

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & CYNTHIA PHILLIPS,
Complainants

v.

DOCKET NO. 10-SEM-02086

ELECTRO-TERM-HOLLINGSWORTH,
Respondent

Appearances:

Kathryn S. Crouss, Esquire and Kevin V. Maltby, Esquire for Cynthia Phillips
Timothy J. Ryan, Esquire and Michael G. McDonough, Esquire for the Respondent.

I. PROCEDURAL HISTORY

On or about August 9, 2010, Complainant Cynthia Phillips filed a complaint with this Commission charging Respondent with discrimination on the basis of sexual harassment and retaliation. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on October 24, 26 and 27, 2016 at the Commission's Springfield location. After careful consideration of the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACTS

1. Complainant Cynthia Phillips is a Chicago native who has resided in Massachusetts since 2008. She currently resides in Chicopee, MA with her husband and children. Complainant worked for Respondent as a wire harness assembler from May 18, 2010 until July 20, 2010. Complainant was scheduled to work 8 hours per day from 8:00 a.m. to 4:30 p.m. at the rate of \$9.00 per hour. She was considered a probationary employee for the first 90 days of

employment. Complainant is currently employed as a sewing machine operator. (Testimony of Complainant)

2. Respondent Electro-Term-Hollingsworth, an employee owned company, is a manufacturer and distributor of electronic wiring, terminals and related items. Respondent is currently located in Springfield, Massachusetts. During Complainant's employment, Respondent was located in Chicopee, MA and employed approximately 45 people.

3. In early 2010, Respondent was expanding its harness department and hired several wirers, including two young men; Alex, who was hired on January 21, 2010 and Jacob, who was hired April 13, 2010. (Testimony of Dinette Bucci)

4. Richard Arbour worked for Respondent from 2006 to 2015. At the time of Complainant's employment, Arbour was the supervisor of the harness department and Complainant's direct supervisor.

5. Tom Dancy has worked for Respondent for 14 years. In 2010, Dancy was the General Manager and oversaw the day-to-day operations of the company. Dancy is currently Respondent's president.

6. Dinette Bucci has worked for Respondent for 21 years. She has been Respondent's HR representative since 1998.

7. Marta Rivera was hired by Respondent on April 19, 2010. She worked in the harness department until her layoff in 2013.

8. Quality Control Manager Kristen McCarthy is a 20-year employee of Respondent whose position required her to occasionally visit the harness department.

9. Sue Carey has worked for Respondent for 13 years. Carey was assigned to the flaring department, and occasionally worked in the wiring department when needed, including a few

times during Complainant's employment. Carey testified that she considers the company to be like family.

10. Sandra Martinez is a 15 year employee of Respondent who supervises three departments. Martinez considered Respondent a "second home." She is the niece of Marta Rivera.

11. Respondent's employees had a 10 minute break at 10:00 every morning. In addition, every Friday morning at 10:10, Respondent held a 30 to 45 minute staff meeting in the company lunch room where financial and sales matters were reviewed and birthdays and other occasions were celebrated. At this meeting, Dancy also fielded questions from staff. (Testimony of Dancy)

12. In 2010, Complainant suffered from pre-existing medical conditions. Complainant has suffered from lower back pain since 2005, and was treated with medication, including opioids, the use of which resulted in a drug dependency that she treated with methadone for a time. Complainant had been previously diagnosed with bi-polar disorder and anxiety for which she was treated by a nurse therapist from April 2010 through March 2012. In April 2010 her mood was diagnosed as "labile" and she reported panic attacks, anxiety and being overwhelmed. (Testimony of Complainant; Exh. 5)

13. For approximately the first two weeks on the job, Complainant's work station was physically located in Respondent's harness department in the lower level of its Chicopee plant. For the following three weeks, Complainant and co-worker Marta Rivera were moved to the building's upper level where they worked on a special wiring project. (Testimony of Complainant; Testimony of Rivera; Testimony of Dancy)

14. In early July, 2010, Complainant and Rivera returned to the harness department, where they shared a work table. There were four other employees of the harness department, including Alex and Jacob, who shared a table three or four feet away from Complainant and Rivera, where they performed crimping work. Complainant testified that she was able to hear Jacob and Alex's conversations from her work table.

15. Complainant testified credibly that after returning to the harness department in early July, she overheard Jacob and Alex talking in graphic terms about sex. She heard Jacob say to Alex "Yo, nigga, I f---ed my girlfriend in the a---last night." "Then I made that b---get down on her knees and she s---d my d--- and drank my c--." Alex responded, "Yeah, I f---ed my girlfriend doggie style."

16. Complainant testified that that Jacob and Alex spent as many as six hours per day engaging in such sexually graphic conversations, which were more explicit than anything she had heard before and caused her to feel ashamed, embarrassed, horrified and shaky. I credit her testimony regarding these remarks, although I find that Complainant exaggerated the frequency with which they were made.

17. Complainant testified that sometime after July 4th, she could no longer stand the offensive language and she asked Rivera to complain to management together with her. Rivera declined and advised Complainant that complaining would only result in more problems for Complainant. (Testimony of Complainant)

18. Rivera testified that Jacob and Alex swore at each other, which upset Complainant, but Rivera never heard them use sexually graphic terms and she denied that Complainant ever asked her to join in complaining about sexually explicit language. (Testimony of Rivera)
According to Rivera's niece, Sandy Martinez, Jacob and Alex were Rivera's "boys," which

meant Rivera had an affinity for them. (Testimony of Martinez) My observation of Rivera's testimony leads me to conclude that her comprehension of English is so limited as to render her testimony unreliable.

19. Complainant testified that sometime on or around July 6, 2010, she complained to Rich Arbour about Jacob and Alex's offensive language. She testified credibly that Arbour's first reaction was to laugh at her, which made her feel horrible and ashamed.

20. Complainant then observed Arbour take Alex and Jacob aside and tell them in a joking manner to stop what they were saying because Complainant was complaining about them.

21. Complainant testified that later that day Alex and Jacob told her that she should not have complained about them. Later that same day she told Arbour that she intended to report to Dancy that he had joked with Alex and Jacob about her complaint. Arbour told her to "do what [she had] to do." Complainant testified credibly that she was fearful of Alex and Jacob, who were young and physically larger than she is. She also claimed that Alex told her at some unspecified time that "snitches get stitches," which she perceived as a threat. (Testimony of Complainant)

22. Arbour denied that Complainant told him that Alex and Jacob had sexually explicit conversations. He testified that Complainant approached him in a hostile manner and screamed that co-workers were using the "n-word." Arbour reported her complaint to Dancy, who told him that such language was impermissible and to address it with his employees. Arbour then spoke to each harness department employee individually in his office and advised them that such language was not allowed in the workplace. Arbour denied ever laughing and joking about the matter. (Testimony of Arbour)

23. Complainant testified that at the end of the work day, she reported the graphic language to Dancy and he told her to return the next day to discuss the matter. (Testimony of Complainant; Testimony of Dancy)

24. Complainant testified that on or about July 8, 2010, she met with Dancy regarding her co-workers' offensive language and told him that Arbour had not resolved the matter. Dancy told Complainant to follow the chain of command by reporting such matters to Arbour and said he would look into it. He called Arbour into his office and told him to resolve the matter. Complainant testified credibly that having to recount the offensive comments to Arbour and Dancy made her feel horrible.

25. Dancy acknowledged meeting with Complainant, but believed the meeting took place a few days earlier, on July 2, 2010. He testified that Complainant complained about "unacceptable language" by harness department employees, but never told him that the language was sexual in nature. I do not credit his testimony that Complainant did not relay in detail the language used by her co-workers. His testimony in this regard is inconsistent with his testimony that Complainant complained about their conversations regarding their "weekend exploits with their girlfriends." (Testimony of Dancy; Exh. 2; para. 35 below)

26. Complainant testified that after her complaint, Alex and Jacob's behavior escalated. They told her they had spent time in prison, that she should "watch herself," and they took her tools and threatened to slash her tires. I do not credit her testimony that they took her tools and threatened to slash her tires. I find that Complainant exaggerated the threat in order to enhance her claim. However, she testified credibly that their actions caused her to feel nervous, fearful, and uncomfortable and she did not want to work in the same department with them.

27. On or about Thursday, July 8, 2010, while on break, Sandy Martinez saw Complainant crying and asked her what had happened. Complainant told Martinez that her coworkers had engaged in horrible and disrespectful conversation about women and she was disgusted. Martinez told her to ask Dancy to reassign her to work upstairs in Martinez's department where she could fill in for an employee who was scheduled to be out on maternity leave. I credit her testimony. Martinez corroborated Complainant's version of their discussion. Martinez testified that she advised Complainant to complain to upper management about the matter, but denied telling Complainant there was an opening in "her department." (Testimony of Martinez)

28. On Friday, July 9, just before the company meeting, Complainant told Dancy that Alex and Jacob's offensive language was only getting worse. Dancy put his hand on her shoulder and said, "This is unacceptable. I will take care of this." (Testimony of Complainant; Testimony of Dancy) Dancy told Complainant he would address the matter immediately after the company meeting. According to Dancy, Complainant did not specifically relay what Alex and Jacob said, nor did he ask her. (Testimony of Dancy)

29. That same day Dancy called Arbour and Alex into his office and told them that foul language would not be tolerated and he would personally "walk anyone out" of the building if he learned that the language was continuing. Alex and Arbour denied that anyone was using foul language and told Dancy that they had "heard him the first time" and that Alex had even removed his radio from his work station in order to ensure that nothing offensive would be heard. (Testimony of Dancy; Testimony of Arbour)

30. Complainant testified that within days after her discussion with Martinez, Sue Carey told Complainant she had made a similar complaint to Dancy and nothing was done. Carey

denied ever making such a complaint to Dancy and denied ever telling Complainant this.

(Testimony of Carey) While I credit Carey's testimony that she did not complain to management about similar offensive language, I find that Carey told Complainant that she heard occasional swearing and use of the word "tits," or "boobs, as she testified and described to Dancy.

31. Complainant testified that subsequent to her internal complaints, Arbour became hostile toward her and assigned her to "re-work," wiring worked on by others that had been returned to the company for repair. According to Complainant, this was contrary to Respondent's practice of having employees fix their own mistakes. She stated that doing re-works prevented her from meeting her required daily work quotas. I do not credit Complainant's testimony in this regard, because it contradicts the credible testimony of several witnesses that employees were paid hourly, had no production quotas and that all employees were required to perform re-work, regardless of who made the initial errors.

32. Respondent's policy was to allow employees who requested in advance to make up time lost for personal matters. (Testimony of Dancy)

Tuesday, July 13, 2010

33. Complainant testified that on the morning of Tuesday, July 13, 2010, she informed Arbour that she planned to leave early for a medical appointment. She stated that Arbour told her that her employment would be terminated if she left early because she had ongoing attendance issues. Complainant testified that she had previously missed work only for medical appointments and had not been warned about poor attendance prior to July 13. After consulting with Dancy, Arbour allowed Complainant to leave. Arbour testified that he had previously warned Complainant orally about her attendance. I do not credit his testimony.

34. Complainant left work at approximately 1:30 p.m. to see her therapist, Nurse Footit, to whom she reported feeling increased anxiety over the past few weeks. (Testimony of Complainant; Exh. 4)

Wednesday, July 14, 2010

35. On Wednesday, July 14, Arbour told Dancy that Complainant's attendance was problematic but he was hesitant to raise the issue with her because of her complaints about offensive co-worker behavior. Dancy told Arbour that the attendance problems had to be addressed as a separate matter and he agreed to meet with Arbour and Complainant to discuss attendance matters. At the meeting, Dancy reminded Complainant that as a probationary employee this was her time to shine, and she was expected to work eight hour days and that poor attendance would not be tolerated. He explained that Respondent's policy of allowing employees to make up time required approval in advance, which she had not secured the previous day. Dancy testified that Complainant had no response to his counseling and instead told him that she was tired of listening to the "boys" discuss their weekend exploits with their girlfriends and that working conditions were intolerable. Dancy assured her that the matter had been addressed with all concerned. He testified that Complainant never relayed her co-workers' conversations explicitly. (Testimony of Dancy) I do not credit his testimony that Complainant did not tell him the nature of the conversations.

36. Complainant testified that as of July 14 matters were getting worse, as Alex and Jacob were threatening her and calling her a "bitch" and a "whore." I do not credit her testimony that she was called a bitch and a whore as she failed to mention these highly inflammatory

epithets in her complaint or in her written narrative of events created shortly after her termination, and such insults would likely have been memorable.

Monday, July 19, 2010

37. Complainant testified that on Monday, July 19, she went to the office of HR manager Dinette Bucci and tearfully told Bucci that her complaints of co-workers' offensive language were met with retaliation and she could no longer tolerate the situation and was leaving to see the doctor. Complainant testified that by this time, she had given up hope that her concerns were going to be addressed and she felt sick.

38. Bucci testified that Complainant came to her office in tears to report that Arbour had denied her permission to leave work early and told her she appeared to be in alcohol withdrawal. She also told Bucci for the first time about her complaints of sexual harassment. Bucci documented Complainant's allegations and called in Dancy.

39. During the discussion in Bucci's office, Complainant told Dancy for the first time that Kristina McCarthy, Sue Carey, Marta Rivera and Sandra Martinez told her about their previous complaints to Dancy about offensive language at Respondent. Complainant also told Dancy and Bucci that Alex told her she was lucky he was no longer a violent person, which she perceived as a threat and had used the word "nigger" which offended Complainant, who had black relatives. Dancy denied to Complainant that the other women had complained to him and he called Arbour into the meeting to inquire about the statement regarding alcohol withdrawal. Arbour denied making the statement and stated that it was Complainant herself who said, "I must look like a drunk." Dancy then called in Alex and asked him if he had threatened Complainant. Alex replied that he no longer even spoke to her about matters unrelated to their work and he

denied ever using the word “nigger” in Complainant’s presence. At the meeting, Dancy again told Arbour and Alex that offensive language was not tolerated and that he would discipline the entire department if it continued. Dancy testified that he believed Arbour because Arbour had never lied to him. (Testimony of Bucci; Testimony of Dancy)

July 20, 2010

40. Complainant testified that on July 20, at approximately 11:30 a.m., Alex threatened her and she “broke down.” She felt horrible, began shaking, saw spots, and experienced dizziness and a pounding headache. She decided that she wasn’t going to risk her health for her low-paying job and asked Arbour for permission to call her doctor. Arbour told her to wait until lunch time, but Complainant called her doctor who said her symptoms could be signs of a stroke and advised her to go to the emergency room. She called her husband who drove her to Baystate Medical Center. (Testimony of Complainant)

41. Complainant arrived at emergency room complaining of anxiety, difficulty breathing, blurred vision, high blood pressure and back pain. She told emergency room personnel that she was under stress and had been taunted at work. (Testimony of Complainant; Ex. 6 at p.123) She also reported that she had problems at home and with her spouse, but turned down an offer to refer her to mental health counseling. Complainant was treated with Ativan and morphine and was discharged. (Ex. 6 at P. 128-30)

42. Complainant testified that when she got home from the emergency room she knew she could not return to the job because of the way she was treated after standing up for herself. (Testimony of Complainant)

43. On July 20, Dancy and Bucci interviewed Kristina McCarthy, Sue Carey, Sandra Martinez and Marta Rivera regarding Complainant's allegations. (Testimony of Dancy; Ex. 4)

44. Dancy and Bucci asked McCarthy if she had witnessed inappropriate language in the harness department and if she had ever complained to him about sexual harassment in the harness department and she denied ever doing so. McCarthy testified that she never heard anyone at Respondent use offensive or sexually explicit language. She denied that Complainant ever spoke to her about the conditions in the harness department. I credit her testimony. (Testimony of McCarthy; Testimony of Dancy)

45. Dancy asked Sue Carey if she ever felt threatened at work. She told him that once a female co-worker told her to "get out of her face," that she heard occasional swearing and once heard a worker use the word "tits," or "boobs." (Testimony of Dancy; Testimony of Carey)

46. Dancy interviewed Marta Rivera and Sandra Martinez together. They told Dancy that they did not feel uncomfortable or threatened in the workplace and did not hear sexually explicit language. Rivera said she was treated with respect. (Testimony of Dancy; Testimony of Rivera)

47. Bucci testified that she sat in on many of the interviews of witnesses and determined that Complainant's allegations were not corroborated and concluded that the alleged sexual harassment did not occur. Notwithstanding, strict warnings with the threat of termination were relayed to all employees of the wiring department. (Testimony of Bucci)

48. The following day, July 21, Complainant told Bucci by phone that she could not return to work because of the ongoing harassment and retaliation. Bucci asked Complainant to come in for an exit interview which she scheduled for a Friday when Complainant's paycheck would be available. (Testimony of Complainant; Testimony of Bucci) According to Bucci,

Complainant and her husband came for her check and when Bucci asked about the exit interview, Complainant's husband took Complainant by the arm and told Bucci that Complainant would not speak to Bucci and that Bucci could speak to Complainant's lawyer.

49. On July 21, Bucci and Dancy interviewed Alex and Arbour. Each denied threatening Complainant and Alex denied speaking with Complainant on Monday or Tuesday. He told them only Marta spoke to Complainant. (Exh. 4, p. 92; Testimony of Bucci; Testimony of Dancy)

50. Again on October 22, 2010, Bucci and Dancy interviewed Sandy Martinez. Martinez told them about her conversation with Complainant and her referral to Dancy. Martinez also told them that Complainant complained about the use of the word "niggah" which Martinez explained to Complainant had a different meaning from the word, "nigger" and was used in a different context. (Ex. 4, p.105)

51. On October 22, 2010, Bucci and Dancy again interviewed Sue Carey. She told them that Complainant complained to her about things being done differently than they were at a previous job where she had done similar work. Carey told Complainant if she ever had a problem to go to Dancy. She denied telling Complainant that she had complained to Dancy about the language and behavior in the harness department. (Ex. 4, p. 106)

52. On October 22, 2010, Bucci and Dancy interviewed Marta Rivera. She told them that she heard the harness department employees using expressions such as "what the f--" and "s--t" but never heard them make remarks about sex. (Ex. 4, p. 107)

Complainant's Attendance Records

53. Dinette Bucci's practice was to enter the information from employees' time cards into an "attendance planner," which tracked employees' hours and attendance. (Testimony of Bucci, Ex. 1 at pg. 20) Complainant's attendance planner reflects the following: Complainant

was one minute late on six occasions; left work early on June 9 (for a doctor's visit related to back pain); left 1.75 hours early on June 10^t (no explanation); left early on July 15th (for a counseling appointment); left early on July 19th (due to illness); and left early on July 20th (for the emergency room). Complainant's weekly hours are as follows:

- Week of May 17, 2010-- Commenced work on Tuesday, May 18, 2010 and worked 32 hours.
- Week of May 24--40 hours
- Week of May 31--32 hours (May 31 was a holiday)
- Week of June 7 -- 37.75 hours. On June 9, Complainant worked 7.5 hours, left early and saw a physician for lower back pain at Pioneer Spine and Sports Physicians. On June 10 she worked 6.25 hours and her time off was not explained. (Ex. 10 at 198)
- Week of June 14 -- 40 hours (On June 16, Complainant worked 7 hours, but worked 8.5 hours on June 17 and June 18)
- Week of June 21--40 hours
- Week of June 28-- 40 hours
- Week of July 5--34.5 hours (July 5 was a holiday. On July 7 Complainant worked 7.5 hours and on July 8, she worked 3 hours. It appears from a handwritten note on the corresponding timecard from this week that Complainant worked some overtime.)
- Week of July 12-- 38.5 hours; On July 13, Complainant worked 6.5 hours and left early for a therapist appointment with nurse Footit.

- Week of July 19-- no hours shown. (However, on July 19, 2010, Complainant left work early due to illness. On July 20, Complainant left work about four hours early and went to the emergency room)
- In June, Complainant was tardy 3 times for a total of six minutes lost.
- In July Complainant was tardy 1 time for a total of one minute lost.

54. After leaving Respondent, Complainant continued to continue to see her therapist.

At an office visit on July 26, 2010, she was experiencing panic, worry, concern and irritability. Her mood fluctuated from happy to horrible and she isolated herself in her room. (Testimony of Complainant; Exh. 5, pg. 113-114) She stated that she rejected her primary care provider's offer of Klonopin and dealt with her anxiety and stress through breathing exercises.

55. At her next office visit on August 26, 2010, complainant told Footit that she felt better. She was less sad and "more alive." She experienced continuing stress regarding a harassment incident and had difficulty locating temporary employment. At her next visit on October 26, 2010, complainant reported that she was working full time and feeling much better with increased energy and felt more alive and less depressed, was not panicked and felt her job contributed to her improvement. (Exh. 5)

56. Complainant testified that her termination affected her home life because she was unable to provide for her family. She also felt insecure about looking for other work because of her fear that her experience at Respondent could be repeated. She had trouble sleeping and was prescribed Trazadone and Ativan. (Testimony of Complainant; Exh.5)

57. On September 22, 2010, Complainant obtained employment making circuit boards at ITT through an employment agency, United Personnel Services. Complainant testified that she worked at this position for seven months whereupon she left because of difficulty working third

shift. However, her work record shows that she was terminated on November 17, 2010, after working only two months, and indicates that ITT did not continue Complainant's assignment because she left work early three times, had fallen asleep at work, had a very poor attitude and in one instance, told a supervisor that she did not complete a piece of work because, in her own words, she "just didn't care." (Testimony of Complainant; Exh. 7)

58. Complainant earned \$9 per hour at Respondent. At 40 hours per week, she would have earned \$360 per week. For the eight week period beginning July 22 until she was employed by United Personnel Services on September 21, 2010, Complainant would have earned \$2,880.00 had she worked full time. (\$360.00x 8 weeks)

III. Conclusions of Law

A. Sexual Harassment

G.L. Ch. 151B, sec. 4(16A) prohibits sexual harassment in employment. Sexual harassment includes the creation of a sexually hostile work environment.¹

Liability will ensue if the harassment was carried out by an employee with a supervisory relationship to Complainant or if Respondent knew or should have known of the harassment and failed to take prompt remedial action to stop the sexual harassment. See, College-town Division of Interco. v. MCAD, 400 Mass. 156, 165 (1987).

I credit Complainant's testimony that her two co-workers subjected her to repeated and pervasive sexual comments that were lewd and offensive. Their conduct included repeated vulgar, sexually explicit discussions of sexual acts within earshot of Complainant. In addition to their sexually offensive comments, they engaged in actions that were threatening and

¹ The definition of sexual harassment includes verbal or physical conduct of a sexual nature where the conduct has the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment."

intimidating to Complainant after she reported their conduct. I credit her testimony that being subjected to this conduct caused her embarrassment and humiliation and disgusted her. While I conclude that Complainant embellished her testimony in some respects in order to enhance her claim, I nonetheless conclude that she was frightened and intimidated by coworkers' comments that she justifiably perceived as threats. I conclude that their conduct created a hostile work environment for Complainant that constituted unlawful sexual harassment. The hostile work environment interfered with her work performance and exacerbated certain of Complainant's pre-existing physical and mental conditions. Since the perpetrators were coworkers and not supervisors, Respondent is liable for their offensive conduct only if it knew or should have known of the harassment and failed to remedy the situation. College-town, supra. Respondent became aware of Complainant's allegations of offensive conduct sometime between July 2 and July 6, 2010. Over the next two weeks, Complainant lodged three additional complaints to management about the conduct which nonetheless persisted and on July 20, 2010 she left the workplace for good. Thus I conclude that Respondent was on notice of the conduct and is liable for its employees' actions because it failed to take adequate steps to alleviate and remedy the conduct as discussed below.

B. Adequacy of the Investigation

After Complainant registered several internal complaints regarding the sexually offensive conduct, Respondent was obligated to conduct a prompt, neutral investigation into the allegations. See, Massachusetts Commission Against Discrimination, Sexual Harassment in the Workplace Guidelines, § VI., para. B (2003) The employer's investigation should generally include interviews of the complainant, the alleged harasser, witnesses, any individuals identified as having knowledge of potential relevance to the allegations, and anyone else whom the

employer believes may have such knowledge. Parties interviewed and particularly the alleged perpetrators of the offensive behavior should be informed that the employer will not tolerate any retaliation against the complaining party or anyone else who cooperates with the investigation.

Id.

While Respondent admonished the harassers, I conclude that it failed to conduct a thorough investigation of the allegations. Complainant testified that she provided the managers with detailed information about the conversations of her coworkers. The managers dispute that claim and state they were unaware of the graphic sexual nature of the comments and admitted that they never inquired as to the specific nature of the language that offended Complainant. I do not credit their testimony that they were unaware of the nature of the objected-to conduct. Even if they were unaware of the specific nature of the allegations, it is difficult to imagine how Respondent could have concluded an investigation without inquiring as to the details of the offensive conduct. It is not an adequate defense to notice to state that the Complainant did not reveal precisely what was said; Respondent had a duty to inquire into the specific allegations. Further, there was credible evidence that Respondent could have reassigned Complainant to a vacancy in another department, at least temporarily, until the matter was resolved. The fact that the behavior continued despite Respondent's assurances that the behavior would cease, supports the conclusion that Respondent failed to implement effective remedial action. Under the circumstances, Respondent's investigation was not prompt and adequate.

B. Retaliation

Complainant claims that Respondent retaliated against her by assigning her less desirable work, counseling her about attendance issues and threatening her with termination.

Massachusetts General Laws c. 151B, s. 4(4) makes it unlawful for an employer to discharge,

expel or otherwise discriminate against any person because he has opposed any practices forbidden under c. 151B or because he has filed a complaint, testified, or assisted in any proceeding alleging a violation of c. 151B.

Retaliation is a separate claim of discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), quoting, Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000); Yeskevicz v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001).

In order to establish a prima facie case of unlawful retaliation, Complainant must prove that: (1) she engaged in protected activity; (2) Respondent was aware she had engaged in protected activity; (3) Respondent subjected her to an adverse employment action; and, (4) a causal connection existed between the protected activity, known by the retaliator, and the adverse employment action. Morris v. Boston Edison Co., 942 F. Supp. 65, 68-69 (D. Mass. 1996); Ruffino, 908 F. Supp. at 1044; Kelly, 22 MDLR at 215; Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

Complainant engaged in protected activity by making internal complaints of sexual harassment to Respondent managers. She claimed that her supervisor began assigning her to "re-works" that should have been done by others that took time away from her required work. However, I did not credit her testimony in this regard, as it contradicts the credible evidence that

Respondent had no work quotas and assigned “re-works” without consideration of who had performed the original work.

Complainant also alleges that Respondent retaliated against her by counseling her and threatening her with termination for poor attendance, in contravention of Respondent’s policy of allowing employees to make up time used for personal matters. She also alleged that each time she took time off was for medical reasons. Complainant testified credibly that as the result of Respondent’s conduct of threatening to terminate her employment she suffered from increased stress and became physically ill and feared coming to work. Although Complainant was not terminated, the mere threat of action, in and of itself, had an adverse effect on her, so as to constitute an adverse action. Farricy v. Suffolk County Sheriff’s Department, MDLR. (2000)

Respondent counters that it had legitimate reasons for counseling Complainant about poor attendance because all but two of Complainant’s instances of missed time were not accounted for by medical reasons and because Respondent expected probationary employees to establish good attendance. However, an examination of Complainant’s time records demonstrates only one instance where she worked less than eight hours and where the time off was unaccounted for. On other occasions, Complainant was either at a documented medical appointment or she made up hours during the same week. While one could reasonably conclude that Respondents’ articulated concerns about Complainant’s attendance were exaggerated, there is some credible evidence that Respondents had legitimate concerns about Complainant’s missing work and getting to work on time. I conclude that Respondents have thus met their burden of articulating a legitimate, nondiscriminatory reason for their actions.

However, while the threat to terminate Complainant’s employment may have resulted in part from concerns about her attendance, the evidence strongly suggests that Complainant’s

complaints about sexual harassment were also factor in the decision to terminate her employment. I conclude that Respondent had "mixed-motives" for threatening Complainant's employment.

Under the mixed-motive framework, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the adverse employment action. Once the Complainant carries her initial burden, the burden of persuasion shifts to the Respondent who "may avoid a finding of liability only by proving that it would have made the same decision" even without the illegitimate motive. Wynn and Wynn, P.C. v. MCAD, 431 Mass. 655 (2000); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) at 244-245. See Northeast Metro. Regional Vocational Sch. Dist. Sch. Comm. v. Massachusetts Comm'n Against Discrimination, 21 Mass. App. Ct. 89, 89 n.1 (1991); Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294 (1991) at 299.

The evidence leads me to conclude that Complainant's protected activity was the primary reason she was threatened with termination. Respondents have failed to persuade me that they would have threatened to terminate Complainant's employment had she not complained of sexual harassment. While her attendance may have suffered somewhat because of her need to attend to medical issues, this factor alone would not have resulted in her termination. I conclude that considerations of Complainant's complaints of sexual harassment were the primary reason for threatening her employment. It is clear that Respondent viewed her complaints as causing disruption in the workplace, chose to support longer-term employees who may have provided cover for the perpetrators, and preferred to have Complainant gone because she was raising uncomfortable issues and threatening Respondent with potential liability for allowing a hostile

work environment to continue. Thus I conclude that Respondents' actions were motivated primarily by unlawful retaliatory animus and not by lawful considerations as it contends.

C. Constructive Discharge

Constructive discharge occurs when the employee's working conditions are so intolerable that a reasonable employee would be compelled to resign. GTE Products Corp. v. Stewart, 421 Mass. 22, 33-34 (1995) A finding of constructive discharge is warranted when an employer makes working conditions so difficult as to be intolerable so that the employee feels compelled to quit. Id. at 34; McKinley v. Boston Harbor Hotel, 14 MDLR 1226, 1240 (1992). There must be a finding that the “working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.” GTE Products Corp., supra. at 34 *citing* Alicea Rosado v. Garcia Santiago, 562 F. 2d 114, 119 (1st Cir. 1997) Complainant testified credibly and convincingly that she could no longer tolerate the abusive working conditions at Respondent and felt she had no choice but to leave. Complainant had complained to the company’s highest manager on several occasions. Respondent did not adequately address the matter nor did Respondent attempt to resolve the matter by separating Complainant and the harassers or by taking other ameliorative measures for a period of two weeks and after several complaints. Complainant felt intimidated by, and fearful of, the perpetrators of the hostile work environment when they threatened her after she complained about their conduct. Complainant's working conditions had become so intolerable that she had no expectation of them improving and was justified in resigning from her job. I conclude that Complainant's work environment was sufficiently hostile and abusive to support a claim of constructive discharge.

IV. REMEDY

A. Emotional Distress

The Commission is authorized to award damages to victims of unlawful discrimination to make them whole, including damages for emotional distress suffered as a direct consequence of the unlawful actions. An award of damages for emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, et al., 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” *Id.* at 576.

I conclude that Complainant was upset by and depressed at having been subjected to a sexually hostile work environment and retaliation, which compelled her constructive discharge. She suffered from insomnia and anxiety and became withdrawn for a period of time. She worried about not being able to support her family and was concerned that she would be subjected to similar conduct at subsequent jobs. However, I conclude that Complainant's increased anxiety and insomnia were of limited duration and continued only until she obtained subsequent employment some two months later, at which time she reported to her therapist that she was feeling better and enjoyed her new job. While I credit Complainant's testimony that Respondent's discriminatory treatment caused her emotional distress, the evidence is clear that

this was not the sole source of Complainant's distress. Other pre-existing stressors in her life included her relationship with her husband, chronic back pain, a diagnosis of bi-polar disorder, and on-going emotional and physical issues related to anxiety and depression and opioid addiction. Nevertheless, a portion of her distress was the direct result of discriminatory and retaliatory treatment by Respondent and the loss of her job. I conclude that she is entitled to an award of damages for emotional distress in the amount of \$5,000.00.

B. Lost Wages

I conclude that Complainant is entitled to lost wages from July 2010 until September 22, 2010. The liability for back pay ended in September 22, 2010 when Complainant began a new job from which she was subsequently terminated for poor attendance and a poor attitude.

If Complainant's hours had not been reduced and had she not been constructively discharged, she would have earned an average weekly income of \$360 for 8 weeks beginning July 22, 2010 until September 21, 2010, when she became employed by United Personnel Services. Therefore, I conclude that Complainant is entitled to lost wages in the amount of \$2,880.00.

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1. Respondent immediately cease and desist from engaging in discrimination on the basis of sexual harassment.

2. Respondent pay to Complainant the sum of \$5,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

3. Respondent pay to Complainant the sum of \$2,880.00 in damages for back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

4. Respondent shall conduct an initial training on unlawful discrimination on the basis of sexual harassment and conducting prompt and effective investigations for all managers and supervisors it employs at any and all of its facilities in the Commonwealth of Massachusetts. With respect to such training:

a. Each training session for managers and supervisors must be at least three (3) hours in length. All managers and supervisors, employed in the Commonwealth of Massachusetts shall be required to attend the initial training. No more than 25 persons may attend each training session. Respondent shall repeat this training once each calendar year for the next five years for all new supervisors and managers who were hired or promoted after the date of the initial training session.

b. Within 30 days of the receipt of this decision, Respondent shall select a trainer to conduct the initial training sessions. The trainer must be selected from the list of trainers who have completed the Commission-certified discrimination prevention-training program, available from the Commission's Director of Training.

c. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.

d. In the event that Respondent is sold, materially changed, or taken over by new management, any and all successor purchasers, assignors, managers, or operators of Respondent (hereinafter referred to as the "new owners") shall be responsible for fulfilling the training requirements specified in this decision if any of the following shall apply:

i. The majority of the managers and supervisors employed by Respondent as of the date of this decision continue to work for the new owners as of the succession date;

ii. The majority of Respondent's governing board (e.g., board of directors, trustees) as of the date of this decision continues to serve on the new owner's board as of the succession date;


iii. The new owners are relatives of Respondent, or previously employed by Respondent as a manager or supervisor; or,

iv. Respondent continues to retain an interest in the successor entity.

For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 12th day of May, 2017.


JUDITH E. KAPLAN,
Hearing Officer