the firm's attorneys to court.

17. On or about September 28, 1995, the complainant met with one of her former law school professors to discuss her feelings of discomfort with David Spruance.

18. On or about October 13, 1995, the complainant contacted the Connecticut Permanent Commission on the Status of Women. Her questions related to a sexual harassment case she was working on for the respondent, as well as to her own employment situation. The complainant inquired into the sexual

harassment posting requirements for employers having three or more employees. By memo dated October 13, 1995, the complainant advised David Spruance that the defendants in his case had not complied with state law. She also informed him that his own firm did not comply with state posting requirements and she offered to draft an employer's policy. David Spruance initialed the memo, indicating he had read it, but did not respond to her offer to draft a harassment policy. He also did not post the required notice.

19. On October 27, 1995, the complainant informed David Spruance that she had passed the Connecticut bar exam.

20. On October 30, 1995, David Spruance informed the complainant that she was discharged. His articulated reason for her discharge was newly found financial difficulties. No other employees were terminated. Also on that day, the complainant took a call at the office from the respondent's landlord. The landlord indicated that a worker, who was to come and remove a wall to expand respondent's office, would be unable to come that day.

21. After receiving her notice of termination, the complainant worked and was paid for two additional weeks.

22. The complainant's mitigation from November 11, 1995 to the date of the public hearing on July 14, 1998 totaled $56,968. Of this amount, $2,418 represented income from unemployment compensation. Had the complainant remained employed by the respondent, her income for this same period would have totaled $84,625.

V ANALYSIS

A Hostile Work Environment Sexual Harassment Claim

1 Applicable Statute

The applicable statute as to this claim is General Statutes § 46a-60(a)(8). This statute provides in part that "[i]t shall be a discriminatory practice in violation of this section: For an employer, by himself or his agent … to harass any employee, person seeking employment or member on the basis of sex. 'Sexual harassment' shall, for purposes of this section, be defined as any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (A) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (B) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (C) such conduct has the purpose of or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."

2 Applicable Case Law

The complainant alleges that the respondent violated § 46a-60(a)(8)(C). "To prove a work environment sexual harassment claim, a claimant must establish that: (1) she belongs to a protected class; (2) she was subjected to unwelcome sexual/harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition or privilege of employment (i.e., that the harassment was sufficiently pervasive or severe to create an abusive work environment); and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action." *Britell v. State of*

Connecticut, Department of Correction, 1997 WL 583840 *13 (Connecticut Superior Court, September 9, 1997) aff'd 247 Conn. 148 (1998).

"To satisfy the fourth element or requirement, the sexual harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Mere utterances of sexual epithets which perhaps give rise to offensive feelings on the part of an employee are not sufficient. … [T]he standard of pervasiveness or severity has both objective and subjective implications. The conduct at issue must create an objectively hostile or abusive work environment, one that a reasonable person, in the plaintiff's situation, would find to be hostile or abusive. Similarly, if a victim does not subjectively view the environment to be abusive, the conduct cannot be found to have altered the conditions of the victim's employment." *Britell,* supra, 1997 WL 583840 *14 (Connecticut Superior Court, September 9, 1997).

However, "not all allegations of harassment are actionable. … Sexual or racial harassment violates Title VII if it is sufficiently severe or pervasive to alter the conditions of (the victim's) employment and create an abusive environment. … The abuse must be severe and pervasive; the incidents must be persistent, not isolated. … Conduct that is 'merely offensive' is beyond Title VII's purview." (Internal citations and quotation marks omitted.) *Massey v. Connecticut Mental Health Center*, 1998 WL 4705590 *3 (Connecticut Superior Court, July 31, 1998). "To establish a claim of hostile work environment, the workplace (must be) permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." (Internal quotation

marks and citations omitted.) *Brittell v. Department of Correction*, 247 Conn. 148, 166-167 (1998). To determine whether an environment is sufficiently hostile or abusive, one must look at "all the circumstances, including 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. … A recurring point of these opinions is that simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. … We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment …." *Faragher v. City of Boca Raton*, 525 U.S. 775, 141 L.Ed.2d 662, 118 S.Ct. 2275, 2283-2284 (1998).

"The fifth element is where proof of the agency relationship … is needed. The plaintiff must show that a specific basis exists for imputing the conduct that created the hostile work environment to the employer. … [I]t is apparent that the fifth element has two parts, the employer's actual or constructive knowledge of the harassment and the employer's inaction or lack of adequate action after learning of it. … A somewhat more refined statement of essentially the same criterion is that the plaintiff must prove that the defendant either provided no reasonable avenue for complaint or that the defendant knew of the harassment but did little or nothing about it." (Internal citations omitted.) *Brittell, supra,* 1997 WL 583840 *15 (Connecticut Superior Court, September 9, 1997).

3 Application

The complainant satisfied the first three elements of the *Britell* test. First, she is a

member of a protected class, female. Second, she was subject to unwelcome harassment that made her feel uncomfortable (Complainant, Tr. 24[1]) and intimidated (Complainant, Tr. 33). Under the barrage of personal questions while traveling in the car, the complainant felt like a hostage in the vehicle (Complainant, Tr. 26). She woke up one morning at 3:00 a.m. as a result of the anxiety caused by David Spruance's comments (Complainant, Tr. 40). She contacted one of her former law school professors to discuss the situation (Complainant, Tr. 40) and sought information from the Permanent Commission on the Status of Women (Complainant, Tr. 45). The complainant did not incite, encourage, or solicit David Spruance's comments. She found them offensive and rebuked him for patting her on the back (Complaint, Tr. 38-39).

Third, David Spruance's questions about kissing the complainant on the cheek (Complainant, Tr. 21), her being a pretty girl with no date (Complainant, Tr. 23), her boyfriend (Complainant, Tr. 33) and her dating practices (Complainant, Tr. 23, 25), clearly demonstrate the gender-based nature of the harassment.

The complainant, however, failed to satisfy the fourth element of the *Britell* test. Although I did not have the opportunity to observe the testimony and credibility of the complainant and David Spruance, even if one were to accept the complainant's testimony at face value, construe it most favorably to her, and ignore the testimony of David Spruance, it is clear that the circumstances described by the complainant do not describe the extreme, severe, and pervasive conduct required by both the federal and state courts. There were no threats of physical or sexual violence and no testimony of a decline in work performance. Although the complainant told her "co-workers of the facts of what happened" (Complainant, Tr. 84), the complainant called no witnesses to corroborate her

[1] Name of witness testifying, followed by Transcript (Tr.) page

allegation of a hostile work environment. The complainant's testimony essentially boils down to four incidents: the meeting at David Spruance's residence where he said that she could move in; the late night, non-sexual, non-threatening telephone call, which was "weird" and "juvenile"; the car ride to and from court on September 25, 1995; the car ride to and from court and the pat on the back which occurred on September 26, 1995. As the complainant correctly points out, the conduct of David Spruance was "weird" and "juvenile". However, the conduct was not severe and pervasive enough to constitute actionable harassment.

Further, the complainant fails to establish the fifth element of the *Britell* test in imputing the hostile work environment to her employer. Admittedly, the conduct was caused by her supervisor, the firm's partner. However, when she emphatically told him on September 26, 1995 not to pat her on the back again, there were no further incidents (Complainant, Tr. 89). Nor was there any testimony that David Spruance made any further inappropriate comments to her after September 26, 1995.

B Retaliation Claim

1 Applicable Statute

The complainant further alleges that the respondent's termination of her employment for alleged financial reasons was actually in retaliation for her having objected to the hostile work environment sexual harassment. The applicable statute is General Statutes § 46a-60(a) (4) that provides, in part, that it "shall be a discriminatory practice in violation of this section for any person, employer … to discharge, expel or otherwise discriminate against any person because he has opposed any discriminatory employment practice …."

2 Applicable Case Law

In order to prove her retaliatory discharge claim, the complainant must first establish a prima facie case of discrimination. This requires the complainant to show: (1) participation in a protected activity known to the respondent; (2) an employment action disadvantaging the complainant; and (3) a causal connection between her activity and the adverse action taken by the respondent. (Internal quotation marks and citation omitted.) *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2nd Cir. 1998). The complainant need not establish that conduct described in her complaint actually amount to a violation of the statute. "She need only demonstrate that she had *a good faith, reasonable belief* that the underlying challenged actions of the employer violated the law. …Thus, it is possible for an employee to reasonably believe that specified conduct amounts to harassment, even when that conduct would not actually qualify as harassment under the law. … Proof of the causal connection can be established indirectly by showing that the protected activity was closely followed in time by the adverse action." (Emphasis in original; internal quotation marks and citation omitted.) Id.

Once the complainant has proved her prima facie case by a preponderance of the evidence, the burden of production shifts to the respondent to articulate some legitimate, nondiscriminatory reason for her termination. If the respondent satisfies this burden, the complainant has an opportunity to prove by a preponderance of evidence that the reason offered by the respondent was merely a pretext for retaliation. *Quinn*, supra, 159 F.3d 768-769. The complainant may prove pretext either directly, by persuading the fact finder that a discriminatory reason more likely than not motivated the respondent, or indirectly by showing that the respondent's proffered explanation is unworthy of

credence. *Ponticelli v. Zurich American Ins. Group*, 16 F. Sup. 414, 435 (S.D.N.Y. 1998). "From a showing that an employment decision was not made for legitimate reasons, a fact finder may infer that the decision was made for illegitimate reasons." *Levy v. Commission on Human Rights and Opportunities*, 236 Conn. 96, 107 (1996).

3 Application

The complainant established her retaliation claim by a preponderance of the evidence. She has proven her prima facie case. First, the complainant participated in two protected activities known to the respondent. She specifically told David Spruance that she objected to his physically touching her (Complainant, Tr. 38) and she notified him of his failure to post the required sign concerning sexual harassment (Complainant, Tr. 46).

While the totality of the circumstances do not result in a finding of a hostile work environment, the evidence does show that the complainant had a good faith belief that the challenged actions of the respondent violated the law. The complainant was uncomfortable and intimidated by the conduct of David Spruance (Complainant, Tr. 24, 33). As a result of these feelings she contacted a law school professor (Complainant, Tr. 40) and the Permanent Commission on the Status of Women (Complainant, Tr. 44).

Second, the complainant suffered adverse employment action. David Spruance denied her the further opportunity to accompany the firm's attorneys to court (Complainant, Tr. 39) and subsequently terminated her employment (Complainant, Tr. 48).

Third, there is a clear causal connection between the protected activities and the adverse action taken by the respondent. The day after she told David Spruance not to touch her again, he no longer allowed her to accompany the firm's attorneys to court

(Complainant, Tr. 39). Less than three weeks after the complainant told David Spruance that he and his firm were not in compliance with the state required postings, he terminated her employment (Complainant, Tr. 48).

Once the complainant has proven her prima facie case, the burden shifts to the respondent to articulate a legitimate, nondiscriminatory reason. The respondent's reason, articulated by David Spruance, was the financial difficulties of the firm (Complainant, Tr. 48; David Spruance, Tr. 144).

As the respondent has met its burden of production, the burden shifts back to the complainant to prove by a preponderance of the evidence that the reason proffered by the respondent is a pretext for retaliation. The complainant has met this burden by amply demonstrating that the respondent's explanation of financial difficulties is not worthy of credence. David Spruance's testimony is inconsistent with other evidence. He testified that most of the firm's work was representing clients in juvenile court, with payment made by the State of Connecticut (David Spruance, Tr. 149). He further testified that up until the end of July 1995 the firm was being paid regularly by the state (David Spruance, Tr. 149) but that starting about the end of August the state payments ceased (David Spruance, Tr. 150). Yet, despite the alleged loss of income in August, the respondent hired the complainant effective September 11, 1995 at an annual salary of $27, 000 with a promised increase to $30,000 after she passed the bar exam (Complainant, Tr. 29). There was sufficient income for David Spruance to loan the complainant $800 (Complainant, Tr. 118). Also, despite testifying that the respondent suffered "a significant drop in revenue", David Spruance had "no recollection of what the actual loss was" (David Spruance, Tr. 149). Further, no employees other than the complainant were

terminated (Complainant, Tr. 49) and the respondent had employed a worker to expand the office into the next office (Complainant, Tr. 49).

While the respondent's burden is admittedly one of production and not one of persuasion, demonstrating financial difficulties would not have been difficult. Yet, there is no evidence of these alleged financial difficulties. The absence of such financial evidence, together with the complainant's testimony of no other lay-offs besides herself and office expansion, convincingly demonstrate that the proffered reason is not worthy of credence.

The absence of such evidence is particularly perplexing in light of the respondent's brief. In its brief, the respondent the alleges that the complainant "was discharged because the firm was beginning to experience a severe financial crisis, the breadth and depth of which was becoming clearer every week during the last quarter of 1995. The Respondent has shared documents with the Complainant that show the exact nature of that financial crisis, and has testified that as of the hearing date of July 17, 1998 there were still federal and state withholding taxes and unemployment taxes due for the 3rd and 4th quarter of 1995 and 1st quarter of 1996." (Respondent's brief, 7).

However, a careful review of David Spruance's testimony (Tr. 144-151) and of respondent's exhibits (none) fails to confirm any of the assertions made by the respondent in its brief. There was no testimony or exhibits of shared documents or unpaid taxes. That the respondent would make such statements in its brief but fail to introduce this detailed information at the public hearing, where it would be subject to cross-examination, further undermines the credence of the proffered reason.

VI CONCLUSION OF LAW

The complainant has not established by a preponderance of the evidence that the respondent created a sexual hostile work environment in violation of General Statutes § 46a-60(a)(8).

The complainant has established by a preponderance of the evidence that the respondent retaliated against her for her opposition to a discriminatory employment practice in violation of General Statutes § 46a-60(a)(4).

VII ORDER OF RELIEF

1. The complainant is awarded back pay of $27,657 for the period from November 11, 1995 to the date of the public hearing on July 17, 1998, less $2,418 in unemployment compensation and $750 on the loan owed by the complainant to the respondent, for a net award of $24,489.
2. The respondent shall pay to the commission the $2,418 deducted from the amount of back pay awarded to the complainant. The commission shall transfer such amount to the appropriate state or local agency.
3. The respondent shall cease and desist from all acts of discrimination prohibited under federal or state law.
4. The respondent shall post in prominent and accessible locations such notices regarding statutory provisions as the commission shall provide. The notices shall be posted within three working days of their receipt.

5. Post-judgment simple interest on said $24,489 net back pay is awarded and shall accrue at the rate of ten (10%) percent per annum from the date of this decision until the award is paid.

The commission's request for prejudgment interest is denied. The commission claims "it is unfair for an employer to enjoy an interest –free loan for as long as it can delay paying out back wages." (Internal quotation marks and citations omitted.) (Commission's brief, 41). However, it is also unfair to punish the respondent for delays caused by the Commission on Human Rights and Opportunities. The complaint was filed December 12, 1995, certified December 17, 1996, not tried until July 17, 1998, with a decision not forthcoming until October 1999. There is no evidence that this delay was caused by the respondent.

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Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Ms. Kathleen Shea
Atty. David Spruance
Spruance & Associates, P.C.
Atty. Robert Muchinsky
Atty. Robert J. Brothers, Jr.
Atty. Donald Freeman
Atty. Raymond P. Pech