

# OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

**HEATHER MALONE**

Complainant

Complaint #8911  
(CLE) 24100499 (31759) 120699  
22A – A0 – 0294

and

**C.L.J., INC. D/B/A RISTORANTE  
GIOVANNI'S**

Respondent

## **ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS**

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**ALJ'S REPORT BY:**

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## INTRODUCTION AND PROCEDURAL HISTORY

Heather Malone (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on December 6, 1999.

The Commission investigated the charge and found probable cause that the C.L.J., Inc. d/b/a Ristorante Giovanni's (Respondent) engaged in unlawful discriminatory and retaliatory practices in violation of Revised Code (R.C.) 4112.02(A) and (I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission then issued a Complaint on November 16, 2000. The Complaint alleged that Complainant was subjected to unwelcome sexual "comments and touching" because of her sex. The Complaint also alleged that Respondent discharged Complainant because of her sex and in retaliation for complaining of sexual harassment.

Respondent filed an Answer to the Complaint. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory or retaliatory practices. Respondent also pled affirmative defenses.

A public hearing was held on November 15-16, 2001 at the Lausche State Office Building in Cleveland, Ohio.

The record consists of the previously described pleadings, a 606-page transcript of the hearing, exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on January 14, 2002 and by Respondent on March 4, 2002, and a reply brief filed by the Commission on March 15, 2002.

### **FINDINGS OF FACT**

The following findings of fact are based, in part, upon the Administrative Law Judge's assessment of the credibility of the witnesses who testified before him in this matter. The Administrative Law Judge (ALJ) has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. He further considered the opportunity each witness had to observe and know the things discussed, each witness's

strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on December 6, 1999.

2. The Commission determined on September 21, 2000 that it was probable that Respondent engaged in unlawful discriminatory and retaliatory practices in violation of R.C. 4112.02(A) and (I).

3. The Commission attempted to resolve this case by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.<sup>1</sup>

4. Complainant is a female.

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<sup>1</sup> Respondent stipulated at the hearing that the Commission attempted to conciliate this matter without success. (Tr. 2)

5. Respondent is a corporation and an employer doing business in Ohio. Respondent owns Ristorante Giovanni's in Beachwood and other restaurants in the Cleveland area. Carl Quagliata is the principal operator of Giovanni's.<sup>2</sup> Quagliata has an office at Giovanni's and works there six days a week.

6. Respondent hired Complainant in August 1998 as a line chef. Complainant worked on the broiler line, made pastries occasionally, and otherwise assisted in food preparation for lunch. Complainant was a salaried employee; she earned \$19,500 per year. Her work hours were 8:00 a.m. to 4:00 p.m.

7. Gregg Korney was Giovanni's Executive Chef when Respondent hired Complainant.<sup>3</sup> Korney had an "easy-going" attitude and was "relaxed" about Complainant reporting to work on time. (Tr. 85, 342) For example, Korney did not care if Complainant arrived after 8:00 a.m. as long as she performed her duties before he arrived around lunchtime.

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<sup>2</sup> Carl Quagliata and his two brothers are partners in Giovanni's and the other restaurants.

<sup>3</sup> The Executive Chef is responsible for running the kitchen. The sous-chefs work directly under the Executive Chef. Complainant's immediate supervisor was the sous-chef who worked with her on the morning shift.

8. In June 1999, Korney and other employees in the kitchen left Giovanni's. Quagliata transferred a chef from one of his other restaurants to Giovanni's to replace Korney temporarily. Quagliata hired Chris Feuerborn as Executive Chef in July 1999.

9. Feuerborn had a different management style than Korney; Feuerborn was more "hyper" and yelled at the kitchen staff except Anna Selvaggio, a long-time employee of the restaurant. (Tr. 343, 463) Feuerborn frequently yelled at Complainant for her work performance. For example, Feuerborn criticized Complainant for the way she prepared steak; he also threw out her cheesecakes because she did not use "the proper pan." (Tr. 397) Feuerborn had several discussions with Complainant about preparing food in a certain manner to meet the high expectations of Giovanni's customers.<sup>4</sup> (Tr. 370-72) Feuerborn also talked to Quagliata about giving Complainant a raise and vacation in August 1999.

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<sup>4</sup> Giovanni's is a prestigious restaurant. It is one of the few "four diamond" restaurants in Ohio. (Tr. 365)

10. On August 23, 1999, Feuerborn yelled at Complainant for giving instructions on how to make spinach to a new sous-chef that he hired. Feuerborn called Complainant a “fucking bitch.” (Tr. 25) Feuerborn told Complainant to leave his “people” alone and asked Complainant if she wanted his job. *Id.* Feuerborn then sent Complainant home an hour early.

11. Complainant called Quagliata once she arrived home and informed him about the incident. Complainant told Quagliata that Feuerborn was regularly yelling at her and becoming “unbearable to work for.” (Tr. 26) Quagliata advised Complainant that she needed to “get along” with Feuerborn because he was the Executive Chef. *Id.*

12. Feuerborn also engaged in unwelcome physical contact with Complainant and made verbal sexual advances toward her. In August 1999, Feuerborn leaned on Complainant from behind while she was bending down in the cooler. Feuerborn told Complainant, “Hey baby, you and I should get together.” (Tr. 139) Complainant did not respond to the comment. (Tr. 36)

13. On two other occasions, Feuerborn rubbed his body (“between his knees and his chest”) against Complainant while she was talking on a telephone, and he rubbed “his whole body” against her in a walkway in the cooking line after she accidentally bumped into him earlier. (Tr. 141-43) Complainant turned away from Feuerborn during the latter incident.

14. In September 1999, Complainant overheard kitchen employees talking about the restaurant hiring a line chef. Complainant assumed that Respondent was going to replace her. After lunchtime, Feuerborn asked Complainant to go outside. It was raining. They stood against a wall to avoid the rain. Feuerborn confirmed that there was an advertisement in the newspaper for Complainant’s job. Feuerborn indicated that Quagliata intended to replace her. Feuerborn told Complainant not to worry because he “liked” her and was not going to let her go. (Tr. 28, 148) Feuerborn then grabbed Complainant’s leg and squeezed it. Complainant remarked, “Well, you have a funny way of showing it.” *Id.*

15. Feuerborn walked up behind Complainant shortly after they returned from outside. He was holding glazed carrots that Complainant had prepared. Feuerborn wrapped one of his arms around Complainant’s

waist from behind and held the glazed carrots out in front of her. Feuerborn asked Complainant, “Do you know what we could do with this, baby?” (Tr. 149) Complainant did not respond to this remark.

16. On October 14, 1999, Complainant reported off work sick before her shift. Respondent “docked” Complainant’s pay for her absence that day. (Tr. 36) Complainant approached Quagliata about the matter. Quagliata told Complainant that she could not just call off work any time she wanted. Quagliata also mentioned that Complainant “looked fine” when she worked the following day. *Id.*

17. On Thursday, October 21, 1999, Feuerborn yelled at Complainant about how she made the Caesar salad dressing that day. He called Complainant a “fucking bitch” and accused her of trying to get him in trouble with Quagliata. (Tr. 31) Complainant denied the accusation. Complainant then replied, “If you’re that unhappy with me, why don’t you just fire me?” *Id.* Feuerborn indicated that he would never fire her because he wanted to keep her there to abuse her.

18. Complainant started “breaking down” and crying within minutes of the incident. (Tr. 32) Complainant walked to the ladies’ restroom where she called her sponsor, Kris Rice.<sup>5</sup> Complainant apprised Rice of the situation. Rice advised Complainant to leave immediately. Complainant left Giovanni’s around 3:00 p.m. without notifying anyone at the restaurant.

19. Complainant reported off work sick the following day between 7:00 to 7:30 a.m. She informed Gary Keil, the sous-chef on duty, about the incident the previous day, the hives on her skin, and her intent to visit a physician about the problem. Complainant also informed Keil that she would provide a physician’s statement upon her return.

20. On Sunday, October 24, 1999, Complainant sent a facsimile to her attorney of a letter that she wrote over the weekend. The letter, which was directed to Quagliata, complained about Feuerborn being “sexually abusive” toward her, grabbing her and making sexual comments to her, threatening her, and sending her home. (Comm.Ex. 3P) The letter further indicated that it was almost unbearable to work “under these conditions”, and Feuerborn’s behavior had to stop. *Id.*

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<sup>5</sup> Complainant is a recovering alcoholic and former cocaine addict.

21. Complainant reported for work on the following Monday, October 25, 1999. Complainant provided Keil a physician's statement that morning regarding her absence the previous Friday. (Tr. 582, Comm.Ex. 3H) Complainant also brought the letter she wrote over the weekend. She intended to give it to Quagliata in person. Quagliata was not there so she placed the letter in her locker.

22. After lunchtime, Feuerborn handed Complainant two "Employee Warning Reports" that he prepared the previous Friday after talking to general manager, John Robertson.<sup>6</sup> The first report indicated that Complainant had walked off the job before her shift ended without informing management. (Comm.Ex. 3K) Complainant wrote in the employee statement section that "Chris the Chef went off on me and I couldn't stay in the kitchen any longer." *Id.* The second report indicated that Complainant "called in sick without proper notice (24 hours)" on October 22, 1999. (Comm.Ex 3L) It also indicated that the same incident occurred on October 14, 1999. Complainant wrote in the employee

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<sup>6</sup> Feuerborn told Robertson, who apparently acted like a district manager for the restaurants owned by Respondent, that he wanted to discharge Complainant. Robertson advised Feuerborn that he had to give Complainant "something in writing" that explained why she was being discharged. (Tr. 197) Robertson reported to Carl Quagliata in matters involving Giovanni's. Quagliata was unaware of Complainant's discharge until after the fact. (Tr. 541)

statement section that she had called in sick both days and obtained a physician's statement for her absence on October 22. Both reports listed "termination of employment" as Respondent's action against Complainant.

23. Complainant retrieved the letter from her locker after she received copies of the reports. Complainant again attempted to locate Quagliata without success. Complainant asked Pier Gregori, a Maitre D' and staff manager, to give Quagliata the letter for her. Quagliata received the letter after Complainant's discharge.<sup>7</sup>

## **CONCLUSIONS OF LAW AND DISCUSSION**

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have

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<sup>7</sup> Quagliata did not investigate Complainant's allegations in the letter. He assumed the allegations were "sour grapes." (Tr. 556)

been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.

1. The Commission alleged in the Complaint that Complainant was subjected to unwelcome “comments and touching” and discharged because of her sex.

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

It shall be an unlawful discriminatory practice:

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

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

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Sexual harassment is sex discrimination and prohibited by R.C. Chapter 4112. Ohio Administrative Code (Adm. Code) 4112-5-05(J)(1); *Cf. Meritor Savings Bank v. Vinson* (1986), 477 U.S. 57 (sexual harassment is sex discrimination under Title VII). Ohio Adm.Code 4112-5-05(J)(1) defines conduct that constitutes sexual harassment:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment 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 or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.<sup>8</sup>

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

6. An employer is vicariously liable for a hostile work environment created by a supervisor with immediate or higher authority over the employee. *Burlington Industries, Inc. v. Ellerth* (1998), 524 U.S. 742; *Faragher v. City of Boca Rotan* (1998), 524 U.S. 775. If no tangible employment action is taken against the employee, then the employer may raise an affirmative defense to liability or damages. *Burlington, supra* at 765; *Faragher, supra* at 807. To be successful, the employer must establish the following two elements by a preponderance of the evidence:

- (1) The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
- (2) The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

*Id.*

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<sup>8</sup> This definition is the same as the EEOC's definition of sexual harassment. See 29 C.F.R. § 1604.11(a).

This affirmative defense is unavailable when the supervisor's harassment "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Burlington, supra; Faragher, supra* at 808.

## **MOTION TO AMEND COMPLAINT**

7. In its brief, the Commission moves to amend the Complaint to conform to the evidence presented at the hearing. See Ohio Adm.Code 4112-3-05(F) and Civil Rule 15(B). Specifically, the Commission moves to amend the Complaint to include an allegation that Complainant was subjected to a "hostile work environment" because of her sex.

8. The terms *quid pro quo* and hostile work environment do not appear in either R.C. 4112 or Title VII. In *Meritor*, the Supreme Court first discussed these terms in holding that "sufficiently severe or pervasive" sexual harassment, which "alters the conditions of the victim's employment and creates an abusive working environment", violates Title VII. *Id.*, at 67, (brackets and citation removed). These terms became extensively used in pleadings in *Meritor's* wake. Title VII plaintiffs were encouraged to plead their cases as *quid pro quo* claims in an attempt to establish vicarious liability against their employer. See *Burlington, supra* at 753 (criticizing use

of the *quid pro quo*/hostile work environment distinction as a proxy for deciding when employers are subject to vicarious liability for employment discrimination).

9. In *Burlington*, the Supreme Court indicated that the terms *quid pro quo* and hostile work environment were not irrelevant to sexual harassment cases, but these terms only serve to distinguish roughly “between cases in which threats are carried out [*quid pro quo*] and those where they are not or are absent altogether [hostile work environment].” *Id.*, at 751. In practice, the factual basis for each category may overlap, making it difficult to label a case as one or the other. 3 *Larsen, Employment Discrimination*, (2<sup>nd</sup> Ed., 2002), Section 46.05[1]. The central inquiry is “whether plaintiff’s sex played a role in the actions at issue”, not whether the facts should be framed as either a *quid pro quo* or a hostile work environment case. *Gregory v. Daly* (C.A. 2, 2001), 243 F.3d 687, 700; See also *Oncale v. Sundowner Offshores Services, Inc.* (1998), 523 U.S. 75, 80 (“The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed”) (citation omitted). The Commission’s complaint, as written, sufficiently pleads unlawful sex discrimination in

violation of R.C. 4112.02(A). Therefore, the Commission's Motion to Amend Complaint is denied.

## **SEXUAL HARASSMENT ALLEGATIONS**

10. Complainant testified that Feuerborn initiated physical contact with her body, made verbal sexual advances toward her, and implied that her continued employment depended upon her submission to such conduct. Specifically, Complainant testified that the following incidents occurred in August and September 1999:

- Feuerborn leaned on Complainant while she was bending down in the cooler and stated, "Hey baby, you and I should get together";
- Feuerborn rubbed his body against her while she was talking on the telephone;
- Feuerborn rubbed "his whole body" against her in a walkway in the cooking line after she accidentally bumped into him earlier;
- Feuerborn told her that Respondent was advertising for a line cook, and Quagliata intended to replace her. Feuerborn then assured Complainant that he "liked" her and was not going to let her go while grabbing her leg and squeezing it; and

- Feuerborn wrapped one of his arms around Complainant while holding glazed carrots out in front of her and asked, “Do you know what we could do with this, baby?”

11. Feuerborn testified at the hearing.<sup>9</sup> Feuerborn denied most of Complainant’s specific allegations; however, he acknowledged generally that persons might “brush up against” or bump into each other in the cooler or on the cooking line in light of the “small quarters” of those areas. (Tr. 376-77) Feuerborn also testified that clipboards for ordering inventory were located near the telephone and acknowledged that a person reaching for the clipboards might touch a person talking on the telephone.

12. Further, Feuerborn acknowledged that he took Complainant outside the restaurant and possibly touched her leg while encouraging her to improve her work performance. (Tr. 384) Feuerborn testified that he showed Complainant the advertisement that day to stress that if she did not improve her work performance, she would be replaced.

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<sup>9</sup> Feuerborn was no longer employed by Respondent at the time of his testimony; his employment at Giovanni’s ended in September 2000.

13. Respondent argues that the Commission failed to “present even one eyewitness to corroborate” Complainant’s sexual harassment allegations against Feuerborn. (R.Br. 8) Although the existence of corroborative evidence is often crucial in sexual harassment cases, there is no explicit corroboration requirement in either R.C. Chapter 4112 or Title VII. *See Durham Life Ins. Co. v. Evans* (C.A. 3, 1999), 166 F.3d 139, 147 (Title VII does not have a corroboration requirement in sexual harassment cases). Credibility determinations are the province of the factfinder. When there are two competing versions of disputed facts, the factfinder may credit either side’s version without corroboration from other witnesses.

14. Besides Complainant’s and Feuerborn’s testimony, the ALJ considered the testimony of Complainant’s sponsor, Kris Rice. Rice testified that she talked to Complainant “almost” daily from August through October 1999. (Tr. 220) Rice testified that Complainant told her that Feuerborn would “go out of his way” to brush up against her at work. (Tr. 240-42) Rice also testified that Complainant told her that Feuerborn touched her leg while they were outside the restaurant discussing her future employment with Respondent. The ALJ credited Rice’s testimony

about these conversations with Complainant; this testimony was consistent with Complainant's version of events.

15. The ALJ also credited Complainant's reasons for not reporting Feuerborn's behavior to Quagliata or other management personnel. Complainant testified that she did not complain to Gary Keil, the morning sous-chef, because he would "go out and drink" with Feuerborn. (Tr. 159) Complainant further testified that she felt it was "useless" to complain to Quagliata because he exhibited similar behavior in the workplace by pulling her ponytail, flirting with her, and touching her hips from behind. (Tr. 37, 75-77, 160) This testimony was consistent with Quagliata's general admission that he is "a touchy person" by nature, and his specific admissions that he pulled Complainant's ponytail and touched her like his other employees. (Tr. 539, 540, 565)

16. Lastly, the ALJ considered that Complainant eventually placed her concerns about Feuerborn in writing *before* she learned of her discharge. (Comm.Ex. 3P) Among other things, the letter referenced Feuerborn's sexual advances and his sexually abusive behavior toward her. After a careful review of the entire record, the ALJ found

Complainant's testimony about the sexually harassing behavior more credible than Feuerborn's denial of such conduct.

## **HOSTILE WORK ENVIRONMENT**

17. Having resolved the factual disputes in Complainant's favor, the inquiry becomes whether Feuerborn's behavior toward her created a hostile work environment as a matter of law. In order to establish sexual harassment based on a hostile work environment, the Commission must show by a preponderance of the evidence that:

- (1) The harassment was unwelcome;
- (2) The harassment was based on sex;
- (3) The harassing conduct was sufficiently severe or pervasive to affect the "terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment"; and
- (4) The harassment was committed by a supervisor or the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

*Hampel v. Food Ingredients Specialists, Inc. et al.*, (Ohio, 2000), 89 Ohio St. 3d 169, 176-77.

18. The Commission easily established the first, second, and fourth elements of a hostile work environment claim. The evidence shows that Feuerborn, a male supervisor, physically touched Complainant, a female subordinate, and made verbal sexual advances toward her. There is no evidence that Feuerborn engaged in the same or similar behavior toward male employees in Respondent's workplace; the lack of such evidence suggests that Feuerborn's actions toward Complainant were based on her sex. Although Complainant did not specifically instruct Feuerborn to stop this behavior, her consistent failure to respond to his sexual advances was enough to communicate unwelcomeness. *Lipsett v. University of Puerto Rico* (C.A. 1, 1988), 864 F.2d 881, 898.

19. As in most cases, the existence of a hostile work environment in this case turns on whether the conduct was "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.* (1993), 510 U.S. 17, 21, quoting *Meritor, supra* at 67. The victim must actually perceive the work environment to be hostile or abusive, and the work environment must be one that a reasonable person would find hostile or abusive. *Harris, supra* at 21-22.

20. In examining the work environment from both subjective and objective viewpoints, the factfinder must examine “all the circumstances” including the victim’s psychological harm and other relevant factors, such as:

. . . 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.

*Id.*, at 23.

21. This inquiry also requires “careful consideration of the social context” in which the particular behavior occurred since the “real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships.” *Oncale, supra* at 82. The totality-of-the-circumstances approach requires the factfinder to consider “the cumulative effect of all episodes of sexual or other abusive treatment.” *Hampel, supra* at 181.

[T]he issue is not whether each incident of harassment standing alone is sufficient to sustain a cause of action in a hostile environment case, but whether—taken together—the reported incidents make out such a case.

*Williams v. General Motors Corp.* (C.A. 6, 1999), 187 F.3d 553, 562.

22. In *Harris*, the Supreme Court explained the rationale for requiring proof of the subjective component of a hostile work environment claim. This showing is necessary to establish that the harassing conduct, in fact, discriminatorily altered the victim's working conditions:

. . . if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

*Harris, supra* at 21-22.

23. The evidence in this case shows that Complainant perceived her work environment at Giovanni's to be hostile, at least in part, because of Feuerborn's harassment based on her sex.<sup>10</sup> This behavior occurred during the same period that Feuerborn yelled at Complainant for work-related reasons and criticized her work performance. During the hearing, Complainant described the dichotomy of Feuerborn's behavior toward her:

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<sup>10</sup> Complainant also testified that Feuerborn kissed her on the lips while greeting her at the company picnic in the summer of 1999. Complainant described the kiss as not "sexual" and indicated that she was not offended by it. (Tr. 106) Complainant testified that the kiss was inappropriate because it was "all in show" and gave those in attendance the false impression that they were "good friends" and "got along really well." *Id.* Complainant's testimony demonstrates that this kiss did not contribute to her perception that her work environment was hostile or abusive.

He was either really crazy and mean, . . . going off on me, or he was being sexual, harassing me.

(Tr. 176)

24. Complainant testified that the combination of Feuerborn's volatile temperament and his sexual advances made him "dangerous" causing her to feel like she was "walking on egg shells."<sup>11</sup> (Tr. 23, 30, 31) Complainant also testified that she was shocked and confused by Feuerborn's behavior, and "never knew what to do." (Tr. 29) Rice corroborated Complainant's testimony that she was confused and stressed over the instability of Feuerborn's behavior toward her. (Tr. 220) Rice testified that Complainant reported these feelings to her contemporaneously.

25. The Commission presented other evidence that demonstrated that Complainant perceived her work environment to be hostile. In the letter to Quagliata, Complainant wrote about Feuerborn's sexual advances toward her. Complainant indicated it was unbearable for her to work "under these conditions", and this behavior had to stop. (Comm.Ex. 3P)

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<sup>11</sup> Complainant testified about an incident where Feuerborn "slammed" down and "shattered" a jug of wine in a fit of anger. (Tr. 23) This incident apparently occurred during the first week that he worked there.

26. Respondent argues that Complainant never complained to management of sexual harassment (or a hostile work environment) until after her discharge. Although the failure to report the objectionable behavior may be considered as part of the totality of the circumstances, the subjective component of a hostile work environment claim does not require employees to complain about their workplace. *Williams, supra* at 566.

A plaintiff can be subjected to sexual harassment sufficiently severe or pervasive as to constitute a hostile work environment and yet, for a number of valid reasons, not report the harassment.

*Id.*

27. In *Williams*, the court recognized that an employee might be reluctant to come forward when one of the harassers was a supervisor. *See also Faragher, supra* at 803 (noting that a victim of sexual harassment “may well be reluctant to accept the risks of blowing the whistle on a supervisor”). Complainant also provided plausible explanations for not reporting Feuerborn’s behavior to either Quagliata or Keil. (Conclusions of Law ¶17, *supra*) It is undisputed that Respondent did not have a sexual harassment policy at the time. Thus, Respondent failed to provide Complainant any internal reporting options to complain about the harassing behavior.

28. The question of what act or combinations of actions may “objectively” create a hostile work environment is “a rather gray area.” *Fall v. Indiana University Bd. of Trustees* (N.D. Ind. 1998), 12 F.Supp. 2d 870, 877. A delicate balance must be struck between “the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing.” *Baskerville v. Culligan International Co.* (C.A. 7, 1995), 50 F.3d 428, 431. As Judge Posner explained in *Baskerville*:

On the [sexual harassment] side lie[s] sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures . . .

On the other side [of the line] lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.

*Id.*, (citations omitted).

Wherever the line is drawn, it must be “sufficiently demanding” to heed the Supreme Court’s admonition that civil rights statutes do not become general civility codes and only prohibit “extreme” conduct that discriminatorily alters the terms and conditions of employment in a hostile manner. *Faragher, supra* at 788.

29. This case involves five incidents of unwelcome physical contact, ranging from Feuerborn rubbing or leaning his body against Complainant, grabbing her around the waist from behind, and squeezing her leg. None of the incidents apparently involved the touching or groping of intimate body parts. Two of the incidents were accompanied by verbal sexual advances while the circumstances of another incident, i.e., squeezing her leg, suggested a threat of a sexual *quid pro quo*. All of the incidents, including the leg squeezing incident, should be considered in determining whether Complainant was subjected to an objectively hostile work environment because of her sex. See *Gregory, supra* (when allegations of a sexual *quid pro quo* co-exist with allegations of other circumstances suggesting that the challenged employment actions were taken because of plaintiff's sex, the court looks to the totality of the circumstances to determine whether there is a sufficient basis to infer sex-based discrimination). In other words, a supervisor's implied suggestion that an employee's continued employment is contingent upon submission to his sexual advances may contribute to a work environment that the reasonable person would find hostile or abusive. *Id.*, at 693.

30. Complainant testified that these incidents occurred in August and September 1999. This testimony demonstrates that these incidents were not isolated, but occurred with some frequency during the brief period that Complainant and Feuerborn worked together. The unwelcome touching and sexual solicitations appear to fall on the sexual harassment side of the line drawn by Judge Posner in *Baskerville*. These incidents went beyond the “genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex” in the workplace. *Oncale, supra* at 81. These incidents went beyond “the ordinary tribulations of the workplace, such as sporadic use of abusive language, gender-related jokes, and occasional teasing”, that do not constitute sexual harassment as a matter of law. *Faragher, supra* at 788 (citation omitted).

31. In its brief, the Commission recognizes that Feuerborn’s constant yelling at Complainant about her work performance also contributed to the hostility in her work environment. The ALJ concludes that a reasonable person, subjected to the same mixture of work-related verbal haranguing and sexually harassing behavior, would perceive such a work environment to be hostile or abusive. In addition, Complainant testified that Feuerborn

called her a “fucking bitch” during two of his outbursts. (Tr. 25, 31) Although Feuerborn may have yelled at both males and female in the kitchen, his use of a derogatory, gender-based phrase to describe Complainant on these occasions may be considered as part of the totality of the circumstances in determining the existence of an objectively hostile work environment.

32. The ALJ also considered whether the unwelcome touching and sexual solicitations unreasonably interfered with Complainant’s work performance. The Commission is not required to prove that Complainant’s “tangible productivity . . . declined as a result of the harassment.” *Harris, supra* at 25 (Ginsburg, J. concurring), *quoting Davis v. Monsanto Chemical Co.* (C.A. 6, 1988), 858 F.2d 345, 349. Instead, the Commission must show that a reasonable person subjected to the discriminatory conduct would find that the harassment so altered working conditions as to “ma[k]e it more difficult to do the job.” *Id.* Complainant’s testimony that Feuerborn’s unwelcome touching negatively affected her ability to concentrate on her work was sufficient to meet this showing. (Tr. 180)

33. After reviewing the totality of the circumstances, the ALJ concludes that Feuerborn's conduct toward Complainant, i.e., five incidents of unwelcome touching (including a sexual *quid pro quo*), two verbal sexual advances or solicitations, and two derogatory references to her gender, was sufficiently severe and pervasive to alter her work conditions and created a hostile work environment as a matter of law. In reaching this conclusion, the ALJ considered the collective severity of these incidents along with the brief period in which they occurred. *Williams, supra* at 564 (Title VII violation may exist due to the cumulative effect of incidents even when no single episode of sexual harassment would be sufficient alone to create a hostile work environment); *See also Hampel, supra* at 181 (severe or pervasive requirement does not present two mutually exclusive evidentiary choices, but reflects unitary concept where strength in one factor may overcome deficiency in other) (citations omitted). Respondent is vicariously liable for Feuerborn's creation of a sexually hostile work environment for Complainant.<sup>12</sup> *Burlington, supra; Faragher, supra.*

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<sup>12</sup> Respondent neither raised any defenses that it should not be liable for Feuerborn's sexually harassing behavior nor provided sufficient evidence showing that Complainant failed to avoid or mitigate her damages caused by his conduct. The evidence shows that Respondent did not adopt a sexual harassment policy until after Complainant's discharge.

## TANGIBLE EMPLOYMENT ACTION

34. The issue of whether Respondent discharged Complainant because of her sex is also properly analyzed under federal case law. Under Title VII, the Commission is usually required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene* (1973), 411 U.S. 792. The burden of proving a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248. It is simply part of an evidentiary framework “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Id.*, at 254, n.8.

35. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas*, *supra* at 802, n.13. In this case, the Commission may establish a *prima facie* case of sex discrimination by proving that:

- (1) Complainant is a member of a protected class;
- (2) Complainant was qualified for her position;
- (3) Respondent took an adverse employment action against Complainant; and

- (4) Respondent took an adverse employment action against Complainant “under circumstances giving rise to an inference of discrimination.”

*Gregory, supra* at 595; *See also Burdine, supra* at 253.

36. The Commission proved the first three elements of a *prima facie* case. R.C. 4112.02(A) protects both sexes “from all forms of sex discrimination in the workplace.” *Hampel, supra* at 178. Respondent hired Complainant as a line cook and gave her a raise after one year of service. Such evidence suggests that Complainant possessed the basic skills to perform her job. *See Gregory, supra* at 696 (second element of *prima facie* case only requires minimum showing that employee possessed “the basic skills for performance of the job”) (citations omitted). Respondent took an adverse employment action against Complainant by discharging her.

37. The Commission also proved the fourth element of a *prima facie* case with the same evidence that created a hostile work environment for Complainant. *See Gregory, supra* 697 (same circumstances suggesting sexually hostile work environment gave rise to inference that tangible adverse employment actions were also based on sex). The evidence shows that Feuerborn made the decision to discharge Complainant. This

decision occurred approximately a month after he engaged in conduct that suggested that Complainant's continued employment depended upon her submission to his unwelcome touching and sexual solicitations. Such evidence, along with the evidence of the other sexual advances and derogatory references to Complainant's gender, is sufficient to create an inference that Complainant's sex also played a role in her discharge at least for purposes of proving a *prima facie* case.

38. Once the Commission established a *prima facie* case, the burden of production shifted to Respondent to "articulate some legitimate, nondiscriminatory reason" for the employment action. *McDonnell Douglas, supra* at 802. To meet this burden of production, Respondent must:

. . . "clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.<sup>13</sup>

*St. Mary's Honor Center v. Hicks* (1993), 509 U.S. 502, 507, quoting *Burdine, supra* at 254-55, n.8.

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<sup>13</sup> Although the burden of production shifted to Respondent at this point, the Commission retained the burden of persuasion throughout the proceeding. *Burdine, supra* at 254.

39. Respondent met its burden of production with Feuerborn's testimony and documentary evidence regarding Complainant's discharge. Feuerborn testified that he discharged Complainant because she left work an hour early without notifying management and reported off work the next day. (Tr. 385) Feuerborn also testified that Complainant's work performance was a factor in her discharge.<sup>14</sup> (Tr. 394) The "Employee Warning Reports" that Feuerborn gave Complainant on the day of her discharge cited the first two reasons. (Comm.Exs. 3K, 3L)

40. Respondent having met its burden of production, the inquiry moves to the ultimate issue of whether Respondent discharged Complainant because of her sex. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for Complainant's discharge were not its true reasons, but were "a pretext for discrimination." *Hicks, supra* at 515, quoting *Burdine, supra* at 253.

[A] reason cannot be proved to be a "pretext for discrimination" unless it is shown *both* that the reason is false, *and* that discrimination is the real reason.

*Hicks, supra* at 515.

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<sup>14</sup> Feuerborn also testified that Complainant had a problem arriving at work on time, but he acknowledged that her tardiness was not a factor in his decision to discharge her. (Tr. 374, 461)

41. Thus, even if the Commission proves that Respondent's articulated reasons are false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the . . . [Commission's] proffered reason of . . . [sex] is correct. That remains a question for the factfinder to answer . . . .

*Id.*, at 524.

Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainant was, more likely than not, the victim of sex discrimination.

42. In order to show pretext, the Commission challenges the credibility of Respondent's articulated reasons for Complainant's discharge. The Commission argues that the evidence does not support the conclusion that Complainant's work performance was a factor in her discharge. This argument is well taken. Neither of the Employee Warning Reports listed work performance as a reason for Complainant's discharge. (Comm.Exs. 3K, 3L) Feuerborn also did not indicate that Complainant's work performance was a reason for her discharge when he provided information

to the Ohio Bureau of Employment Services (OBES) about this decision only 17 days after her discharge. (Comm.Exs. 3I, 3J)

43. The ALJ also considered Feuerborn's testimony that he would have "likely" given Complainant "another chance" if she had reported to work on October 22, 1999. (Tr. 468) This testimony suggests that even if Feuerborn was not satisfied with Complainant's work performance, he was not ready to discharge her for that reason at that time.

44. Likewise, the evidence does not support Feuerborn's testimony that Complainant's reporting off work on October 22, 1999 was a reason for her discharge. Feuerborn indicated in his response to OBES that "the final incident", which led to Complainant's discharge, occurred the previous day on October 21. (Comm.Ex. 3J) Feuerborn further indicated in this response that Complainant "would have been terminated" on October 22, but she called off work that day. *Id.* The Employee Warning Report for October 21 listed "termination of employment" as Respondent's action against Complainant for "walking out of work without notice." (Comm.Ex. 3K)

45. The Commission also argues that the remaining reason, i.e., leaving work an hour early without authorization, is a “questionable basis” for Complainant’s discharge. (Comm.Br. 32) The evidence shows that although Complainant’s work hours extended beyond lunchtime, her primary responsibility was lunch preparation. This responsibility would have ended by 3:00 p.m. when Complainant left the premises early on October 21. Further, this was not the first time that Complainant left work at that time. Feuerborn previously sent Complainant home an hour early in a fit of anger telling her that there was “nothing else” for her to do. (Tr. 25)

46. As the foregoing evidence demonstrates, Feuerborn’s testimony about his reasons for Complainant’s discharge and the documentary evidence, which was prepared less than a month later, are inconsistent. Feuerborn was unable to explain the inconsistencies at the hearing. The ALJ resolved the conflict in favor of the documentary evidence, which was more contemporaneous. The ALJ concludes that but for Complainant’s refusal to acquiesce to Feuerborn’s sexual advances, it is unlikely that Complainant would have been discharged for leaving work an hour early without proper notice:

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination, and . . . no additional proof of discrimination is *required*.

*Hicks, supra* at 511, (bracket removed); *See also Reeves v. Sanderson Plumbing Products, Inc.* (2000), 530 U.S. 133, 147.

## RETALIATION

47. The Commission also alleged in its Complaint that Respondent discharged Complainant in retaliation for complaining of sexual harassment. This allegation, if proven, would constitute a violation of R.C. 4112.02 provides that:

It shall be an unlawful discriminatory practice:

- (I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

48. At this point, there is no need to undergo a prolonged analysis of this allegation. The Commission failed to establish the threshold element

of all retaliation cases, i.e., showing that Complainant engaged in protected activity under the statute. It is undisputed that Complainant did not complain to management about Feuerborn sexually harassing her (or any other sexually harassing behavior in her workplace for that matter) until after her discharge. There is also no evidence that Complainant engaged in another form of protected opposition before any adverse employment action was taken against her. Nor is there any evidence that Complainant filed a previous charge of discrimination with the Commission or otherwise participated in proceedings initiated by such a charge. The retaliation claim must be dismissed because the Commission failed to show that Complainant engaged in a protected activity—the first element of a *prima facie* case of unlawful retaliation under R.C. 4112.02(I). See *Hollins v. Atlantic Co., Inc.* (C.A. 6, 1999), 188 F.3d 652 (setting forth *prima facie* elements of Title VII retaliation claim).<sup>15</sup>

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<sup>15</sup> Title VII's anti-retaliation provision is embodied in 42 U.S.C. §2000e-3. It also contains an opposition and a participation clause. This provision is substantially the same as R.C. 4112.02(I).

## RELIEF

49. When the Commission makes a finding of unlawful discrimination, the victims of such behavior are entitled to relief. R.C. 4112.05(G)(1). Title VII standards apply in determining the appropriate relief under the statute. *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.* (1994), 69 Ohio St.3d 89.

50. Like Title VII, one of the purposes of R.C. Chapter 4112 is to make “persons whole for injuries suffered through past discrimination.” *Albemarle Paper Co. v. Moody* (1975), 422 U.S. 405, 421. The attainment of this objective requires that:

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

*Franks v. Bowman Transportation Co.* (1976), 424 U.S. 747, 763 (footnotes omitted).

51. In providing a “make whole” remedy, victims are “presumptively entitled to reinstatement.” *Ford v. Nicks* (C.A. 6, 1989), 866 F.2d 865, 875. There is also a strong presumption in favor of awarding back pay:

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

*Albemarle Paper Co., supra* at 421.

This presumption “can seldom be overcome.” *Los Angeles Dept. of Water and Power v. Manhart* (1978), 435 U.S. 702, 719. There must be “exceptional circumstances” to deny an award of back pay. *Rasimas v. Michigan Dept. of Mental Health* (C.A. 6, 1983), 714 F.2d 614, 626.

52. The difficulty in calculating back pay does not constitute an exceptional circumstance. The Commission should award back pay “even where the precise amount of the award cannot be determined.” *Id.*, at 628. In other words, the calculation of back pay does not require “unrealistic exactitude”; only a reasonable calculation is required. *Salinas v. Roadway Express, Inc.* (C.A. 5, 1984), 735 f.2d 1574, 1578. The Commission should resolve any ambiguity in the amount of back pay against the discriminating employer. *Rasimas, supra* at 628; *Ingram, supra* at 94.

53. To be eligible for back pay, victims must attempt to mitigate their damages by seeking substantially equivalent employment. A substantially equivalent position affords the victim “virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status.” *Rasimas, supra* at 624. Victims forfeit their right to back pay if they refuse to accept a substantially equivalent position or fail to make reasonable and good faith efforts to maintain such a job once accepted. *Ford Motor Co. v. EEOC* (1982), 458 U.S. 219; *Brady v. Thurston Motor Lines* (C.A. 4, 1985), 753 F.2d 1269.

54. The discriminating employer has the burden of proving that the victim failed to mitigate damages. To meet this burden, the discriminating employer must establish that: (1) there were substantially equivalent positions available in the geographic area the victim had reasonable access to, and (2) the victim failed to use reasonable diligence in seeking such positions. *Rasimus, supra* at 624.

55. The victim’s duty to use reasonable diligence is not burdensome. This duty does not require the victim to be successful or go to “heroic

lengths” to mitigate damages; only reasonable steps must be taken. *Ford, supra* at 873. The reasonableness of the victim’s efforts to find substantially equivalent employment should be evaluated in light of the victim’s individual characteristics (such as educational background and work experience) and the job market. *Rasimus, supra* at 624.

56. Besides proving lack of mitigation, the discriminating employer also has the burden of proving that the victim had interim earnings. The victim’s interim earnings are deducted from the back pay award. R.C. 4112.05(G)(1).

57. In this case, the Commission presented evidence of Complainant’s efforts to mitigate her damages. Complainant testified that she started her job search the same week of her discharge. The Commission also provided an OBES booklet of employer contacts that Complainant maintained while she received unemployment compensation for six months. (Comm.Ex. 10) Complainant testified that she received two job offers during that period, but she refused them because they paid less than her job at Giovanni’s, and, in one case, the kitchen was “really dirty.” (Tr. 170-71) Respondent failed to show that these jobs were substantially

equivalent to Complainant's job at Giovanni's; therefore, Complainant's refusal to accept these jobs does not prevent her from obtaining back pay for this period. *Cf. Seller v. Delgado Community College* (C.A. 5, 1988), 839 F.2d 1132 (duty to mitigate damages does not require Title VII claimant remain in non-comparable position during the pendency of this claim).

58. Further, Respondent failed to present any evidence during the hearing on the mitigation issue. In other words, Respondent failed to show that substantially equivalent positions to Complainant's job with Giovanni's were available in the Cleveland area at any time after her discharge, and she failed to use reasonable diligence in seeking such positions. Absent such evidence, Respondent failed to meet its burden of proving that Complainant failed to mitigate her damages. Complainant is entitled to back pay, less her interim earnings.<sup>16</sup>

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<sup>16</sup> When there is a back pay award, victims are entitled to prejudgment interest. *Ingram, supra* at 93. Prejudgment interest is calculated from the time of the unlawful discriminatory practice. *Id.*

59. In regards to interim earnings, Complainant testified that she cleaned houses in 1999 and made pies that she sold to her friends and restaurants. (Tr. 47, 172) The evidence shows that Complainant earned \$6,374.92 from her employment at Sushi Rock and \$100 from Elan Catering in 2000. (Comm.Ex. 14, pp. 6-7) On October 1, 2000, Complainant began working at the Lion & Lamb Restaurant as a hostess and server. Complainant earned approximately \$300 per month for performing these functions and baking pies that the restaurant sold.

60. The evidence shows that Complainant continued to work at the Lion & Lam until February 18, 2001. *Id.*, at p. 8. Complainant earned \$117 and \$135 from March to May 2001 while working for another restaurant and cleaning houses, respectively. *Id.*, at pp. 9-10. Complainant apparently returned to work at the Lion & Lamb in May 2001. She earned approximately \$4,125 in salary and tips from May through mid-November 2001. *Id.*, at p. 11. She also earned \$4,460 cleaning houses during that period. *Id.*

## RECOMMENDATIONS

For all of the foregoing reasons, the Administrative Law Judge recommends in Complaint #8911 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;
2. The Commission order Respondent to provide sexual harassment training to all employees, including supervisors, within six months of the Commission's Final Order in this case.<sup>17</sup> This training should be approved by the Commission's Office of Special Investigations (OSI) at 1111 East Broad Street, Suite 301, in Columbus, Ohio, and Respondent should notify that office upon completion of such training.
3. The Commission order Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final

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<sup>17</sup> The Commission's rules state in Ohio Adm.Code 4112-5-05(J)(6) that "[p]revention is the best tool for the elimination of sexual harassment." Sexual harassment training of all employees is one method of prevention. It is also in the best interest of all employers to adopt a sexual harassment policy that gives employees more than one internal reporting option. This policy should be disseminated to all employees and posted conspicuously in the workplace.

Order for a line cook position. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage she would have been paid had she been employed as a line cook on October 25, 1999 and continued to be so employed up to the date of Respondent's offer of employment; and

4. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the Commission's Final Order a certified check payable to Complainant for the amount that Complainant would have earned had she been employed as a line cook by Respondent from October 25, 1999 and continued to be so employed up to the date of Respondent's offer of employment, including any raises that she would have received, less her interim earnings during that period, plus interest at the maximum rate allowed by law.<sup>18</sup>

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TODD W. EVANS  
ADMINISTRATIVE LAW JUDGE

September 13, 2002

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<sup>18</sup> Any ambiguity in the amount that Complainant would have earned during this period with Respondent, as well as her interim earnings elsewhere, should be resolved against Respondent. *Rasimas, supra* at 628; *Ingram, supra* at 94.