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HR-83-026-JL

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by Irene  
Gomez-Bethke, Commissioner,  
Department of Human Rights,

Complainant,

FINDINGS

OF FACT,  
vs.

CONCLUSIONS OF LAW

AND ORDER

Town Taxi Company,

Respondent.

The above-entitled matter came on for hearing 'before Jon L. Lunde, duly appointed hearing Examiner, commencing at 9:00 a.m. on Monday, September 26, 1983, at the Office of Administrative hearings, Courtroom 12, 300 Summit Bank Building, 310 Fourth Avenue South, Minneapolis, Minnesota, pursuant to a Notice and Order for Hearing dated April 29, 1983. Thomas J. Barrett, Special Assistant Attorney General, 1100 Bremer tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared on behalf of the complainant. Thomas E. Reiersgord, Attorney at Law, Yngve & Reiersgord, 6250 Wayzata Boulevard, Minneapolis, Minnesota 55416, appeared on behalf of the Respondent. The record closed on November 1, 1983, upon receipt of the last brief authorized by the Hearing Examiner.

NOTICE

Pursuant to Minn. Stat. 363.071, subd. 2 (1982), as amended by Minn. Laws 1983, Ch. 301, 201, this Order is the final decision in this case and under Minn. Stat. 363.072 (1982), as amended by Minn. Laws 1983, Ch. 247, 144-145, the Commissioner of the Department of Human Rights or any other per

Son aggrieved by this decision may seek judicial review pursuant to Minn. Stat. sec. 14.63 through 14.69 (1982), as amended by Minn. Laws 1983, Ch. 247, 9-14.

#### STATEMENT OF ISSUES

The issues in this case are as follows:

1. Whether the Complainant is collaterally Estopped from bringing this action due to the dismissal of the Charging Party's charge of sexual discrimination by the Equal Employment Opportunity Commission on June 24, 1983.

2. Whether the Respondent is an employer as defined by Minn. Stat. 363.01, subd . 15 (1982).

3- Whether an employee of the Respondent discriminated against the Charging Party in the terms, conditions or privileges of her employment contrary to the provisions of Minn. Stat. 363.03, subd. 1(2)(c)(1980), as amended.

4. The damages, if any, that the Charging Party is entitled to receive from the respondent and the other relief that should be ordered.

Based upon all the files, records and proceedings herein the Hearing Examiner makes the following:

#### FINDINGS OF FACT

1. the Respondent operates a taxicab company in the Twin City metropolitan area. Its principal place of business is in Fridley, Minnesota. In August, 1979, the Charging Party, was employed by the Respondent as a taxicab driver and part-time dispatcher. She worked in a facility the Respondent operated in St. Louis Park.

2. When her employment commenced Charging Party drove a cab provided by the Respondent. As a taxicab driver, she worked the afternoon shift from 2:00 p.m. to midnight. As a dispatcher, she worked from 11:00 a.m. to 7:00 p.m. on Sundays. A dispatcher's duty is to relay telephone calls for taxicab service to the cab driver closest to the address where the pickup is to be made.

3. Charging Party drove one of respondent's cabs as an employee for approximately six months. However, in February of 1980 she discontinued driving the Respondent's cabs and became an "owner-operator" by purchasing her own cab and agreeing to pay the Respondent monthly dues in return for its dispatching services. As an owner-operator Charging Party was not paid any wages as a cabdriver. Instead she was entitled to keep all the revenues she earned and paid her own operating expenses, including the dues payable to the Respondent and a rental fee she paid to the Respondent for a two-way radio she leased from it.

4. After becoming an owner-operator, Charging Party continued to work as a dispatcher on Sundays until June, 1981, when she was discharged after a dispute concerning her duties in that position. She was reinstated after arbitration proceedings that summer, but has worked infrequently as a dispatcher on Sundays, or at any other time, since reinstatement. The wages Charging Party earned as a dispatcher were either paid to her by check or offset from dues owed to the respondent, or both.

5. When Charging Party first began working for the Respondent, Robert McCullough was the dispatcher on the after-noon shift. Charging Party and McCullough had a good working relationship at the time he left his employment in the early winter of

1980.

6. McCullough returned to work for the Respondent as its afternoon dispatcher in the summer of 1980. At that time, or shortly thereafter, Charging Party was involved in at least three different disputes with the Respondent. McCullough assisted her in those matters and took her "under his wing." as a union steward, McCullough represented Charging Party during the arbitration of the grievance she filed when discharged as a dispatcher. In addition, McCullough consulted with Charging Party in her disputes with the Respondent concerning the bumper it required her to install on her cab, and the personal lettering that she put on her cab identifying it as the "Cab of Distinction". The Respondent insisted that all cabs be equipped with special bumpers and would not allow the distinctive identification Charging Party added to her cab. It refused to dispatch calls to her until she installed the appropriate bumper and removed the unique lettering. Charging Party complied with both of these demands.

7. During the summer, 1920, and into the fall, McCullough and Charging Party developed a close relationship. They frequently met for breaks when McCullough got off work at 10:00 p.m., and either had coffee at a local restaurant or went for walks together. On at least two occasions McCullough was Charging Party's guest at her home.

S. In Charging Party's mind, she and McCullough had a father/daughter relationship. McCullough felt differently, and on two occasions late in the fall or early in the winter, 1980, McCullough told Charging Party that he loved her and he kissed or attempted to kiss her. Charging Party told him that 'he was too old for her and that she was not interested in any romantic involvement with him. After that McCullough did not make any sexual advances toward Charging Party or attempt to kiss her and did not make any sexual demands upon her.

9. however, after Charging Party made it clear to McCullough that she would not have a romantic involvement with him, she perceived a change in -his behavior toward her. the first change she noticed occurred when she was parked at a cabstand one evening. McCullough, who was off duty at that time, came to the cabstand and proceeded to call her names. She left when he would not stop.

10. On two or three later occasions McCullough came to the office when Charging Party was dispatching cabs and stared at 'her. McCullough said that he was supervising her work. On one of those occasions, she tried to hold the door shut when McCullough left the room but he forced his way back in.

11. Charging Party also felt that McCullough was sarcastic on the radio and that he had unjustifiably belittled her. on one occasion, he failed to deliver a message from her boyfriend and kidded her about the fact that the boyfriend had called her. On another occasion, he kidded her about her calling in sick and refusing to take a call dispatched to her. Charging Party allegedly became so frustrated and angry about his conversation on the radio that she went home early on approximately ten occasions during the period from early winter 1980 through February 27, 1982.

12. (Xi three occasions, McCullough refused to assign work to Charging Party after arguments between them concerning the number of calls dispatch to her. After those arguments, McCullough took her off the air for the day and would dispatch no further calls to her.

13. On several occasions, Charging Party complained to Glen Bierbrauer, the general manager and part owner, about being belittled on the air by McCullough. After each complaint, Bierbrauer warned McCullough not to engage in unnecessary radio conversation and to leave Charging Party alone. When no further complaints were made, Bierbrauer concluded that the problem had been solved. Charging Party did tell Bierbrauer that McCullough wanted a romance with her, but she never mentioned that he made sexual advances, treated 'her adversely by refusing to fairly dispatch calls to 'her, or that she left work on many occasions because of his radio conversation and belittling remarks. Bierbrauer did not know what McCullough said to Charging Party or what it was that she considered to be belittling (Dr sarcastic, and 'he did not investigate to find out what specific remarks were made. He was unaware that McCullough had ever attempted to kiss Charging Party or that he had forced his way into the dispatching office.

14. Diana Mucciacciaro was and continues to be an owner-operator for the respondent. She heard arguments between McCullough and other cabdrivers over

the radio. It was not unusual for the dispatcher and the various cabdrivers to have arguments if the drivers forgot to pick up a patron, took too much time in doing so, or objected to the dispatcher's assignment of fares. The remarks she heard McCullough make to Charging Party were not any different from or more frequent than the remarks McCullough made to other drivers on the air. ever, Charging Party's reaction to them was unique because Charging Party would depress her microphone button thereby blocking all other cabdrivers' ability to contact the dispatcher.

15. McCullough was an authoritative and rather aggressive individual. He was employed by the Respondent at various times from 1966 through the fall of 1982 when he was finally laid off for financial reasons. During the period of his employment, he had been discharged approximately six times for trying to manage too much and taking too much authority, but he had always been rehired because of his dispatching abilities, his knowledge of the district and his fair and honest manner of allocating calls among the drivers. However, McCullough would not tolerate arguments over his dispatching on the air, and when cabdrivers complained about his assignment of calls, he would take these drivers off the air, which meant that they were not given any business until they spoke to Bierbrauer.

16. All the Respondent's cabdrivers are now owner-operators who own their van vehicles and pay their own expenses. They keep all income, but do pay dues to the respondent in return for dispatching services. However, all owner-operators are members of Teamsters' Local 792 which is recognized by the National Labor Relations Board as a union.

17. The Respondent cab company was owned by Steve Harvey and Bierbrauer during the period of Charging Party's employment. However, as a result of financial difficulties they sold the company to Henry C. Bierbrauer, its former owner,

in March, 1923.

18. Charging Party continued to work for the Respondent until March 1983, when her contract was terminated due to dissatisfaction with her job performance and her efforts to establish a competitive taxicab business.

19. In February or March, 1982, Charging Party filed a charge of discrimination against the Respondent with the Minnesota Department of Human Rights and the Equal Employment

Opportunity Commission (EEOC). On June 24, 1983, the EEOC determined that there was no probable cause to believe that the Respondent had discriminated against her for purposes of Title VII of the Civil Rights Act of 1964, as amended, on the grounds that its dispatcher, Robert McCullough, had belittled her on the air or refused to give her orders. However, the Department of Human Rights pursued her charge. Its Complaint was served on April 29, 1983. The Respondent duly answered that Complaint.

Based on the foregoing Findings of Fact, the Hearing Examiner makes the following:

#### CONCLUSIONS

1. That the Hearing Examiner has subject matter jurisdiction of this matter under Minn. Stat. 363.071, subds. 1 and 2 (1980), as amended, and 14.50 (1983).
2. that the Respondent was given proper notice to this proceeding and that the Department of Human Rights has complied with all relevant, substantive and procedural requirements of law and rule.
3. that the Respondent is an employer for purposes of Minn. Stat. 363.01, subd. 15 (1982).
4. That the Respondent's dispatcher was the Charging Party's supervisor and not a co-worker for purposes of Respondent's liability under the respondeat superior doctrine.
5. That the Complainant established a prima facie knowing of sexual harassment affecting the terms and conditions of the Charging party's employment for purposes of 'Minn. Stat. 363.03, subd. 1(2)(c)(1980), due to her temporary suspension from work on three occasions.
6. That the Complainant failed to establish a prima facie case of sexual harassment affecting any other terms and conditions of 'her employment or any constructive suspension resulting from intolerable working conditions for purposes of Minn. Stat. 363.03, subd. 1(2)(c).
7. That the prima facie case of sexual harassment was rebutted by the Respondent.
2. That the Complainant failed to establish, 'by a preponderance of the evidence, that she was discriminated against on the basis of her sex by the Respondent, its agents or employees.
9. That the Complainant is not barred by res judicata or equitable estoppel.

Based on the foregoing Conclusions of Law, and for the reasons set forth in the attached Memorandum:

IT IS ORDERED that the Complainant's Complaint be and the same is 'hereby DISMISSED.

Dated this 8th day of November, 1983.

JON L. LUNDE  
Hearing Examiner

Reported: Taped

MEMORANDUM

JURISDICTIONAL MATTERS

The Respondent argued that, as a cab driver, Charging Party was not its employee but an independent contractor and that it is not therefore, subject to the provisions of the Minnesota Human Rights Act or within Minn. Stat. 363.01, subd. 15, defining an employer.

On that issue the Complainant bears the burden of proof to present facts establishing a master and servant relationship between Charging Party and the respondent. The usual rule is that one seeking relief under a statute must prove 'himself within the statute's terms. 31A C.J.S., Evidence 104, p.

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Federal Courts have held that independent contractors are not covered by Title VII. See, e.g., Mathis v. Standard Brands Chemical Indus., 10 F.E.P.

295, 297 Ga. 1975). in determining whether a particular individual is an employee, the federal courts have begun to apply a modified common law test which looks to the degree of control involved and the economic "realities" -- the economic dependence of the worker on the putative employer -- in determining whether an employment relationship exists. I Larson, Employment Discrimination 5.22, p. 2-12.

Li this case, Complainant showed that Charging Party was employed as a dispatcher and that Respondent was her employer in that capacity. The Complainant also established that Respondent controlled the equipment Charging Party used, by requiring certain bumpers and the removal of distinctive lettering, and that she was dependent on the Respondent's dispatchers for business. Complainant also established that Charging Party was disciplined by McCullough -- when hne took her off the air -- and that she was ultimately "discharged" by the Respondent for unsatisfactory job performance. The degree of control Respondent exercised over Charging Party in these areas, coupled with her dependence upon it, persuades the Hearing Examiner that the Respondent was her employer for purposes of the Act, in spite of the fact that she owned her own cab and received no wages. Although the record is incomplete, the evidence of an employment relationship preponderates.

The Respondent implied that the EEOC's dismissal of a similar charge filed by Charging Party is res judicata or collaterally estops the Complainant in -this case.

This action is not barred on either theory. Four basic elements must present to permit dismissal on either ground:

1. The parties must be the same in both actions or in privity with prior parties;
2. The claims or issues in both actions must be the same;
3. There must have been a full and fair adjudication on the issues determined in the prior action; and
4. The prior action must 'have resulted in a final judgment that has not been modified.

Baltimore S..S. Co. v. Phillips, 274 U.S. 316 (1927)-;  
Campbell v. Glenwood  
Hills Hospital, Inc., 142 N.W.2d 255, 259 (Minn. 1966), Ellis  
v. Minneapolis

Commission of Civil Rights, 319 N.W.2d 702, 704 (Minn. 1982).

In this case, there has been no full and fair adjudication on Charging Party's charge. Further, the EEOC dismissal was not a final judgment. That dismissal authorized her to bring a private suit in federal court. The fact that she chose, instead, to pursue her claim in state administrative proceedings should not prejudice her. Thus, it is concluded that 'her charge cannot be dismissed due to the EEOC finding of no probable cause.

#### THE CHARGE

The Complainant charges the Respondent with sexual discrimination against

the Charging Party contrary to the provisions of Minn. Stat., 363.03, subd. 1 (2)

(c). The relevant portions of 363.03 provide as follows:

Subd . 1- Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:

2) for an employer, because of sex

(c) 'To discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

The provisions of Minn. Stat. Ch. 363, are modeled after Title VII of the

Civil Rights Act of 1964, 42 U.S.C. 2000e, e@ se The principles enunciated by the Federal courts in cases involving the Civil Rights Act are

applicable in construing the Minnesota Act. Danz v. Jones, 263 N.W 2d 395 (Minn. 1978). The ultimate burden or persuasion to establish an act of

illegal discrimination rests at all times with the Complainant and involves a

three-step process of pleading and proof. The Complainant must first estab-

lish a prima facie case of discrimination. The Respondent must then rebut the

prima facie case by articulating some legitimate, nondiscriminatory reason for

the employment action and the Complainant may then show thhat the reasons

offered are a mere pretext for illegal discrimination. Hubbard v. United

Press Intern., Inc., 330 N.W. 2d 429, 441n. 12 (Minn. 1983).

In this case, tne Complaint charges that the Respondent's dispatcher,

Robert McCullough, harassed and intimidated Charging Party after she refused to become

romantically involved with him. Under Title VII and the Minnesota Haman

Rights Act, it is an unlawful employment practice for an employer to

discriminate against any individual on the basis of sex with respect to that

individual's compensation, terms, conditions or privileges of employment.

Guidelines of the Federal Equal Employment Opportunity Commission,  
29 C.F.R.

1604.11 (a), broadly define sexual harassment partially providing  
as follows:

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to a rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Minnesota law is now almost identical with these Federal regulations.

Effective March 24, 1982, sex discrimination under Minn. Stat., 363.01,

subd. 10, was amended to include sexual harassment. Effective August 1, 1982,

Minn. Stat. 363.01, subd. 10(a) Refined sexual harassment as follows:

Subd. 10(a). Sexual harassment. "Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal (Or physical) conduct or communication of a sexual nature when:

(2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment . . . .

In order to establish a prima facie showing of sexual harassment as defined above, the complainant must show that the Charging Party was One Object of unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature, that the Charging Party rejected the advances, requests or other sexual conduct; that the rejection resulted in adverse employment decisions affecting her terms and conditions of employment and that the harassment, using a "but for" test, was based on sex. the basis of the prima facie showing is to present facts which, if not explained, make it more likely than not that the employment actions affecting the Charging Party's terms and conditions of employment were based on an illegal discriminatory factor. Fernco Construction Corp. v. Waters, 438 U.S. 567, 17 F.E.P. 1062 (197e).

The Complainant showed that the Charging Party is a woman and therefore a protected class member and that McCullough engaged in verbal and physical conduct of a sexual nature when he kissed Charging Party, told her he loved her and indicated a desire to have a romantic relationship with her. In addition, it is clear, as Charging Party testified, that she rejected the sexual advances made by McCullough, telling him that he was too old for her and that she did not want to become involved with him. Thus, all elements of a prima facie case of discrimination except. adverse employment consequences were established. As to adverse employment consequences, however, a prima facie showing of employment consequence was made only as to the three occasions when she was "Taken of the air" or, in effect, suspended from working for the duration of her shift. No other adverse employment consequences affecting a term, condition or privilege of her employment were established, and as to them, no prima facie showing harassment was made. Furthermore, as to her removal from the air, her prima facie showing of discrimination was persuasively rebutted and, on the entire

record, the Complainant failed to establish, by a preponderance of One evidence, that she was sexually harassed or otherwise discriminated against on the basis of her sex.

Because she refused McCullough's sexual advances, Charging Party alleges that the terms and conditions of her employment were affected in two different ways -- one tangible and one intangible. She alleges first, that McCullough unfairly assigned or dispatched fares to her and removed her from the air three times; and second, that he created an offensive and intimidating working environment that became so intolerable that she was, in effect, constructively discharged on each of the ten days she left work early and went home.

There is no credible evidence in the record that after Charging Party rejected McCullough's advances he did not assign work to her in the same manner that he assigned it- to other male or female cabdrivers. no evidence was presented showing that her income during the relevant time period was different from that of other cabdrivers, that she had a fewer n number of calls dispatched to her, or that McCullough was otherwise unfair or discriminatory in dispatching fares. the mere allegation of unequal work assignments is insufficient to

establish adverse employment consequences. Therefore, as to that allegation, no prima facie showing of harassment was made. However, her removal from the air on three occasions, which is tantamount to a suspension, does establish employment consequences, when considered in the context of Charging Party's other allegations -- particularly McCullough's observation of her on-the-job performance as a dispatcher, and a prima facie case of harassment. The burden to establish a prima facie case of discrimination is not an onerous one.

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that the Complainant needs to show are the bare essentials of unequal treatment based on sex. *Danz v. Janes*, supra, at 399.

However, the prima facie showing of harassment resulting from the three "suspensions" mentioned was effectively rebutted by the Respondent and, on the entire record, the Complainant has failed to establish, by a preponderance of the evidence, that the suspensions were related to her rejection of McCullough's romantic advances. The Respondent established, in rebuttal, that McCullough and other dispatchers frequently, if not commonly, took drivers off the air especially when drivers objected to dispatching decisions made and argued with the dispatcher on the air. Furthermore, the Respondent established that Charging Party argued with McCullough on the air and would, during the course of these arguments, block communications between the dispatcher and other drivers by depressing the broadcast button on her microphone. In view of the fact that these arguments occurred, and that both male and female drivers were taken off the air by McCullough in similar circumstances, it is not more likely than not that Charging Party's removal from the air was based on illegal, discriminatory criteria -- such as her rejection of his romantic advances. The context in which the "suspensions" occurred and the circumstances surrounding them were totally unexplained or elaborated on, and a finding of harassment in the absence of further explanation by the Charging Party simply cannot be made.

In determining whether sexual harassment has taken place, the entire record must be considered and the totality of the circumstances, including the

context in which the alleged incidents occurred. Thus,  
1604.11(b), of the

EEOC guidelines provides:

(b) In determining whether alleged conduct constitutes sexual harassment, the commission will look at the record as a whole and the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

The Minnesota Supreme Court has indicated that in sexual harassment cases

all the circumstances surrounding the conduct alleged to constitute 'harass-

ment, such as the nature of the incidents and the context in which they occur-

red should be examined. See Continental Can Co., Inc. v. State, 297 N.W.2d

241, 249 (Minn. 1980). In the instant case, the mere fact that Charging Party was

taken off the air three times during a thirteen-month period does not estab-

lish that it is more likely than not that the action was based on illegal dis-

criminatory criteria where no evidence is presented concerning the circum-

stances and the context in which that action was taken, or the time when it

occurred relative to her rejections of McCullough's expressed love for 'her.

Therefore, as to her removal from the air on two or three occasions, the prima facie case of harassment was rebutted.

As to the Complainant's charge that McCullough created an offensive working environment which, in effect, resulted in her- "constructive discharge" or "constructive suspension" on ten different occasions, no prima facie showing of sexual harassment was made. Charging Party alleged that McCullough observed her while she was dispatching cabs on three occasions, and once forced himself into the dispatching office when she attempted to bar the door. However, it was not shown that observing dispatchers was not one of McCullough's job duties, or that he did not observe other male dispatchers in the performance of their work. Furthermore, the times when these observations occurred and the circumstances and context in which they occurred were not established.

Similarly, while McCullough, went to a cabstand where Charging Party was parked and called her names in a loud voice, it is not known when that occurred, what names he called her or the other circumstances and context involved.

Charging Party also alleged that McCullough used sarcastic language and belittled her on the radio and testified that his conduct was so offensive that she felt it necessary to leave work early on approximately ten occasions. The only examples of that sarcastic and belittling language presented were McCullough's refusal to deliver her boyfriend's message to her and his gibes concerning the fact that the boyfriend had called her at work and McCullough's gibes concerning her illness one day when she called in sick.

The courts have recognized that the terms and conditions of employment include the environment in which an employee works, and that one's working environment can be so heavily polluted with discrimination as to completely destroy the emotional and psychological stability of protected class members. *Bundy v. Jackson*, 641 F.2d 934, 24 F.E.P. 1155 (D.C. Cir. 1981). In that case the court held that sexual harassment can be established even though the employee loses no tangible job benefits. Thus, Charging Party is entitled to relief if her working environment was substantially and adversely affected due to McCullough's observation of her or his conversations on the radio if they

caused her to leave work early on ten occasions and, in effect, constructively suspended her. Constructive discharge occurs when an employee resigns in order to escape intolerable working conditions caused by discrimination. *Continental Can Co. Inc. v. State*, supra, at 251, *Greenspan v. Automobile Club of Michigan*, 495 F.Supp. 1021 (E.D. Mich. 1980). Generally, speaking, the constructive discharge doctrine is applied when an employer deliberately renders an employee's working conditions intolerable, forcing that employee to quit. See 3 *Larson, Employment Discrimination*, 86.50, pp. 17-18.2. There is no reason not to apply a similar principle to cases where intolerable working conditions cause short term absences from work rather than a complete termination of employment and to recognize the former as a "constructive suspension."

In this case, the Complainant has wholly failed to establish that she was constructively suspended on those ten occasions when she alleged that it was necessary to leave work early because of McCullough's belittling or sarcastic language, or a prima facie showing of a constructive suspension was not established on the record. There is no evidence that Charging Party was belittled, as

what was said by McCullough is not know the context and circumstances surrounding the remarks that he made, whatever they were, was not explained, and

their relationship to her rejection of his sexual interest in her was not

established. The remarks that he did make during the "boyfriend incident" and

'her illness were not belittling, and even if sarcastic, would not 'have con-

structively discharged or suspended the average person and did not create a

work environment so polluted with discrimination so as to cause a normal

person to abandon employment on the 10 days Charging Party alleged she went home

early. As a dispatcher, McCullough was in a supervisory capacity over Charging Party

because he determined when she would work and monitored -her job performance.

Likewise, McCullough was in a supervisory capacity over Charging Party as a driver be-

cause he assigned fares to 'her and had the power to take her off the air.

this, 'had a discriminatory practice been established, Respondent would be li-

able for any damages caused under the doctrine of respondeat superior. This

is true even though Bierbrauer was ignorant of all Charging Party's charges except her

complaints of belittlement by McCullough and took steps to stop that belittle-

ment each time Charging Party complained to him.

J.L.L.

