

2003 WL 21999600

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United States District Court, E.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, Plaintiff,

v.

LUTHERAN MEDICAL CENTER, Defendant.
Anna Givant, Sheila Linz, Phyllis Emma, Irina
Larina, Iya Dubson, Isabela Fidala, Denise Gatto,
and Kathleen Rooney, Plaintiffs-Intervenors,

v.

Lutheran Medical Center and Conrado Ponio,
M.D., Defendants.

No. 01 Civ. 5494 (LBS) (MDG) | March 28, 2003.

DRAFT CONSENT DECREE

Attorneys and Law Firms

Equal Employment Opportunity Commission, Katherine
E. Bissell, Regional Attorney, Elizabeth Grossman,
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Proskauer Rose LLP, By Bettina B. Plevan, New York,
NY, Attorneys for Lutheran Medical Center

Beldock, Levine & Hoffman, By: Robert L. Herbst, New
York, New York, Attorneys for Plaintiffs-Intervenors

Faruqi & Faruqi LLP, By: Adam R. Gonnelli, Faruqi &
Faruqi LLP, New York, New York, Attorneys for
Plaintiffs-Intervenors

*1 1. The United States Equal Employment Opportunity
Commission (“EEOC”), Plaintiffs-Intervenors, and
Lutheran Medical Center (“LMC”) are the parties
(collectively “the Parties”) to this Consent Decree
 (“Decree”).

BACKGROUND

2. On August 15, 2001, EEOC filed, and subsequently
amended, the complaint commencing this Action, alleging
that LMC engaged in unlawful employment practices on
the basis of sex in violation of the Civil Rights Act of
1964, as amended, 42 U.S.C. 2000e, *et seq.* (“Title VII”).

3. The Amended Complaint was based on charges by Iya

Dubson, Phyllis Emma, Isabella Fidala, Anna Givant,
Denise Gatto, Irina Larina, Sheila Linz, Kathleen Rooney
(collectively “Charging Parties” or
“Plaintiffs-Intervenors”). EEOC alleged that Dr. Ponio, an
employee of LMC, acting through actual or apparent
authority as a supervisor, had subjected Charging Parties
and other similarly situated female employees to sexual
harassment during their medical examinations. Further,
the Amended Complaint alleged that LMC knew or
should have known of the sexual harassment and failed to
take adequate measures to prevent such sexual
harassment.

4. Charging Parties, through counsel, intervened as
Plaintiffs in this action. The claims by
Plaintiffs-Intervenors have been resolved in a Settlement
Agreement and General Release between LMC and
Plaintiffs-Intervenors (“Settlement Agreement”).

5. LMC denies the allegations made in the complaints of
EEOC and Plaintiffs-Intervenors. This Decree does not
constitute an adjudication or finding by this Court on the
merits of the allegations of the complaints. Nothing
contained in this Decree shall be construed as an
admission of liability on the part of LMC. Other than this
Decree, all documents and communications exchanged in
the course of settlement negotiations shall be inadmissible
in any legal proceeding except in actions to enforce this
Decree.

GENERAL PROVISIONS

6. In order to avoid the uncertainties and expense of
litigation, and in consideration of the mutual promises,
agreements and consideration contained herein, EEOC,
Plaintiffs-Intervenors, and LMC do hereby stipulate and
consent to the entry of this Decree as final and binding
between the Parties.

Resolution

7. This Decree resolves all issues raised in EEOC Charge
Numbers 160-AO-1848 through 160-AO-1855, all claims
presented by EEOC’s Amended Complaint, and all claims
presented by Plaintiffs-Intervenors’ Complaint. The
Decree in no way affects EEOC’s right, in accordance
with EEOC procedures, to process any future charges that
may be filed against LMC, and to commence civil actions
on any such charges, so long as such charges do not
include the claims contained in EEOC Charge Numbers
160-AO-1848 through 160-AO-1855 and EEOC’s
Amended Complaint.

Jurisdiction

8. The Parties agree that this Court has jurisdiction over the subject matter of this action and the Parties for the duration of this Decree, that venue is proper, and that all administrative prerequisites have been met. No party shall contest the validity of this Decree or the jurisdiction of this Court to enforce this Decree and its terms.

MONETARY RELIEF

*2 9. In settlement of this action and in exchange for Release Agreements duly executed by Claimants (as defined in paragraph ten (10) below) and by Charging Parties, LMC shall pay a total of five million four hundred twenty-five thousand dollars (\$5,425,000) to be distributed amongst Claimants, Charging Parties, and Charging Parties’ attorneys (The Release Agreements for Claimants shall be in the form attached as Exhibit A.). No part of this monetary amount will be spent on the costs of implementing this Decree or for any other injunctive relief put forth in this Decree.

Claim Fund

10. Of this total monetary amount, three million four hundred fifty two thousand dollars (\$3,452,000) will be distributed to Claimants (“Claim Fund”). Claimants are those individuals, other than Charging Parties but including the forty-three (43) individuals known to EEOC and LMC, who have contacted EEOC in the course of this action and EEOC believes to have experienced sexual harassment by Dr. Ponio. EEOC shall have complete discretion over the allocation of the Claim Fund.

11. Within thirty (30) days of the entry of this Consent Decree, EEOC shall inform each Claimant (in the form attached as Exhibit B) of the amount that she would receive from the Claim Fund (“Notification Letter”). Claimants wanting to receive from the Claim Fund must return a duly executed Release Agreement and completed Form W-9 to EEOC within thirty (30) days of the date of EEOC’s Notification Letter.

12. If any releases are not returned to EEOC within the deadline prescribed in paragraph eleven (11) above, then EEOC will reallocate pro rata the amounts that have not been released and follow the procedures provided in this paragraph. Within fourteen (14) days after the deadline for receipt of executed releases, EEOC will notify those Claimants who have returned duly executed Release Agreements within the deadline, of the pro rata increase to their initial allocation and forward to them a revised Release Agreement reflecting the total amount reallocated

to that Claimant. Within thirty (30) days of the date of this notification letter, EEOC must receive from these Claimants their duly executed Release Agreements.

13. Within fourteen (14) days of the deadline for receipt of duly executed Release Agreements, EEOC will forward all such duly executed Release Agreements and fully completed and executed Form W-9s from each Claimant to LMC’s counsel, Bettina B. Plevan, Esq., Proskauer Rose LLP, 1585 Broadway, New York, New York 10036-8299 (“LMC’s Attorneys”). If there is a reallocation of the Claim Fund pursuant to paragraph twelve (12) above, only the duly executed Release Agreements received pursuant to paragraph twelve (12) must be forwarded to LMC’s Attorneys. Within ten (10) days of receipt of both duly executed releases and fully completed and executed Form W-9s from each Claimant forwarded by EEOC, LMC shall distribute to Claimants the portion of the Claim Fund specified by EEOC and referenced in the release agreements. The total amount allocated by EEOC shall be exactly equal to the total Claim Fund of the three million four hundred fifty two thousand dollars (\$3,452,000) specified in paragraph ten (10), above. This payment to Claimants is for compensatory damages for pain and suffering and emotional distress. This payment does not in any way constitute backpay. In or about January or February 2004, Forms 1099 shall be mailed to Claimants. The payment and Forms 1099 will be mailed to the addresses provided by Claimants in their duly executed Release Agreements. A copy of the checks and Forms 1099 shall be sent to EEOC at the same time when they are sent to Claimants.

Charging Parties

*3 14. The remaining one million nine hundred seventy three thousand dollars (\$1,973,000) will be distributed in accordance with, and under the terms of, the Settlement Agreement between LMC and Plaintiffs-Intervenors. Pursuant to the terms of the Settlement Agreement, LMC will pay (sic)?? 365,750(sic) to Beldock Levine & Hoffman and (sic)??299,250(sic) to Wolf Haldenstein Adler Freeman & Herz as attorneys’ fees and attorneys’ expenses. LMC will pay the remaining one million three hundred and eight thousand dollars (\$1,308,000) to the eight Charging Parties according to the terms and conditions of the Settlement Agreement. This payment to Charging Parties is for compensatory damages for pain and suffering and emotional distress. This payment does not in any way constitute backpay.

NOTICE POSTING

15. LMC acknowledges that it is committed as a matter of medical center policy and is required as a matter of law to

conduct all of its operations in compliance with the requirements of Title VII regarding the prohibition of sexual harassment and retaliation against employees for exercising their rights under Title VII. In furtherance of this commitment, LMC shall post and maintain in Occupational Health Services offices, for the duration of this Decree, the notice of non-discrimination (in the form attached as Exhibit C), in places where employee notices are generally posted in such offices.

ANTI-HARASSMENT POLICY

16. LMC represents that it will maintain, and cause to be published in LMC’s Employee Handbook, the Policy Prohibiting Discrimination, Harassment and Retaliation (the “Policy”) (in the form attached as Exhibit D), which includes provisions regarding sexual harassment and retaliation and complaints and investigations regarding the same. These provisions shall not be deemed to prohibit any employee from filing a charge of discrimination with the EEOC or any other administrative agency. The Policy shall be distributed to all LMC current employees within thirty (30) days following the Court’s entry of this Decree and all new LMC employees at the time when LMC makes its employment offer before the earlier of their preemployment physical assessments or orientation sessions. The Policy shall apply to every LMC current employee regardless of whether such employee may also avail herself of a collectively bargained grievance procedure. During the term of this Decree, changes initiated by LMC to the Policy shall be subject to approval by EEOC, which shall not be unreasonably withheld.

ANTI-DISCRIMINATION TRAINING

17. LMC shall provide mandatory training on the anti-discrimination requirements of federal, state and local law, including sexual harassment, to all current employees. During the term of this Decree, changes initiated by LMC to such training shall be subject to approval by EEOC, which shall not be unreasonably withheld. The training shall be substantially in the following format:

18. MANAGEMENT TRAINING

*4 (a) Within six (6) months of the entry of this Decree, management-level employees (defined as employees holding the title of supervisor and above) will be given a live training session of approximately two (2) hours and attended by approximately thirty-five (35) participants per session.

(b) Management training sessions shall include the viewing and discussion of the “Sexual Harassment: Is It

or Isn’t It,” videotape provided by Provant Media and designed specifically for medical centers like LMC and a presentation covering, without limitation: (i) a summary of the laws governing sexual harassment, discrimination and retaliation; (ii) examples of conduct prohibited under the applicable laws and LMC’s anti-discrimination policies; and (iii) a summary of the procedures and policies that LMC has instituted to prevent all forms of harassment and discrimination, including procedures regarding receiving, documenting and investigating claims of sexual harassment. In addition, LMC’s management training sessions will include case studies covering a variety of scenarios and a question/answer session. Copies of LMC’s Policy Prohibiting Discrimination, Harassment and Retaliation will be distributed at all management training sessions.

(c) Management-level employees who are unable to attend a live training session due to patient care responsibilities will be required to view a videotape of such a training session within six (6) months of the entry of this Decree.

(d) Within twenty (20) days of completing the above program of management training,

LMC will notify the EEOC of its completion of the program and will provide the EEOC with a list of attendees.

(e) In the third (3rd) year after entry of this Decree, all management-level employees will be required to complete an interactive web-based refresher training of approximately one (1) hour provided by WeComply, Inc and designed to ensure their familiarity with and understanding of LMC’s Policy Prohibiting Discrimination, Harassment and Retaliation.

19. NON-MANAGEMENT TRAINING

(a) Within six (6) months of the entry of this Decree, non-management employees (defined as all bargaining unit employees and all other employees below the level of supervisor) will be given one (1) training session of approximately one-and-a-half (1.5) hours and attended by no more than seventy (70) participants per session.

(b) Non-management training shall include the viewing and discussion of the “Sexual Harassment: Is It or Isn’t It” videotape from Provant Media and designed specifically for medical centers like LMC and a presentation covering, without limitation: (i) a summary of the laws governing sexual harassment, discrimination and retaliation, (ii) examples of conduct prohibited under the applicable laws and LMC’s anti-discrimination policies, and (iii) a summary of the procedures and policies that LMC has instituted to prevent all forms of harassment and

discrimination, including procedures regarding reporting complaints of sexual harassment. In addition, non-management training will include case studies covering a variety of scenarios and a question/answer session. Copies of LMC's Policy Prohibiting Discrimination, Harassment and Retaliation will be distributed at all non-management training sessions.

*5 (c) Non-management employees who are unable to attend a live training session due to patient care responsibilities will be required to view a videotape of such a training session within six (6) months of the entry of this Decree.

(d) Within twenty (20) days of completing the above program of non-management training, LMC will notify the EEOC of its completion of the program and will provide the EEOC with a list of attendees.

(e) In the third (3rd) year after the entry of this Decree, all non-management employees will be required to complete an interactive web-based refresher training of approximately one (1) hour provided by WeComply, Inc. and designed to ensure their familiarity with and understanding of LMC's Policy Prohibiting Discrimination, Harassment and Retaliation.

MISCELLANEOUS

20. Any Claimant desiring reinstatement to the same position she previously held with LMC must provide EEOC notice by the same deadline when she is to return her duly executed Release Agreement. Within five (5) days of receipt of such notice, EEOC will forward the name of any such Claimant desiring reinstatement to LMC's Attorneys. LMC shall reinstate any such Claimant to the same position she previously held with LMC if (i) a job opening for that position becomes available during the period when this Decree is in effect; (ii) such Claimant had left LMC due to a sexually inappropriate medical exam; (iii) such Claimant had not been terminated by any subsequent employer due to performance problems; and (iv) the reinstatement would not cause a violation of any collective bargaining agreement applicable to LMC. If more Claimants express a desire for reinstatement to their

Dated: New York, New York

_____, 2003

prior positions than there are openings, then the order of reinstatement will be prioritized by the date when the Claimant left her employment at LMC with those departing earlier being reinstated first. For the purposes of this paragraph only, the term "Claimant" includes Charging Parties.

21. LMC will implement the new policy (in the form attached as Exhibit E), for the conduct by Occupational Health Services of medical examinations of LMC employees.

22. LMC agrees that it will neither rehire nor grant attending privileges to Conrado Ponio, M.D.

23. Except as specified in the "Relief" section of this Decree, each party shall bear its own attorneys' fees and costs incurred in this action, provided, however, that no claimant taking money referred to in this Decree shall be deemed to be a prevailing party under the law with respect to this case.

24. This Decree constitutes the complete understanding among the parties hereto. No other promises or agreements shall be binding unless agreed to in writing and signed by these parties. No waiver, modification or amendment or any provision of the Consent Decree shall be effective unless made in writing, approved by all parties to this Decree and approved by the Court or ordered by the Court, except that the parties may mutually agree to modify the procedures in paragraphs 15-20 above without the approval of the Court.

*6 25. All parties hereto have participated, through their respective counsel, in the drafting of this Decree, and this Decree shall not be construed more strictly against any party. Paragraph headings have been added for convenience only, and shall not affect the construction of this Decree.

26. This Decree will remain in effect for a period of three years from the date of entry of this Decree by the Court. The Court shall retain jurisdiction during this period solely for the purpose of enforcement of any provision of the Consent Decree.

Dated: New York, New York

(sic)3/28(sic), 2003

EQUAL EMPLOYMENT OPPORTUNITY

PROSKAUER ROSE LLP

COMMISSION

By _____

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SO ORDERED:

Date: _____

Leonard Sand, U.S.D.J.