

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**DONNA M. MILLER
Complainant**

v.

**MOUNTAIN MARKETING, INC.,
SHARON LEVINE, PRESIDENT,
and PAUL LEVINE.
Respondents**

PHRC CASE NO. 200101328

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

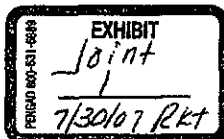
COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

Donna M. Miller, :
Complainant :
v. : PHRC Case No. 200101328
: PHRC Docket No. E101328
Mountain Marketing, :
Sharon Levine, President, and :
Paul Levine, :
Respondents :

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required.

1. The Complainant herein is Donna M. Miller (hereinafter "Complainant").
2. The Complainant is an adult female.
3. Mountain Marketing, Inc., is one of the Respondents in this matter.
4. At the time of the sexual harassment and constructive discharge alleged in the Complaint, Amended Complaint, and Second Amended Complaint, Mountain Marketing, Inc., employed four or more persons within the Commonwealth of Pennsylvania.
5. Sharon Levine is another Respondent in this matter.



6. At the time of the sexual harassment and constructive discharge alleged in the Complaint, Amended Complaint and Second Amended Complaint, Sharon Levine was President and Chief Executive Officer of Mountain Marketing, Inc.

7. At the time of the sexual harassment and constructive discharge alleged in the Complaint, Amended Complaint and Second Amended Complaint, Paul Levine was a management employee of Mountain Marketing, Inc.

8. At the time of the sexual harassment and constructive discharge alleged in the Complaint, Amended Complaint and Second Amended Complaint, Paul Levine was Complainant's supervisor.

9. Mountain Marketing, Inc., received service copies of the Complaint and Amended Complaint (true and correct copies of which are attached hereto as Appendix "A."), which included a "Certificate of Service" signed by PHRC Harrisburg Regional Office staff person Regina Young indicating a service date of January 8, 2002.

10. Sharon Levine had actual notice of the Complaint and Amended Complaint.

11. Paul Levine had actual notice of the Complaint and Amended Complaint.

12. Mountain Marketing, Inc., received a service copy of the Second Amended Complaint (a true and correct copy of which is attached hereto as Appendix "B"), which included a "Certificate of Service" signed by PHRC Harrisburg Regional Office staff person Regina Young indicating a service date of August, 22, 2002.

13. Sharon Levine received a service copy of the Second Amended Complaint (a true and correct copy of which is attached hereto as Appendix "B"), which included a "Certificate of Service" signed by PHRC Harrisburg Regional Office staff person Regina Young indicating a service date of August, 22, 2002.

14. Paul Levine received a service copy of the Second Amended Complaint (a true and correct copy of which is attached hereto as Appendix "B"), which included a "Certificate of Service" signed by PHRC Harrisburg Regional Office staff person Regina Young indicating a service date of August, 22, 2002.

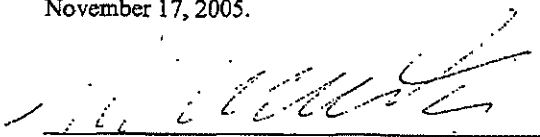
15. On or about October 22, 2002, Sharon Levine and Mountain Marketing, Inc., mailed a Verified Answer to the Second Amended Complaint. (A true and correct copy of the Verified Answer received by PHRC Harrisburg Regional Office staff is attached as Appendix "C.")

16. By correspondence dated November 17, 2005, PHRC Harrisburg Regional Office staff notified Mountain Marketing, Inc., that probable cause existed to credit Complainant's allegations. (A true and correct copy of this notification is attached as Exhibit "D.")

17. By correspondence dated November 17, 2005, PHRC Harrisburg Regional Office staff notified Sharon Levine that probable cause existed to credit Complainant's allegations. (A true and correct copy of this notification is attached as Exhibit "E.")

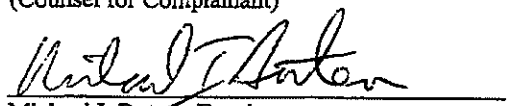
18. By correspondence dated November 17, 2005, PHRC Harrisburg Regional Office staff notified Paul Levine that probable cause existed to credit Complainant's allegations. (A true and correct copy of this notification is attached as Exhibit "F.")

19. None of the Respondents replied to PHRC Harrisburg Regional Office staff's invitation to attend a conciliation conference contained in staff's correspondence of November 17, 2005.



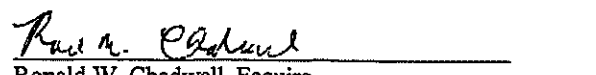
Thomas M. Marsilio, Esquire
(Counsel for Complainant)

7/27/07
Date



Michael I. Butefa, Esquire
(Counsel for Respondents)

7-30-07
Date



Ronald W. Chadwell, Esquire
Assistant Chief Counsel
(Counsel for Pennsylvania Human Relations Commission
in support of the Complaint)

7/30/07
Date

FINDINGS OF FACT

1. The Complainant herein is Donna M. Miller (hereinafter "Complainant") (S. F. 1.)
2. The Complainant is an adult female. (S. F. 2).
3. Mountain Marketing, Inc., is one of the named respondents in this matter.
(S. F. 3).
4. At the time of the sexual harassment and constructive discharge, Mountain Marketing, Inc., employed four or more persons within the Commonwealth of Pennsylvania. (S. F. 4).
5. Sharon Levine is a named Respondent in this matter. (S. F. 5).
6. At the time of the sexual harassment and constructive discharge, Sharon Levine was President and Chief Executive Officer of Mountain Marketing, Inc. (S. F. 6).
7. At the time of the sexual harassment and constructive discharge, Paul Levine was a management employee of Mountain Marketing, Inc. (S. F. 7).
8. Paul Levine was the Complainant's supervisor. (S. F. 8).
9. The Complainant was employed by Mountain Marketing, Inc., from March 21, 2000 to April 24, 2001. (N. T. 16).

* To the extent that the Opinion that follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these findings of Fact for reference purposes:

N. T. Notes of Testimony
S.F. Stipulations of Facts
C.E. Complainant's Exhibit

10. The Complainant commenced her employment with the Respondent as a "dialer". (N. T. 16).
11. The Complainant worked on a computerized device that automatically called a list of people. (N. T. 16-17).
12. The Complainant would then attempt to convince people to come out and view properties. (N. T. 16-17).
13. At all times relevant to this complaint, the Respondent was in the business of selling timeshares. (N. T. 17)
14. At some point, soon after commencing work as a dialer, Cindy Tisi, Complainant's supervisor, approached the Complainant about becoming a "confirmer". (N. T. 18).
15. A confirmer is the individual who calls back the person initially spoken to by the dialer. (N. T. 18).
16. If the person called actually shows up for the sales pitch, the confirmer recovers a bonus. (N. T. 18).
17. The Complainant worked on and off as a confirmer during the remainder of her employment with Respondent. (N. T. 18).
18. The Complainant also performed the duties of a morning shift supervisor. (N. T. 18, 19).
19. In addition, sometimes at night Complainant managed a group of dialers. (N. T. 19).
20. The Complainant had been promised the morning supervisor position. (N. T. 19).
21. Paul Levine held himself out to the employees to be the owner of Mountain Marketing, Inc. (N. T. 21).

22. Paul Levine testified at the public hearing that he "ran Mountain Marketing in Freeland", the office in which the Complainant was employed. (N. T. 49).
23. Paul Levine supervised all of the employees, including the Complainant and Cindy Tisi. (N. T. 163).
24. Sharon Levine was president and an owner of Mountain Marketing, Inc. (N. T. 150).
25. Sharon and Paul Levine are husband and wife. (N. T. 21).
26. During the course of her employment with Respondent, the Complainant's pay fluctuated between \$9.50 and \$10.00 per hour. (N. T. 22).
27. There was no legitimate reason for the Complainant's pay rate to fluctuate. (N. T. 23).
28. Upon being confronted by Complainant regarding her pay rate, Paul Levine told the Complainant that if she would just take the money he was offering her for sex, she wouldn't be complaining about her paychecks. (N. T. 23).
29. Paul Levine made this type of comment to the Respondent on numerous occasions. (N. T. 23).
30. When the Complainant would complain about being shorted on pay and/or bonuses, Paul Levine would comment once again that if she would first take the money that he offered, she would not be complaining about her pay. (N. T. 23).
31. Paul Levine also commented about the Complainant's husband, stating if he could get off his lazy ass, Complainant would not have to be there working. (N. T. 23).
32. On February 11, 2001, the Complainant confronted Paul Levine about a paycheck in front of a group of dialers. (N. T. 23).

33. In front of the other employees, Paul Levine made derogatory comments about the Complainant's husband and also commented that Complainant should have taken "the \$7,500". (N. T. 23).
34. On this occasion, the Complainant turned around in front of everyone and asked Paul Levine if he was offering her money for sex again. (N. T. 23-24).
35. Paul Levine responded by blowing the Complainant a kiss. (N. T. 24).
36. The Complainant responded by telling him that she would never have sex with him. (N. T. 24).
37. When the Complainant or Sharon Levine would ask Paul Levine if the money he offered was for sex, he would laugh and blow the Complainant a kiss. (N. T. 25).
38. Toward the end of October and into November 2000, Paul Levine would yell various dollar amounts to the Complainant across the room in front of other employees. (N. T. 24).
39. After making the statement, Paul Levine would point to the ceiling with his thumb and say "couch" referring to having sex on the upstairs couch. (N. T. 25).
40. On an average week, Paul Levine was present in the office during four of Complainant's shifts every week. (N. T. 29).
41. One day, Paul Levine came over to Complainant when she was sitting as a dialer, pinched her sleeve and said "you clean up nice, you should take the \$2,500, that's what I am down to now". (N. T. 26).
42. On another occasion, the Complainant fell down the outside stairs at her home. (N. T. 32).
43. When the Complainant returned to work, Paul Levine told her co-workers, including her two daughters, that the Complainant had been drunk or her husband had beaten her up again. (N. T. 32-33).

44. On another occasion, Paul Levine stated that if Complainant took \$7,500 for sex, she wouldn't have to put up with her "lazy ass" husband who laid on the couch. (N. T. 33).
45. On any given day, up to thirty people would hear Paul Levine's comments to the Complainant. (N. T. 34).
46. Complainant's daughter, Jolene Jones, another employee of Respondent, witnessed Paul Levine offering money on at least ten occasions "to have sex with the Complainant". (N. T. 116).
47. Cassandra Miller, Complainant's other daughter, witnessed Paul Levine offer the Complainant \$700.00 for sex on one occasion and \$1,000 on another occasion. (N. T. 127-128).
48. Cassandra Miller witnessed her mother becoming upset and crying before and after work everyday during her employment with the Respondent. (N. T. 128-129).
49. Complainant's husband credibly testified that his wife is not the same outgoing person he married, but rather she has become extremely withdrawn. (N. T. 139).
50. Her behavior has adversely affected his life and the life of their two daughters. (N. T. 142).
51. The Complainant also continuously complained to Sharon Levine about Paul Levine's sexual harassment. (N. T. 30).
52. Cindy Tisi, Complainant's supervisor told both Sharon and Paul Levine that Complainant was constantly complaining about Paul Levine's harassing behavior. (N. T. 31).
53. Ms. Tisi also commented to Sharon Levine and Paul Levine that the Complainant was having difficulty functioning in the workplace. (N. T. 31).

54. The Complainant sought medical attention and was given medication for a nervous condition caused by the stress she was experiencing in the work place. (N. T. 35).
55. Despite the Complainant's continued complaints to Sharon and Paul Levine about the sexual harassment, the harassment not only continued but got worse. (N. T. 41).
56. The Complainant was never made aware of any policies of the Respondent, regarding sexual harassment in the workplace. (N. T. 41).
57. Neither Paul Levine nor Sharon Levine took any steps to end the sexual harassment of Complainant. (N. T. 41).
58. Cindy Tisi, Complainant's supervisor spoke to Sharon Levine several times, one on one, hoping that Sharon Levine would be able to "have some weight" with Paul Levine. (N. T. 100-101).
59. Cindy Tisi also spoke with Paul Levine regarding his sexual harassment of the Complainant. (N. T. 105).
60. Paul Levine did not take Ms. Tisi's concerns seriously. (N. T. 105).
61. Ms. Tisi heard Paul Levine make sexually provocative statements to the Complainant in numerous occasions. (N. T. 101-102).
62. Ms. Tisi witnessed Complainant being embarrassed by Paul Levine in a room full of telemarketers. (N. T. 103).
63. Ms. Tisi personally witnessed the continuous harassment of the Complainant by Paul Levine until the Complainant's employment ended. (N. T. 105).
64. On April 24, 2001, Sharon and Paul Levine told Complainant that she was no longer the morning shift supervisor, nighttime supervisor or confirmer. (N. T. 19).

65. The Complainant was told that she was being replaced in those positions by other employees. (N. T. 20).
66. Sharon Levine told Complainant that this action was taken because Paul Levine did not like the Complainant. (N. T. 20).
67. The Complainant asked Paul Levine why she was being demoted and he stated "because he's the boss". (N. T. 42).
68. The Complainant was extremely upset, crying and shaking the rest of the day and even the next day. (N. T. 42).
69. The Complainant then called her physician who advised her not to return to work for the Respondent. (N. T. 42).
70. At the public hearing, Paul Levine did admit to inappropriate comments to the Complainant but stated that the comments are "in jest". (N. T. 155).
71. Paul Levine was aware that the Complainant was extremely upset with the comments he was making to her. (N. T. 166).
72. Cindy Tisi, Complainant's supervisor specifically told him that the Complainant was upset. (N. T. 166).
73. At the public hearing, Paul Levine admitted he offered the Complainant \$1,000 but testified that it was a joke. (N. T. 166).
74. Cindy Tisi testified that Complainant quit her employment with Mountain Marketing, Inc., because she was too upset to continue working there. (N. T. 105).
75. During her employment with Mountain Marketing, Inc., Complainant's daily activities were controlled by Paul Levine, by Sharon Levine and/or by Cindy Tisi. (N. T. 97).

76. Complainant never met anyone from Advanced Employment Concepts at anytime during her employment with Mountain Marketing, Inc. (N. T. 97).
77. Paul Levine was an employee of Mountain Marketing, Inc. (N. T. 161-62).
78. In calendar year 2000, Complainant was paid \$9,900.01 in wages as the result of her employment with Mountain Marketing, Inc. (N. T. 44; C.E. -1).
79. From January 1, 2001 through April 24, 2001, Complainant was paid \$3,699.52 in wages as the result of her employment with Mountain Marketing, Inc. (N. T. 45-46; C.E. - 2).
80. During calendar year 2001, Complainant was employed by Mountain Marketing, Inc., from January 1, 2001, through April 24, 2001. (N. T. 45).
81. At the time her employment with Mountain Marketing, Inc., ended, Complainant was owed one week of vacation leave. (N. T. 55).
82. Complainant worked as a part-time waitress for Cold Cracker Eatery in October, November and December 2001 and earned less than \$600.00 during those three months. (N. T. 15-47).
83. Mountain Marketing, Inc., closed its Freeland office (the facility in which Complainant had been employed) at the end of 2001. (N. T. 108).
84. From October 19, 2000, through May 14, 2001, Complainant sought medical treatment on seven occasions to deal with anxiety and stress caused by Paul Levine's treatment of her in the work place, each of the treatments resulting in a \$15.00 co-pay incurred by Complainant. (N. T. 55-56; C.E. - 3).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties have fully complied with the procedural prerequisites to a public hearing.
3. The Complainant is an "individual" and a "person" within the meaning of the Pennsylvania Human Relations Act.
4. Sharon Levine is an "individual" and a "person" within the meaning of the Pennsylvania Human Relations Act.
5. Paul Levine is an "individual" and a "person" within the meaning of the Pennsylvania Human Relations Act.
6. Mountain Marketing, Inc., is an "employer" within the meaning of the Pennsylvania Human Relations Act.
7. To establish a *prima facie* case of a hostile environment sexual harassment claim, a Complainant must show:
 - (a) that she suffered intentional discrimination because of her sex;
 - (b) that discrimination was pervasive or regular;
 - (c) that the discrimination detrimentally affected her;
 - (d) that a reasonable person of the same sex would have been detrimentally affected; and
 - (e) that a basis for employer liability is present.
8. Complainant established a *prima facie* case of a hostile environment, sexual harassment claim because she established:

- (a) that Paul Levine intentionally made repeated sexually offensive comments in the workplace;
 - (b) That the offensive sexual comments were pervasive and regular;
 - (c) That the sexual harassment detrimentally affected her;
 - (d) That a reasonable person of the same sex would have been detrimentally affected; and
 - (e) A respondeat superior relationship existed between the employer (Mountain Marketing, Inc.) and Paul Levine and Sharon Levine.
9. Mountain Marketing, Inc. is liable to Complainant for hostile environment sexual harassment.
10. "Persons" who "aid, abet, incite, compel or coerce" acts declared by the Pennsylvania Human Relations Act to be unlawful, are liable for discrimination under Section 5(e), 43 P.S. § 955(e).
11. In his role as Complainant's supervisor and owner of Mountain Marketing, Inc., Paul Levine aided, abetted, incited, compelled, and/or coerced Mountain Marketing, Inc., to subject Complainant to unlawful sexual harassment thereby creating a hostile work environment.
12. In her role as President of Mountain Marketing Inc., by failing to take effective action to stop Paul Levine's sexual harassment, Sharon Levine aided, abetted, incited, compelled, and/or coerced Mountain Marketing, Inc., to subject Complainant to unlawful sexual harassment thereby creating a hostile work environment.
13. Mountain Marketing, Inc., was an employer of Complainant, Paul Levine and Sharon Levine.
14. A case of constructive discharge constitutes a tangible employment action.

15. A case of constructive discharge may be shown by establishing that the conduct complained of would have the foreseeable result that working conditions would become so intolerable that a reasonable person in the employee's position would have felt compelled to resign.
16. *Complainant has established the existence of a constructive discharge.*
17. Whenever the PHRC concludes that a Respondent has engaged in an unlawful practice, the PHRC has broad discretion in fashioning a remedy.

OPINION

This case arises from a complaint filed on or about May 22, 2001 at Docket No. 200101328 by Donna M. Miller (hereinafter "Complainant"), against Mountain Marketing, Inc., Sharon Levine, President and Paul Levine (hereinafter "Respondent"). In her complaint, Complainant alleged that, during her term of employment, she was subjected to persuasive and regular sexual harassment by Respondent Paul Levine. The Complainant further alleged that Respondents Paul and Sharon Levine as individuals are liable for sexual harassment and her constructive discharge because they aided, abetted incited, compelled and/or coerced Complainant's employer to treat the Complainant in the manner in which she was treated. Complainant's complaint clearly alleges violations of Section 5(a) and 5(e) of the Pennsylvania Human Relations Act of October 27, 1955, P. L. 744 as amended, 43 P. S. §§ 951 et. Seq. (hereinafter "PHRA" or the "Act").

PHRC staff conducted an investigation and found probable cause to credit the allegations of discrimination. The PHRC staff and the parties then attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. These efforts proved unsuccessful in resolving the matter and the case was approved for public hearing. The public hearing was held on July 30, 2007 in Luzerne County. The matter was held before Permanent Hearing Examiner Phillip A. Ayers. Thomas M. Marsillo, Esquire appeared on behalf of the Complainant and Ronald W. Chadwell, Assistant Chief Counsel represented the state's interest in this matter. Michael I. Butera, Esquire appeared on behalf of the Respondents. Post hearing briefs were simultaneously filed by the parties.

The three part test for analyzing cases of unlawful employment discrimination and allocating the burdens of production thereto is firmly established. First, the Complainant has the burden of producing evidence which demonstrates a *prima facie* case of unlawful discrimination. Second, if Complainant demonstrates a *prima facie* case, the Respondent must produce evidence which articulates a legitimate, non-discriminatory reasons for its action. Third, the Complainant then must show that the profitered reason is pretextual. Texas Department of Community Affairs v. Burdene., 450 U. S. 248, 101 S. Ct. 1089 (1980); McDonnell-Douglas Corp v. Green, 411 U. S. 792, 93 S. Ct. 1817 (1973). Upon initial observations, matters alleging sexual harassment and hostile work environment do not fit the analysis mold. As has been noted, the McDonnell-Douglas model is not a fixed absolute that applies in all respects. The standard is a flexible one contingent on the particulars facts of the case.

Section 5 (a) of the PHRA states:

"It shall be an unlawful discriminatory practice ...
for any employer because of the ... sex ... of any individual ...
to bear or to discharge from employment such individual ...
or to otherwise discriminates against such individual ... with
respect to compensation, hire tenure, terms, conditions or
privileges of employment ...

In order to prevail with a hostile environment sexual harassment claim, the Complainant must prove:

- (1) that she suffered intentional discrimination because of her sex,
- (2) the discrimination was pervasive or regular
- (3) the discrimination detrimentally affected her,
- (4) that a reasonable, person of the same sex would have been detrimentally affected, and
- (5) Respondent superior relationship existed. Jensen v. Potter, 435 F.3d 444, 449(3rd Cir. 2006).

In regard to the first prong, the Complainant, the Respondent Paul Levine certainly made the offensive comments to the Complainant because she is a female. The second

prong of the analysis is whether the discrimination was severe or pervasive. The evidence in this matter is overwhelming on this particular issue. Respondent Paul Levine made sexually offensive comments to the Complainant four or five times a night. These comments were made when Respondent Paul Levine was in the office during Complainant's shifts. (N. T. 26 – 29). Certainly courts have recognized that environments filled with offensive comments can give rise to sexual harassment hostile work environment claims. Hart v. Harbor Court Associates., 46 F. Supp. 2d 441 (D. Md. 1999). The second prong of the model is met.

The third requirement is that harassment detrimentally affected the Complainant. There can be no doubt that the repeated offers of money for sex made the Complainant feel "belittled" and "dirty". On any given day, up to thirty people in Respondent's workplace could hear Respondent Paul Levine's comments to the Complainant. This was, at the very least, extremely embarrassing to the Complainant. There is also evidence in the record as to how these comments affected the Complainant's mental and emotional well being. Her supervisor testified that the Complainant was constantly complaining about Respondent Paul Levine and that Complainant was experiencing difficulty in functioning at the workplace. (N. T. 31) It is clear that any reasonable woman would be adversely affected under these circumstances presented in the instant case. The Complainant was placed in a situation where her supervisor repeatedly offered her money for sex and the President and owner of the company knew about it and did nothing. Accordingly, the fourth element of the prima facie requirement is met.

Lastly, the facts present a clear basis for liability on the part of the employer. Simply stated, Respondent Paul Levine was the manager of the office and was an agent of Respondent Mountain Marketing, Inc. Sharon Levine, Paul Levine's wife, was the president and owner of Mountain Marketing, Inc., and she certainly had the authority and knowledge

to remedy the Complainant's situation. But she chose not to do so. Liability exists where the Respondent knew or should have known of the sexual harassment and failed to take prompt remedial action to remedy the situation. Andrews v. City of Philadelphia, 895 F.2d at 1486. Upon review of the evidence presented at public hearing, the Complainant has set forth a hostile environment sexual harassment claim in violation of Section 5 (a) of the PHRA.

Next, we move to the Respondent's articulation of a defense in this matter. Respondent Paul Levine was the only witness presented by the Respondent at the public hearing. His testimony revolves around two specific themes; firstly, his personal interpretation as to what constituted sexual harassment and, secondly, his assertion that his statements were in "jest". (N. T. 155). It is distressing that, even at the public hearing Respondent Paul Levine had no remorse for the embarrassment and humiliation caused by his sexually offensive comments to the Complainant. He admitted that he had offered the Complainant \$1,000.00 on several occasions. (N. T. 165). Upon cross examination, Mr. Levine could not give any legitimate reason why he continually offered money to the Complainant. Furthermore, Respondent testified that he was aware that the Complainant was extremely upset with the comments he was making to her. The impression given by Respondent Paul Levine at the public hearing was that he not only made numerous sexually offensive comments to the Complainant, knew that the comments upset the Complainant, but he simply did not care.

We now briefly move to the issue of constructive discharge. Quite simply, to sustain a constructive discharge allegation, the Complainant must establish that an employer knowingly permitted conditions of employment to exist that were so intolerable that a reasonable person would feel compelled to resign. Goss v. Exxon Office Systems, Co., 747 F.2d 885, 887 (3rd Cir. 1984).

A review of the record reveals that both, Respondents Sharon Levine and Paul Levine, permitted the Complainant's working environment to become an intolerable situation. One Respondent, Paul Levine, was indeed causing the conditions, and the other Respondent, Sharon Levine, did nothing to curtail the actions of Paul Levine. This inaction is shocking especially since Sharon Levine clearly had knowledge of the behavior from not only from the Complainant, but also Ms. Tisi, Complainant's supervisor. Under the circumstances presented in this case, it was reasonable for the Complainant to believe that her only alternative was to resign.

Lastly, there are two aiding and abetting allegations in the instant case. Section 5(e) of the Pennsylvania Human Relations Act provides:

It is unlawful for "any person... to aid,
abet, incite, compel or coerce the doing
of any act declared by this section
to be an unlawful discrimination practice..."

In the instant case, Sharon Levine was the President and Chief Executive Officer of Respondent Mountain Marketing, Inc. The Complainant and her supervisor complained directly to her regarding Respondent Paul Levine's behavior. There was no action taken by Sharon Levine either on behalf of herself or on behalf of Mountain Marketing, Inc. Courts have ruled that where a supervisor fails to take action to prevent sexual harassment, that supervisor can be held individually liable under Section 5(e) of the PHRA. Dici v. Commonwealth of Pennsylvania, Pennsylvania State Police, et. al., 91 F3rd 542 (3rd Cir. 1996) Both, Sharon Levine and Paul Levine can be individually held liable because of their failure to appropriately address the harassment. Their inaction directly resulted in the Complainant's constructive discharge.

Having found that the Complainant herein has shown unlawful discrimination under the Act, we now move to the issue of determining the appropriate remedy in the instant

case. The Commission has broad discretion in the fashioning of an appropriate remedy.

Section 9 of the Act provides, in pertinent part.

(f)(1) If, upon all the evidence at the hearing, the Commission should find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as decided that this Act, the Commission shall state its findings of fact, and shall issue and cause to be served on such a respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including but not limited to, herein, reinstatement or upgrading of employees with or without back pay. . . and any reasonable, verifiable out-of-pocket expenses caused by such unlawful discriminatory practice. 43P.5. § 959 (f)

The remedy serves two purposes. The first purpose is to insure that the state's interest in eradicating unlawful discriminatory practices is vindicated. That interest is served by the entry of a cease and desist order against the Respondents. The second purpose of any remedy is to restore the injured party to his/her status before the discriminatory action and make him/her whole. Consolidated Rail Corp. v. Pennsylvania Human Relations Commission, 582 A.2d 702, 708 (1990).

In the matter before the commission, the specific nature of the remedy is very clear. First, the Respondents herein shall be ordered to cease and desist from sexually harassing any individuals because of their sex, and, furthermore shall cease and desist from aiding, abetting, inciting, compelling and/or coercing the sexual harassment of any individuals because of their sex. Secondly the Complainant is entitled to an award of back pay. It is automatic that the calculation of the back pay award need not be exact. Rather it is only necessary that the method used be reasonable. Uncertainties, in general, should be resolved against a discriminating employer. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). Furthermore, the Complainant is entitled to an award of interest on

the back pay. See Brown Transport Corp. v. Commonwealth, Human Relations Commission, 578 A.2d 555 (1990).

In the matter before the Commission, the period of lost back pay through uncontested testimony, is April 24, 2001 until the end of 2001. The Respondent closed its Freeland office at the end of 2001. From January 1, 2001, through April 24, 2001, the Complainant earned \$3,669.52 from her employment with the Respondent. The Complainant's average weekly pay was \$229.35. The Complainant is entitled to a back pay award for the remaining 36 weeks in the year 2001.

$$229.35 \times 36 \text{ weeks} = \$8,256.60$$

The Complainant is also entitled to an additional week which represents a week of vacation

$$(\text{Lost week's vacation})229.35 + 8,256.60 = \$8,485.95$$

Next we move to the question of mitigation of damages. The question of mitigation of damages is a matter that lies within the sole discretion of the Commission (Consolidated Rail Corp., cited *infra*, 582 A.2d at 708). Moreover, the burden is on the employer to demonstrate any alleged failure to mitigate. See Cardin v. Westinghouse Electric Corp., 850 F.2d 1996, 1005 (3rd Cir. 1988). Also, see generally State Public School Building Authority v. M. M. Anderson Co., 410 A.2d 1329 (Pa. Cmwlth. 1980). The Respondent must show that the Complainant did not exercise reasonable diligence in pursuing employment. However, upon review of the record, the Respondent did not produce any credible evidence that the Complainant failed to adequately mitigate.

However, this figure should be reduced by \$600.00 which represents the income earned by the Complainant from other employment in 2001. Therefore, the Complainant's back pay award is \$7,885.95. As stated previously, the Complainant is entitled to an award of interest. Interest shall be computed from January 1, 2002 through the date that the Complainant receives her award of back pay. Lastly, Complainant is entitled to reasonable,

out-of-pocket expenses for medical treatment caused by the stress of her environment. The record reflects that Complainant had 7 out-of-pocket co-pays each in the amount of \$15.00. The total amount of these co-payments are \$105.00.

An appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DONNA M. MILLER
Complainant

v.

**MOUNTAIN MARKETING, INC.,
SHARON LEVINE, PRESIDENT,
and PAUL LEVINE.**
Respondents

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PHRC CASE NO. 200101328

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above captioned matter, it is the Recommendation of the Permanent Hearing Examiner that the Complainant has proven unlawful discrimination in violation of the PHRA. Accordingly, it is the Permanent Hearing Examiner's Recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION



Phillip A. Myers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

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and PAUL LEVINE.
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PHRC CASE NO. 200101328

FINAL ORDER

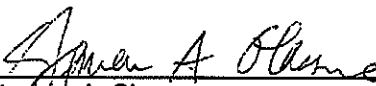
AND NOW, this day of 1/17 MARCH 2008, after review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, and Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion as its own finding in this matter and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

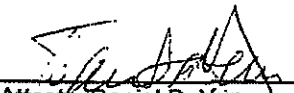
1. That Respondent Mountain Marketing, Inc. shall cease and desist from failing to provide its employees with a working environment free from sexual harassment and shall cease and desist for failing to adequately respond to complaints of sexual harassment in the workplace.

2. That Respondents Paul and Sharon Levine shall cease and desist from aiding and abetting the failure to address the complaints of sexual harassment.
3. That Respondents Mountain Marketing, Inc., Paul Levine and Sharon Levine are jointly and severally liable to pay to the Complainant, within 30 days of the effective date of this order, the lump sum of \$7,885.95, which amount represents back pay for the period of April 25, 2001 through December 31, 2001 and one week lost vacation.
4. That Respondents Mountain Marketing, Inc., Paul Levine and Sharon Levine shall jointly and severally pay interest of six percent (6%) per annum on the back pay award and vacation pay from April 25, 2001 until the date of payment.
5. That Respondents shall also jointly and severally pay the Complainant \$105.00 for out-of-pocket expenses.
6. That, within 30 days of the effective date of this Order, Respondents shall report to the Commission on the manner of their compliance with the terms of this Order by letter addressed to William Fewell, assistant Chief Counsel, in the Commission's Harrisburg Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION



Stephen A. Glassman
Chairperson



Attest: Daniel D. Yun
Secretary