EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN

Melissa Pflaum 315 Shane Ct Madison WI 53590 Complainant vs. Union Transfer & Storage Inc 537 Atlas Ave Madison WI 53714 Respondent	RECOMMENDED FINDINGS OF FACT Case No. 20002092

1. The Complainant, Melissa Pflaum, started her employment with the Respondent as an Inbound Consultant on January 3, 2000.
2. The Respondent, Union Transfer and Storage, Inc., is a company with its principal place of business at 5034 Voges Road, in the city of Madison, Wisconsin, and is solely owned by John Birbaum.
3. The Respondent did not have a sexual harassment policy while the Complainant was working there.
4. The Respondent, on average, employs fewer than ten (10) people.
5. Respondent's employee, Albert Hurd, did not have supervisory authority over the Complainant or any other employees.
6. On January 3, 2000, the Respondent's employee, Albert Hurd, began to write unwelcome notes to the Complainant, which the Complainant found objectionable.
7. Hurd commented to the Complainant on her physical appearance.
8. Hurd told the Complainant he wished to have sex with her.
9. Hurd told the Complainant that he was a more able sex partner than her husband.
10. The Complainant had been friendly toward Hurd, but did not welcome Hurd's comments and informed him of her desire for Hurd to stop making them.
11. On January 19, 2000, the Complainant told James Poehnelt about the Complainant's concerns.
12. The Complainant had not informed any other co-workers or supervisors of Hurd's conduct until January 19, 2000.
13. The Respondent became aware of Hurd's harassing behavior on January 19, 2000.
14. On January 20, 2000, Birbaum confronted Hurd about his behavior and warned him not to have any contact with the Complainant.
15. On January 21, 2000, Hurd intimated a threat towards the Complainant's husband and asked the Complainant on a date. The Complainant did not immediately report this to the Respondent.
16. On January 23, 2000, a Sunday, the Complainant contacted Birbaum to inform him that Hurd was placing unwelcome telephone calls to her home.
17. On January 23, 2000, Birbaum contacted Hurd's probation officer.
18. On January 24, 2000, the Respondent suspended Hurd, pending a further investigation.
19. The Respondent permitted Hurd to work before beginning his suspension because of a previously scheduled appointment.
20. On January 24, 2000, Hurd was arrested for a parole violation.
21. The Respondent terminated Hurd on January 24, 2000.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Madison General Ordinance §3.23.
2. The Complainant is a member of the protected class "sex."
3. The Respondent's employee Albert Hurd sexually harassed the Complainant within the meaning of the ordinance.

4. The Respondent did not discriminate against the Complainant in violation of §3.23 because it took reasonable action to provide a harassment-free environment once it became aware of its employee's conduct.

ORDER

The complaint is dismissed.

MEMORANDUM DECISION

This complaint presents a question of whether the Complainant's employer failed to provide an environment free from sexual harassment or acted reasonably upon being informed of harassment. A public hearing was held on August 14, 2001, in Room LL-120 of the Madison Municipal Building. Paul A. Kinne of Gingras, Cates and Luebke, S.C., appeared on behalf of the Complainant. William A. Abbott of Bell, Gierhart and Moore, S.C., appeared on behalf of the Respondent. The Hearing Examiner finds that the Respondent took reasonable steps in response to the harassment allegations in the form of a warning to, suspension, and termination of the perpetrator of harassment in the limited time it had to act.

The Respondent hired the Complainant to be an Inbound Consultant Co-op Manager. The job duties entailed processing orders, administering payroll and managing inventory. On January 3, 2000, Complainant began her employment. Almost immediately, a co-worker, Albert Hurd, directed harassing behavior towards her. The harassing behavior lasted three (3) weeks in total and did not include physical touching or contact.

On January 3, 2000, Hurd began to write letters to the Complainant at the office. Later, Hurd regularly commented on her physical appearance. Hurd intimated that he wished to have sex with the Complainant and that he was a more able partner than the Complainant's husband. Hurd repeatedly asked the Complainant out on dates.

The Complainant did not welcome or encourage Hurd's actions. The Complainant did not initially report Hurd's conduct to a supervisor or anyone else. On January 19, 2000, the Complainant told a co-worker, James Poehnelt, about Hurd's behavior. Subsequently, Poehnelt informed John Birbaum, the Respondent's owner. After this, Hurd's conduct became acutely threatening. On January 21, Hurd alluded to a gun he claimed to have and his ability to hurt the Complainant's husband. The Complainant did not immediately make Birbaum aware of these comments. On January 23, Hurd called the Complainant at her home and played suggestive music over the phone in lieu of speaking. After being contacted by the Complainant, Birbaum called Hurd's probation officer on January 23 to inform the officer of Hurd's actions. The Respondent suspended Hurd for the harassment on January 24, 2000. Hurd was arrested and jailed that day for a probation violation. Ultimately, Hurd was terminated on January 24.

The Complainant alleges that the Respondent should be held liable because Hurd was a supervisor. The Hearing Examiner cannot agree with this characterization of the facts. Vicarious liability is applicable when a supervisor creates an actionable hostile environment. Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries v. Ellerth, 524 U.S. 742 (1998). While Hurd may have received promotions or other rewards for his work, the record indicates that Birbaum was the Complainant's sole supervisor. Contributing to this conclusion are the facts that Birbaum was the sole owner of the Respondent, a very small business not containing the structured command hierarchies present in larger corporations. The record indicates that Hurd had no authority over the Complainant's employment status or that of any other employee. Therefore any harassing behavior on his part may not automatically be imputed to the Respondent.

At most, Hurd could be characterized as a sort of leadworker, but even that conclusion does not come from any supervisory authority Hurd might have had. Rather, Hurd's years of experience with the Respondent, in conjunction with the Complainant's inexperience and their working together, would create a situation in which Hurd could tell the Complainant what she should do. This still does not rise to the level of having employment authority over the Complainant.

Because Hurd cannot be considered a supervisor, the Respondent's liability extends from the date it became aware of Hurd's alleged actions. The Hearing Examiner must determine when the Respondent became aware of the harassment in order to determine whether the Respondent acted reasonably in responding to the Complainant's allegations of harassment. The parties agree that the Respondent did not have a posted sexual

harassment policy or any established procedures for reporting harassment. The Complainant cites this uncertainty as the reason why she did not report earlier instances of unwelcome behavior on Hurd's part. The Hearing Examiner looks with disfavor upon the Respondent for not creating procedures for reporting harassment. However, in this case, the Hearing Examiner cannot say that the lack of a policy prevented the Complainant from reporting harassment to Birbaum or any other person at the Respondent's office. While the total absence of a sexual harassment policy can, in some circumstances, lead to a finding of liability, the Hearing Examiner believes that the circumstances of this employment setting do not require such a finding.

The Respondent is a small business, employing no more than ten (10) people at any given time. The owner, John Birbaum, works in the Respondent's office with a majority of employees. In such a small workplace, the Hearing Examiner finds it unreasonable to believe that the Complainant did not know who to speak with about problems with a co-worker. Birbaum's presence at the office would make it clear that he was the person in charge. At a larger business with multiple levels of authority, it may be more difficult to pinpoint exactly whom to speak with. But in this instance, the Complainant should have known that she could have complained to Birbaum.

On January 19, 2000, the Complainant told her co-worker, James Poehnelt about Hurd's harassing behavior. Poehnelt, in turn, relayed this information to Birbaum. Until Poehnelt spoke with Birbaum, the Respondent had no cause to know of Hurd's actions toward the Complainant. January 19 was the first day that the Complainant clearly and unequivocally expressed (through an intermediary) that she felt she was the target of harassment. As a result, the Hearing Examiner considers January 19, 2000, to be the date upon which the Respondent became aware of the harassment.

Given a January 19th date of notice, the Hearing Examiner looks to the record to review the actions made by the Respondent. The pertinent questions are whether the Respondent acted appropriately in dealing with the unwelcome behavior, once made aware of it and whether the conduct was repeated. The Hearing Examiner's finding is that the Respondent took appropriate steps in disciplining Hurd when it became aware of the harassment.

The Respondent gave a verbal warning to Hurd on Thursday, January 20, the day after the Respondent first became aware of the harassment. Despite the warning, Hurd persisted in harassing the Complainant by calling her home on January 23. That day, the Complainant called Birbaum to notify him of Hurd's conduct, the first notice the Respondent received since January 19. It is important to note that Hurd's continued harassment occurred, for the most part, outside of the worksite. On January 23, after being made aware that Hurd was calling the Complainant's home, Birbaum telephoned Hurd's probation officer. On Monday, January 24, Hurd was arrested for parole violation. On that day, Hurd was suspended and terminated.

Four business days elapsed between the Respondent's being placed on notice (Wednesday, January 19) and the date Hurd was arrested, suspended and terminated (Monday, January 24). Birbaum's contacting the probation officer after the Complainant's weekend call is a demonstration of his personal concern beyond that of an ordinary employer. The Respondent did not disregard the harassment problem. The Respondent did allow Hurd to continue to work after being accused of harassment, but this fact alone, when weighed against what the Respondent did do, is not dispositive of discrimination.

The Complainant argues that the termination should have occurred immediately upon the Respondent's notification of possible harassment. The Hearing Examiner cannot agree. It is reasonable and essential for an employer to have an opportunity to conduct an internal investigation into allegations of harassment. The consequences of automatic termination upon being accused of harassment where there is no evidence, without investigation of any kind, are too grave. Hindsight reveals that Hurd sexually harassed the Complainant. However, when the Respondent was made aware of the Complainant's accusations, it could not have known this with complete certainty and should not have assumed that the allegations were true.

The Complainant contends that the Respondent's failure to contact the police immediately upon awareness of the Complainant's allegations illustrates the Respondent's flagrant disregard for harassment. In the Hearing Examiner's judgment, a Respondent has no obligation to make contact with any law enforcement entity when there is no evidence of criminal conduct at the worksite. The record reveals, as stated above, unwelcome notes and comments. There is insufficient evidence to believe any sexual assault or direct threats of bodily harm occurred at the workplace.

Given the limited period of time that the Respondent had to respond to the Complainant's concerns, the Hearing Examiner believes that the Respondent acted reasonably. Whether the Respondent acted entirely as the Hearing Examiner might wish is irrelevant so long as it acted promptly and reasonably to end the harassment. On this record, the Respondent, within 24 hours, had warned Hurd about his conduct. Though this warning ultimately proved to be unsuccessful, its failure was not clear until the following weekend after work hours. Once Birbaum was made aware of further harassment on Hurd's part, he took immediate action to assure the Complainant's safety.

Birbaum suspended Hurd the next business day back and finally terminated him on the same day. The Respondent's actions, though perhaps taken for a variety of reasons, had the effect of providing the Complainant with an environment free from sexual harassment.

It is the Respondent's prompt action that leads to the conclusion that it did not violate the ordinance's prohibition on sexual harassment. The Hearing Examiner does not intend to minimize the Complainant's discomfort or pain resulting from Hurd's conduct. The Hearing Examiner can only apply the Ordinance as it is presented to the Commission.

For the foregoing reasons, the Hearing Examiner finds that the Respondent did not discriminate against the Complainant in employment on the basis of her sex. The complaint is hereby dismissed.

Before closing, the Hearing Examiner finds it necessary to comment upon the deterioration in the professional relations between counsel for the parties. The Hearing Examiner does not make any findings with respect to either party's conduct or the allegations of improper argument or conduct. It is regrettable that relations have fallen so far and the Hearing Examiner encourages each attorney to examine his conduct to see what might be done in the future to enable more productive relationships.

The Complainant expressed concern over the Respondent's provision of a transcript of proceedings. While provision of such an unofficial transcript is unusual, the Hearing Examiner did not take the Respondent's offer of a transcript as an attempt to subvert the process. The Hearing Examiner understood the transcript to be offered as a guide to the Respondent's argument and not a replacement for the official hearing tapes. In fact, the Hearing Examiner did not find it necessary to make any reference to the Respondent's unofficial transcript and relied solely on the hearing tapes.

Signed and dated this 5th day of April, 2002.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner