STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 2759-99
DCR DOCKET NO. EE06WB-41629-E

CLARA SHOCKLEY,	)	
Complainant,	)	**ADMINISTRATIVE ACTION**
	)	**FINDINGS, DETERMINATION**
v.	)	**AND ORDER**
R&R TRAA COMPANY AND B&R TRAA ENTERPRISES,	)	
Respondents.	)	

APPEARANCES
Michael Daily, Esq., (Quinlan, Dunne & Daily, P.A., attorneys) for the complainant.
Gregory R. McCloskey, Esq., (Begley, McCloskey & Gaskill, attorneys) for the respondents.

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint, twice amended, filed by the complainant, Clara Shockley (Complainant), alleging that her former employers, R&R TRAA Company, B&R TRAA Enterprises, Worth Management Corporation, and George Goldsworthy, d/b/a McDonalds, unlawfully discriminated against her because of her sex and subjected her to unlawful reprisal, in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On September 15, 2003, the Honorable Robert S. Miller, Administrative Law Judge (ALJ), issued an initial decision dismissing the complaint. Having independently reviewed the record and the ALJ's decision, the

Director adopts the ALJ's initial decision as modified herein.

PROCEDURAL HISTORY

On October 29, 1996, Complainant filed a verified complaint with the Division alleging that she was subjected to sexual harassment and terminated as a reprisal for complaining about sexual harassment, both in violation of the LAD. The complaint named "McDonald's" as the only respondent. On March 12, 1997, an answer to the verified complaint was filed on behalf of " Worth Management d/b/a McDonald's." Two amended verified complaints were subsequently filed, the first on November 30,1998 and the second on July 25, 2000, wherein R&R TRAA Company, B&R TRAA Enterprises, Worth Management Corporation and George Goldsworthy d/b/a McDonald's were substituted as the respondents.[1]

At Complainant's request pursuant to N.J.S.A. 10:5-13, this matter was transmitted to the Office of Administrative Law on May 5, 1999, for determination as a contested case. A telephone pre-hearing conference was conducted on October 19, 1999. Motions to dismiss the complaint, made by Respondents on May 17, 2001 and August 31, 2001, were denied. Hearings were held on March 19, 2001, March 23, 2001, July 16, 2002, July 18, 2002, and August 6, 2003.

The ALJ issued an initial decision on September 15, 2003 (ID)[2]. On September 26, 2003,

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[1]Worth Management Corporation and George Goldsworthy thereafter settled with Complainant, and the claims against them, including Complainant's reprisal claim, were dismissed as part of the settlement. R&R TRAA Company and B&R TRAA Enterprises remained as the respondents in this matter (Respondents).

[2]Hereinafter, "ID" shall refer to the ALJ's initial decision issued on September 15, 2003; "Ce" shall refer to Complainant's exceptions to the initial decision filed on September 26, 2003; "Re" shall refer to Respondents' replies to Complainant's exceptions filed on October 9, 2003; "C" shall refer to Complainant's exhibits; "R" shall refer to Respondents' exhibits; "T1" shall refer to the transcript of the hearing conducted on March 19,2001; and "T2" shall refer to the transcript of the hearing conducted on March 22, 2001.

Complainant filed exceptions to the initial decision. On October 9, 2003, Respondent filed a reply to Complainant's exceptions. The Director was granted one 45 day extension for the issuance of this order, and the Director's decision is due on December 15, 2003.

THE ALJ'S DECISION

Findings of Fact

The ALJ set forth his findings of fact at pages 3 through 7 of the initial decision. Those findings are briefly summarized as follows.

On August 6, 1992, Complainant was hired by Respondents as a crew person preparing and serving meals. Her employment was divided between Respondents' North Wildwood store in the summer months, and the Cape May Courthouse store during other times of the year. On or about January 26, 1996, Respondents sold both stores to Worth Management and George Goldsworthy, doing business as McDonalds (hereafter "Goldsworthy"). As a result of a favorable recommendation by Respondents, Goldsworthy retained Complainant as an employee. She remained in Goldsworthy's employ until August 14, 1996, when she was fired, purportedly for insubordination. On October 29, 1996, she filed a complaint with the Division alleging that McDonald's had subjected her to sexual harassment and reprisal (ID 3).

Prior to hiring Complainant in 1992, Respondents had adopted and put into effect a sexual harassment policy. That policy provided as follows:

> SEXUAL HARASSMENT: At this McDonald's franchise, we prohibit sexual harassment of any employee because it is intimidating, an abuse of power, and inconsistent with our policies, practices and management philosophy. Sexual harassment is defined as unwelcome sexual advances, request for sexual favors, and other verbal or physical conduct of a sexual nature. Sexual harassment is sexual conduct that interferes with another person's work performance or creates an intimidating, hostile, or offensive work environment.

> WHAT TO DO IF YOU EXPERIENCE OR WITNESS DISCRIMINATION OR SEXUAL HARASSMENT:
> Employees who feel that they have been subjected to discrimination or harassment should immediately report it to management, including their Shift Manager, their Store Manager, their Area Supervisor, or Owner/Operator. We encourage employees to freely report these incidents and prohibit retaliation for making or being witness to such a report. We will thoroughly investigate discrimination and harassment reports, and will do so confidentially. If the report is determined to be true, disciplinary action will be taken against the offender, ranging from a warning to termination, depending on the severity of the misconduct.
> (ID 3-4).

Following the policy statement was a listing of the address and telephone number of the main office of the company and the names and telephone numbers of the two owner/operators (Robert Traa and Karen Traa), of the Director of Operations (Todd Kemp), and of two area supervisors (Debbie Tighe and Mike Brandenberger).

The sexual harassment policy was delivered to employees in the form of a handbook, (C-4), and a "Policies and Practices" pamphlet, (C-2), that was distributed to all employees, including Complainant. New employees were also told at their orientation sessions that sexual harassment would not be tolerated and that any incidents should be reported to a supervisor, store manager, director of operations, or owner/operator. In addition, every supervisor was required to attend several anti-sexual harassment training programs conducted by the franchiser, McDonald's Corporation (ID 4).

During the years 1992 to 1996, Karen Traa , an owner/operator of both stores, investigated more than 10 sexual harassment complaints. In some cases she found the allegations unfounded. Others resulted in the taking of disciplinary action against the offenders, action which ranged from counseling to discharge. Traa testified that there were three or four cases of employee discharge relating to violations of the company's sexual harassment policy. Ibid.

Robert Traa, the other owner/operator of the stores, also took an active part in their

operation. He and Karen Traa frequently worked directly with the employees in the preparation and serving of meals. Ibid. Both Traas knew Complainant and, on several occasions during her employment, spoke with and worked alongside her. Between August 1992 and January 1996, Karen Traa visited and spent time in both the North Wildwood and Cape May Court House stores between 25 and 50 times each (ID 4-5). Todd Kemp, the Director of Operations, also visited the stores frequently, and at times worked side-by-side with Complainant. On none of these visits did Complainant tell either of the Traas or Kemp that she was being subjected to sexual harassment or otherwise indicate that she was unhappy because she felt the workplace had become hostile to her (ID 5).

During the August 1992 to January 1996 period, the manager of the Cape May Court House store was John Miley, and the manager of the North Wildwood store was Peter Francis.[3] The supervisory hierarchy in both stores was swing manager, second assistant store manager, first assistant store manager, and store manager. Only the store manager had the power to hire, fire and suspend employees without first consulting upper management, i.e., Robert Traa, Karen Traa, and Todd Kemp.[4] The first assistant store manager had the power to issue an oral warning, and to "write up" an employee for breaking company rules. Writing up an employee meant to prepare a written warning and insert it into the employee's file. The second assistant store manager had the power to issue an oral warning and to recommend the issuance of a written warning. All of the

[3]As will be described hereafter, Complainant complained to or informed a manager that she was being sexually harassed on only one occasion. A second instance in which she was subjected to harassment was brought to the attention of a manager by second assistant store manager Linda Wilson.

[4]The only exception was Peter Francis, who became first assistant store manager when he transferred to the Cape May Court House store during the winter months.

managers had the power to assign tasks to the crew (the lower level hourly employees who prepared and served food). Ibid.

Complainant's sexual harassment allegations while employed by Respondent centered primarily on a co-employee named Brian Travis. A member of the crew like Complainant, his duties involved the preparation and serving of food. He would frequently, and according to Complainant, constantly make comments which Complainant found rude and offensive. These comments, sometimes directed at her and sometimes at other females and even customers, included "you've got junk in your trunk" and "you've got a soft booty." Ibid. According to Complainant, he once told her, "I know why your breasts are so small...[you haven't got] anyone to suck them"(ID 5-6). Sometimes he would pucker his lips and make kissing sounds. Several times he tried to touch her, but she brushed his hand away and chased him to the back of the store. On one occasion he touched her on her "rear." (ID 6).

On another occasion, date and year unspecified, while Complainant was walking past Travis in the back of the store, he puckered his lips at her, made a kissing sound, and mimicked the action of a vibrator with a cucumber he was holding. Complainant told him this was sexual harassment. At that moment, Linda Wilson, a second assistant store manager, came around the corner and observed what had happened. Wilson confirmed to Travis that his actions constituted sexual harassment, and reported it to John Miley. Travis was called into Miley's office. Miley told him that this conduct would not be tolerated and could result in his being fired. Miley told Wilson to "write [Travis] up," i.e., to complete a "Disciplinary Action" form and put it in Travis's file, which she did (ID 6).

In addition, another employee, Butch Robertson , on two or three occasions stuck his tongue

out at Complainant and wagged it, suggesting she participate in oral sex. Several times he made reference to her "posterior" and tried to touch her. Once he did touch her, and she chased him to the rear of the store. Furthermore, Robertson was friendly with Travis and "encouraged" his inappropriate behavior. Robertson was a maintenance worker with no authority over Complainant. Ibid.

One day, Complainant told Miley that Robertson was directing obscene remarks towards her. Miley confronted "Butch," made him aware of the accusations, and warned him that if he heard any more complaints on the subject he, Robertson, would be "dealt with severely." Miley told Complainant what he had done and put a "warning" form into Robertson's personnel file. Thereafter, Robertson approached Complainant and apologized. Ibid.

During December of either 1994 or 1995, the Cape May Court House employees gathered to present a birthday cake to store manager Peter Francis. Complainant also gave Francis a leather cap as a gift, and Francis thanked Complainant and kissed her on the lips (ID 6-7). Complainant testified that she was surprised by this, and that the kiss lasted "a second" and then the two simultaneously withdrew. From time to time over the three and one-half years of Complainant's employment, male and female employees including a few supervisors, discussed in graphic detail their private sex lives. Complainant stated that she felt this was "not appropriate," and when it happened she would walk away (ID 7).

At some unspecified date, probably during 1995, after a telephone call she had made to Todd Kemp, Complainant attended a meeting in Kemp's Cape May Court House office. Complainant was expecting the main subject matter of the meeting to be the sexual harassment she felt she had been experiencing. To her surprise, she found herself on the defensive. Both Miley and Francis alleged

that employees at both stores were complaining about her conduct and attitude, particularly her alleged outbursts. Complainant did not raise with Kemp, Miley, or Francis any specific complaints that she had, but she remembers Kemp telling her at the end of the meeting that if she experienced any acts of sexual harassment she should report them to him. She then said "well Todd, what do you think I was trying to say to you," and immediately walked back to her workstation. When she asked other employees if they had made any complaints about her, they denied it (ID 7).

No tangible adverse employment action was taken against Complainant during her employ by Respondents. In fact, at some point during her employment she was given a promotion. During the time that Complainant worked for Goldsworthy, that is, from January 26, 1996 to October 29, 1996, the sexual harassment worsened significantly and, prior to being discharged, she was "written up" several times for "being loud." Ibid.

Conclusions of Law

Citing the New Jersey Supreme Court's decision in Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 592 (1993), the ALJ found that a plaintiff states a cause of action for hostile work environment sexual harassment upon a alleging that he or she was subjected to discriminatory conduct that a reasonable person of the same sex would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or offensive work environment (ID 8). Applying these standards, the ALJ concluded that the insulting remarks and harassing conduct of Brian Travis and "Butch" Robertson satisfied the Lehmann standards, and that Complainant established the existence of a hostile work environment based on sex (ID 9).

This finding notwithstanding, the ALJ concluded that Respondents were not liable for the hostile work environment created by Complainant's co-employees because Complainant failed to

establish that Respondents knew or had reason to know that a hostile work environment existed and, further, Respondents had in place an effective mechanism for reporting and resolving complaints of sexual harassment which Complainant unreasonably failed to avail herself of (ID 10). Citing Herman v. Coastal Corporation, 348 N.J. Super. 1, 20 (App. Div. 2002), and Heitzman v. Monmouth County, 321 N.J.Super. 133, 146 (App. Div. 1999), the ALJ found that an employer may be liable for the harassing conduct of a co-worker, but only if management-level employees knew or should have known about the harassment and the employer failed to take prompt remedial action (ID 9-10). Moreover, the ALJ found that an aggrieved employee has a duty to avoid or mitigate harm (ID 10). Therefore, if an employer has provided a proven, effective mechanism for reporting and resolving complaints that is readily available to employees, the employee cannot recover damages if he or she unreasonably fails to take advantage of that mechanism (ID 10, relying on Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Industries v. Ellerth, 524 U.S. 742 (1998).

Here, the ALJ found that no instance of sexual harassment occurred in the presence of owners or upper management (i.e., Karen Traa, Robert Traa, and Todd Kemp), despite the undisputed fact that all three regularly appeared in both stores, and worked side-by-side with Complainant and her co-employees (ID 10). Additionally, the ALJ stated that there were only two instances when sexual harassment was reported to a store manager and, in each instance, Miley took prompt and appropriate disciplinary action. The ALJ concluded that although Linda Wilson, a second assistant store manager, observed one or more instance of sexually inappropriate or offensive conduct, she cannot be considered a management-level employee since she had no power to hire or fire anyone, or the power to take any disciplinary action whatsoever.

Further, the ALJ found that Respondents had in place a widely publicized and well designed

policy and program to combat sexual harassment, which included orientation sessions for new employees, refresher training sessions for existing employees, and the distribution of a handbook and a "Policies and Practice" pamphlet to all employees, old and new. Management also testified that all complaints of sexual harassment were investigated, and appropriate disciplinary action, including discharge, was taken when the complaints were found to be justified. The ALJ concluded that Complainant failed to inform either owner/operator that she was being harassed despite numerous opportunities to do so. Complainant did not make any specific complaints of sexual harassment to the Director of Operations, and except for one occasion, Complainant failed to complain to either store manager, and offered no reason why she failed to do so (ID 11). Therefore, the ALJ concluded that Complainant had no viable claim under the LAD, and dismissed her complaint against Respondents.

EXCEPTIONS

Complainant takes exception to the ALJ's finding that she is not entitled to recover because she unreasonably failed to take advantage of the corrective measures available to her. Complainant takes exception to three specific findings of the ALJ: 1) that Complainant unreasonably failed to take advantage of the preventative or corrective opportunities available to her; 2) that Complainant's failure to complain to upper-management prevents her from a recovery; and 3) that Complainant's complaint to Second Assistant Store Manager Linda Wilson did not bind the employer because Wilson could not be considered a "management" level employee (Ce 1). Instead, Complainant urges the Director to find that Linda Wilson's knowledge of inappropriate conduct, derived from Complainant's complaint to her and Wilson's personal observation, is imputable to Respondents because Ms. Wilson held a supervisory position contemplated by Respondent's anti-harassment

policy as one of the positions to whom complaints of harassment should be reported (Ce 2). Thus, Complainant contends that the evidence precludes a finding that she unreasonably failed to take advantage of the preventive or corrective mechanism made available to her (Ce 2-3).

Respondents replied to Complainant's third exception, essentially stating that the record supports the ALJ's decision because when Wilson observed the acts of sexual harassment, she immediately took action, and disciplinary action then followed. Respondents further argued that no further acts of sexual harassment were reported to Ms. Wilson while Respondents owned the two McDonald's locations (Re 1-2).

THE DIRECTOR'S DECISION

The Director's Factual Findings

The ALJ heard testimony from Complainant, her witnesses, and Respondents' witnesses regarding the sex-related comments and conduct in the workplace, the supervisory structure of the Respondents' companies, the presence of a sexual harassment complaint procedure, and Complainant's failure to utilize this internal grievance mechanism. Based on this testimony, the ALJ made specific credibility findings in his initial decision. Generally, the Director must give substantial weight to the ALJ's credibility determinations and to all findings based on these determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses and to assess their demeanor. See Clowes v. Terminix International, Inc., 109 N.J. 575, 587 (1988); Renan Realty Corp. v. Department of Community Afairs, 182 N.J. Super. 415, 419 (App. Div. 1981). Where the Director finds it necessary to reject or modify a factual finding of the ALJ, the Director must state with particularity the substantial, credible, competent evidence in the record on which the Director relies in making new or modified findings. N.J.A.C. 1:1-18.6 (d). After thorough

review of the record, applying the legal standards set forth above, the Director adopts the ALJ's factual findings as set forth in the initial decision and summarized above.

The Legal Standards and Analysis

Sexual harassment is a form of sex discrimination prohibited by the LAD. Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 601 (1993). The standards for determining employer liability for sexual harassment under the LAD are set forth in Lehmann, and involve two categories of sexual harassment. Quid pro quo sexual harassment occurs when an employer attempts to make an employee's submission to sexual demands a condition of his or her employment. In contrast, hostile work environment sexual harassment occurs when an employer or fellow employee harasses an employee because of his or her sex to the point at which the working environment becomes hostile. Lehmann v. Toys 'R' Us, supra , 132 N.J. at 601. The instant complaint falls under the hostile work environment strand of sexual harassment.

To establish a claim for hostile environment sexual harassment, a female complainant must demonstrate she was subjected to conduct that occurred because of her sex and that a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile or offensive working environment. Id. at 603-604. Based on the findings of fact and the record developed by the parties, the Director adopts the ALJ's conclusion that Complainant satisfied the standard for establishing hostile environment sexual harassment with respect to the conditions to which she was subjected by co-employees Travis and Robertson.

The record supports Complainant's assertions that Travis made comments which were crude and offensive, and were often times directed at her and other female employees (ID 5). He made gestures suggestive of sexual activity, and he impermissibly touched her (ID 5-6). On the occasion

that Travis mimicked the action of a vibrator with a cucumber he was holding, Complainant told him that those actions constituted sexual harassment. Co-employee Butch Robertson also exhibited conduct suggestive of sexual activity and impermissibly touched Complainant (ID 6). In light of these findings, the Director adopts the ALJ's conclusion that Complainant was subjected to conditions sufficiently severe or pervasive to satisfy the standard for a sexually hostile work environment under Lehmann.

The Director also agrees with the ALJ, however, that Respondents are not liable for the hostile environment created by these employees.[5] An employer is generally vicariously liable for a hostile work environment created by a supervisor because the power or authority an employer delegates to a supervisor to control the day- to- day working environment facilitates the harassing conduct. Lehmann, supra, 132 N.J. at 619-620. But under agency principles, an employer is not generally liable for harassing conduct by co-workers, because employers do not entrust mere co-employees with any significant authority with which they might harass a victim. Heitzman v. Monmouth County, 321 N.J. Super. 133, 145 (1999). However, as noted in Lehmann, even if an employer has not delegated authority to the harasser, the employer may be held liable for the harassment if the employer was negligent by failing to take appropriate action to prevent and remedy

[5]Although the Director concurs with the ALJ's ultimate conclusion concerning liability, the Director does not agree that the affirmative defense to hostile environment sexual harassment claims recognized by the U.S. Supreme Court is applicable to this case (ID 10, citing Faragher v. City of Boca Raton, 524 U.S.775 (1998) and Burlington Industries v. Ellerth, 524 U.S. 742 (1998)). The so-called Faragher/Ellerth defense is available under a Title VII sexual harassment claim where supervisory employees are alleged to have engaged in harassment. The instant case involves allegations of harassment by co-employees. In addition, the New Jersey Supreme Court has not specifically adopted the defense in an LAD claim despite the opportunity to do so. See Gaines v. Bellino, 173 N.J. 301 (2002); Entrot v. BASF Corporation, 359 N.J. Super. 162, 192 (App. Div. 2003).

sexual harassment. Lehmann, supra,132 N.J. at 621. Thus, it is well settled that when a co-worker engages in harassing conduct the employer may be liable, but only if "management-level employees knew, or in the exercise of reasonable care should have known, about the campaign of harassment," and the employer failed to take prompt and effective measures to stop it. Heitzman v. Monmouth County, supra, 321 N.J. Super. at 146, quoting Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998); Herman v. Coastal Corp., 348 N.J. Super. 1, 24 (App. Div. 2002).

As noted, an employer may be held liable for the harassing conduct of its employees if the employer was negligent or reckless. Although the existence or absence of an effective anti-harassment policy and complaint mechanism does not automatically determine whether or not an employer was negligent, the existence of effective preventative mechanisms is some evidence of whether the employer was negligent. Lehmann, supra, 132 N.J. at 621. The New Jersey Supreme Court has identified several factors to be considered in determining whether an employer acted negligently regarding its implementation of anti-harassment policies and procedures: 1) Did the employer enact well publicized formal policies prohibiting harassment in the workplace? 2) Did the employer establish effective formal and informal complaint structures for employees to use? 3) Did the employer provide anti-harassment training, mandatory for supervisors and managers and available for all employees? 4) Did the employer implement effective sensing or monitoring mechanisms to check the trustworthiness of its anti-harassment policies and complaint mechanisms? and 5) Did the employer express and demonstrate through consistent practice an unequivocal commitment from the employer's highest levels that harassment would not be tolerated? Gaines v. Belino, 173 N.J. 301, 313 (2002), citing Lehmann v. Toys 'R' Us, supra at 621.

The Director finds that Respondents exercised reasonable care as measured by the foregoing

standards in the implementation of its anti-harassment policy. Respondents had in place an anti-harassment policy that was clear and concise (C- 2, C-4). Following the statement of policy was a listing of contact information, including phone numbers, of the two owner/operators (Robert Traa and Karen Traa), the director of operations (Todd Kemp), and two of the area supervisors. Respondents also periodically distributed information about its anti-harassment policy and complaint mechanism. The policy was disseminated in the handbook delivered to all new employees, and was included in the "Policies and Practices" pamphlet also made available to all employees. Complainant received copies of both publications. Furthermore, new employees were told at their orientation sessions that sexual harassment would not be tolerated and should be reported to specific personnel. Respondents demonstrated their intolerance for sexual harassment by internally investigating over ten complaints of sexual harassment and even firing three or four employees for such conduct over a four year period (ID 4).

Moreover, the record clearly establishes that in the two instances in which Respondents learned that Complainant was subjected to sexual harassment, Respondents took prompt, effective measures to stop the harassment by co-workers. On one occasion, second assistant store manager Linda Wilson personally observed co-worker Travis mimic a sexual act in Complainant's presence. Wilson stated to Travis that his actions were sexually harassing and reported it to store manager Miley, who issued a warning directly to Travis and instructed Wilson to put a warning slip in his personnel file. On the second occasion, Complainant complained directly to Miley that co-worker Robertson had directed obscene remarks to her. Again, Miley personally warned Robertson of severe consequences should his behavior continue, and placed a warning slip in Robertson's personnel file. Significantly, on the two occasions that Miley was informed of incidents of

harassment, disciplinary action was taken without delay. Complainant presented no credible evidence that the harassment by these individuals continued subsequent to Respondents' corrective action.

In support of her claim, Complainant relied on handwritten notarized statements submitted by former co-workers Marta Phillips and James Curran, Jr., and the OAL testimony of Linda Wilson (C-8, C-9, T2 54-111). The unsworn written statements describe the harassing conduct of Travis and/or Robertson and assert that management knew of the conduct but took no action (C-8, C-9). However, the statements ignore the fact that Miley did discipline Travis and Robertson, and they provide no information regarding the timing of the inappropriate conduct in relation to Respondents' corrective action. Neither individual testified at the hearing, so the ALJ was unable to consider their testimony and assess their credibility. Although Linda Wilson testified at the hearing, the ALJ found her recollection of dates, persons, and other details to be "very poor or non-existent," (ID 2), and her testimony lacked any reference to the specific times when the alleged acts of harassment occurred. Hence, in determining Respondents' liability the ALJ placed little significance in the statements of Phillips and Curran, or the testimony of Wilson, other than to find that they corroborated the claim that Travis and Robertson made offensive sexual remarks and gestures. Accordingly, Complainant presented no credible evidence that would warrant overturning the ALJ's conclusion that Respondents took prompt effective action in response to the harassment by Travis and Robertson.[6]

[6]To the extent Complainant relies on testimony at the hearing to overturn the factual basis for the ALJ's conclusions, Complainant must provide transcripts of the relevant portions of the hearing testimony to support her exceptions and cite specific portions of the transcript. See Matter of Morrison, 216 N.J. Super.143 (App. Div. 1987). Here, Complainant has provided only the transcripts for the hearing on March19, 2001 and March 22, 2001. Therefore, the Director is unable

Courts have found that employers have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is a part of a pattern of harassment in the workplace. Herman v. Coastal Corporation, 348 N.J. Super.1, 24-25 (App. Div. 2002). In the present case, Respondents became aware of two instances of sexual harassment. Because Respondents took prompt disciplinary action against Travis and Robertson, the sexually harassing conduct was arrested and one of the offenders even issued an apology to Complainant. The Director finds that Respondents had an effective procedure for encouraging victims of harassment to report such conduct, and for investigating the charges and taking prompt effective action to remedy reported discrimination. In the two instances in which Respondents were made aware of sexual harassment directed at Complainant, prompt disciplinary action was taken.[7]

Although the ALJ found that Complainant's allegations of sexual harassment "centered primarily" on the actions of Travis, and to a lesser extent Robertson, (ID-5), Complainant suggested

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to review the transcripts of the other hearing dates, including those containing Complainant's testimony.

[7] The ALJ correctly found that any sexually inappropriate conduct observed by Linda Wilson cannot properly be imputed to Respondents since she was not a management-level employee with the authority to hire or fire, or impose meaningful discipline (ID 11). In addressing when an employee's knowledge may be imputed to the employer, the New Jersey Supreme Court has favorably cited decisions from other jurisdictions that have considered as factors whether the employee has authority to hire, fire, discipline, or control wages and schedules; and whether under the employer's express policy the employee had responsibility to relay harassment complaints to management. Cavuoti v. New Jersey Transit Corp., 161 N.J. 107, 124 (1999), citing Hunter v. Countryside Assoc. For the Handicapped, Inc., 723 F. Supp. 1277, 1278 (N.D. Ill. 1989); Campbell v. Board of Regents of the State of Kansas, 770 F. Supp. 1479, 1487-88 (D. Kan. 1991). In this case the ALJ found that, as a second assistant store manager, Wilson could only issue oral warnings and recommend issuance of written warnings, (ID 5), and Respondents' anti-harassment policy did not designate the second assistant store manager as part of the management team to whom complaints about discrimination should be reported (ID 3).

in her testimony that she was subjected to episodes of sexual harassment beyond the acts attributed to these employees. For example, it was alleged that, "[f]rom time to time over the three and a half years complainant worked for respondent" male and female employees openly discussed their private sex lives in graphic detail (ID 7). However, Complainant produced insufficient evidence to demonstrate that Complainant was subjected to sexual harassment for which Respondents are responsible.

The ALJ made no specific findings concerning Complainant's claim that employees discussed their private sex lives at the workplace. Nevertheless, assuming these conversations took place as alleged, there is no evidence that they were in any way directed at Complainant or that they created a hostile work environment. Further, the Director has found that Respondent had established an effective mechanism for reporting, investigating and addressing complaints of harassment, and this process was used successfully by Complainant on two occasions. Despite her familiarity with the process and positive experiences with it, Complainant failed to use it to address the workplace conversations that she found objectionable. There is no evidence in the record that Complainant ever complained to management about sexual harassment in the form of conversation or banter among employees. Moreover, the ALJ concluded that "there is not a shred of evidence" that Complainant was subjected to acts of sexual harassment in the presence of Respondents' owners or managers, despite the fact that they regularly worked alongside Complainant and her co-workers (ID 10). Nor is there evidence that any acts of harassment affecting Complainant were reported to management, besides the two instances involving Travis and Robertson (ID11). Moreover, Karen Traa credibly testified that all complaints of sexual harassment were investigated and appropriate discipline, including discharge, was taken when justified (ID11). In deciding in favor of respondents,

the ALJ found that Respondents' witnesses (Karen Traa, Robert Traa, and Todd Kemp) were thoroughly credible, and answered all questions responsibly, candidly, consistently, and coherently (ID 2). Conversely, the ALJ found Complainant and Linda Wilson to be much less credible, and their testimony to be contradictory and vague. Ibid. Thus, a review of the entire record demonstrates that Complainant has failed to show that Respondents are liable for the existence of a hostile work environment associated with the personal conversations which took place at Respondents' facilities.

CONCLUSION AND ORDER

Based on the foregoing, the Director concludes that Complainant has failed to satisfy her burden to demonstrate that she was subjected to hostile environment sexual harassment for which Respondents are liable. There is substantial credible evidence in the record to support the ALJ's conclusion that Respondents are not liable for negligently maintaining a sexually hostile work environment in violation of the LAD. Accordingly, having conducted a thorough and independent review of the record, the Director adopts the ALJ's conclusion that Respondents have not violated the LAD, and hereby dismisses this complaint.

DATE_____

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J. FRANK VESPA-PAPALEO, ESQ.,
DIRECTOR