

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & LINDA SWENSON,  
Complainants

v.

DOCKET NO. 12-SEM-00348

MOHAMMED MOINI,  
Respondent

Appearances:

Tani Sapirstein, Esquire for Complainant  
Patricia Rapinchuk, Esquire for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about February 15, 2012 Complainant Linda Swenson filed a complaint with this Commission charging Mohammad Moini and Drs. Moini and Witzenberger with discrimination on the basis of gender and sexual harassment under M.G.L. c. 151B, §§ 4(1) and 4(16). The complaint was subsequently amended to include a claim against Moini individually pursuant to §4(4A) for interference with rights protected by c. 151B. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for public hearing as against the individual Respondent Moini only.<sup>1</sup> A public hearing was held before me on August 1 and 3, 2017 and September 14, 2017 at the Commission's Springfield location. After careful consideration of the entire record in this matter and the post-

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<sup>1</sup> The claim against the corporation was never discussed at the public hearing and is presumed to have been waived.

hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

## II. FINDINGS OF FACT

### Background

1. Respondent Mohammad Moini has been a practicing periodontist for almost 40 years. Respondent first went into practice with another dentist in 1977. In 1980, Dr. Thomas Witzenberger joined the practice. Respondent's initial partner retired in 1986 and Respondent and Witzenberger continued to practice together under the professional corporation name Drs. Moini, Witzenberger & Associates, P. C. ("the practice") until Witzenberger's retirement in 2016. During Complainant's employment, the practice included locations in Springfield, Hadley and Wilbraham. Respondent and Witzenberger never worked together in the same office. Respondent worked in the Springfield office two and one half days per week on days that Witzenberger worked in one of the other offices, and on the remaining days, they switched offices. Respondent worked in the Wilbraham office on Monday mornings and Witzenberger worked there on Monday afternoons. (T. 2, p. 151-152)

2. Complainant Linda Swenson was employed by the practice. She was hired as an insurance coordinator in 2001. In 2003, Complainant voluntarily resigned to work for another dental practice. In the spring of 2006, Respondent, who did much of the hiring, recruited Complainant to return to the practice as bookkeeper, with flexible hours and a salary increase. (T.1, p. 46-48) Complainant worked primarily in the Springfield office. In September 2011, Complainant began working solely under Witzenberger's direction, and did so until leaving the

practice altogether in February 2012. She returned to work for the practice under Witzenberger's direction from 2013 until his retirement in 2016. (T. 1, p. 48-50)

3. The practice employed more than six individuals, including hygienists, dental assistants and clerical workers, all of whom were women. It is an employer within the meaning of M.G.L.c. 151B, §4(1)

4. The Springfield office was divided into a clinical area and a business area. In one area there was a doctor's office used primarily by Respondent, the reception area and the clinical rooms. On the other side of the office were the transaction, insurance, and lunchrooms and an office used by Witzenberger. (T.2, p. 74-76)

5. Complainant was friendly with her co-workers and they shared what she referred to as "girl talk" about their personal lives in the office. Complainant sometimes ate in the lunch room with her co-workers where Respondent also ate lunch daily and she engaged in personal conversations there as well. (T.1, 88) The atmosphere in the lunchroom was relaxed and candid and there were discussions concerning various personal matters in Respondent's presence. (T. 1, 89-91) Among the topics of conversation were plastic surgery, weight loss, liposuction and breast reduction.

6. Dr. Norman Lee, now a self-employed periodontal surgeon, worked for the practice from 2006 to 2009, first as an associate and then a partner. It was initially planned that he and another dentist would ultimately take over the practice from Witzenberger and Respondent, who planned to retire in a few years. As a result of contractual disputes, the plan fell through and Lee left the practice in 2009. Lee and the practice were thereafter engaged in litigation that ended in a negotiated settlement. Complainant came to have a close relationship with Dr. Lee, kept in touch with him after he left the practice, and considers him a friend. (T. 3, p. 17-18)

7. Sandra Fiedler worked for the practice for 30 years as a hygienist and office manager until her retirement in 2008. She worked primarily in the Springfield office. She stated that Respondent was an excellent clinician and a hard worker, but was demanding and sometimes difficult to work for. (T. 1, p.19; 27-29)

8. Paula Tarozzi-Ryan, a dental hygienist, has worked for the practice and then for Respondent since 1990. At the time of the public hearing she worked for Respondent in Springfield and Hadley. Tarozzi-Ryan gets along well with Respondent and respects him, but stated he is impatient and can be difficult at times. (T.2, p. 32-23) Tarozzi-Ryan and Complainant got along well, and she described Complainant as a very good office manager who was fair and organized.

9. Nancy Moriarty was hired by the practice in 2006 as a transcriptionist in the Springfield office. Her duties later increased to include the position of receptionist in the Wilbraham office on Mondays. In 2007, she began performing insurance-related duties in lieu of transcription and continued to work the front desk in Wilbraham on Mondays. She left the practice in 2013 for a job with an insurance company. (T.2, p. 70-76; 94-95)

10. Moriarty's office was in close proximity to Complainant's. For a few years, Moriarty had a wonderful relationship with Complainant and considered her a mentor. She described Complainant as helpful, friendly to everyone and poised but outspoken and self-assured. Moriarty observed that Complainant and Respondent had a close relationship and laughed and joked together. Moriarty viewed Respondent as a father figure and stated that although he was demanding he was always kind to her. (T.2, p. 77-78)

11. Lisa Cirelli has worked for the practice as a dental hygienist since September 1987. She testified that she has a friendly, respectful, "love-hate" relationship with Respondent and

they don't always see eye-to-eye. According to Cirelli, in the early years the practice was extremely busy and everyone got along. She and Complainant had a great relationship, bonded over the challenges of child-rearing and leaned on one another for support. She stated that Complainant was a wonderful office manager, was efficient and compassionate and always looked out for the employees. In her view, Complainant was also boisterous, outspoken and controlling. Cirelli observed that Complainant and Respondent appeared to get along well. (T. 2, p. 108-112)

12. Linda Hill, a periodontal assistant, worked for the practice, with two breaks in employment, from 1978 to February 2016, when Dr. Witzemberger retired. Hill testified that assisting Respondent was stressful because he performed more complex and time-consuming procedures and kept several operatories going at once. Respondent always complained that she did not work quickly enough and was insulting to her, and she preferred to assist Witzemberger and Lee. In 2008, Hill requested to work primarily under Witzemberger and Lee and thereafter, rarely worked directly for Respondent. (T. 3, p. 20-21, 31-32)

13. Respondent described Complainant as "wonderful," "qualified" and "great." (T. 158-159) He testified she was on the "front line" and was the liaison between the doctors and the staff." (T. 2, Pp.161) According to Respondent, he and Complainant got along well and that she was like a family member to him. He referenced how when in the lunch room, they would discuss family and personal problems.

14. In January 2008, when Sandy Fiedler retired, Complainant was promoted to the position of office manager. In that position, Complainant performed bookkeeping, auditing, payroll, collections, bank deposits and insurance work. She also supervised staff, interviewed job candidates, managed the doctors' schedules and set up training for staff. (T. 1, p. 71-74)

15. In 2008, Complainant traveled to Chicago for a dental conference with Respondent and two other employees. She had a friendly relationship with Respondent at the time and they had dinner together while the other two employees attended a baseball game. Respondent testified credibly that during dinner, Complainant confided in him about intimate details of her personal life and marriage. He stated that he was so discomfited by the conversation that he changed the subject. (T. 2, p. 184-185)

16. The dentists were paid a bi-weekly draw and received additional compensation based on production, which represented the revenue each dentist brought into the practice. The production revenue went into a single pot that was later divided based on the percentage of each dentist's production. A dentist who produced more received a larger bonus. On October 1, 2008 Respondent noticed that his production had decreased when it should have increased. At his request, Complainant reviewed production reports from the prior two and half years for discrepancies. (Tr. 1, p. 80-82; 164-166)

17. Complainant testified that she uncovered \$250,000 allocated to Witzenberger that should have been allocated to Respondent. (T. 1, p. 124-129) As a result of these discrepancies, Respondent reported Witzenberger to the District Attorney. Ultimately Witzenberger repaid the money to Respondent and no criminal charges were brought against him. Thereafter, there was significant tension between Respondent and Witzenberger, who spoke to one another only when necessary. Around the same time, there was litigation between the practice and Dr. Lee, which was resolved in 2011. (T-2, p. 192-198)

Allegations of hostile work environment

18. Complainant testified that when Respondent was impatient or upset with a patient, he would sit out of the patient's sight, place his hand near his pelvis and move his hand up and down in a gesture that Complainant recognized as simulating masturbation. She testified that the gesture was intended to signify that Respondent wished the patient would "shut up." Complainant testified that Respondent made this gesture frequently and when he did so, she would give him a dirty look and say "Really?" and walk away. Complainant never told Respondent that the hand gestures were offensive to her. (T. 1, p. 52-54)

19. Dental hygienist Cirelli stated that she and a co-worker began using a similar gesture as early as 1992 to express annoyance or incredulity when dealing with a difficult patient. The gesture was not intended as sexual, according to Cirelli. She stated Respondent also made other hand gestures such as playing an imaginary violin when a patient complained or a hand waving motion meant to convey impatience. (T. 1, p. 115-120) The receptionist Moriarty observed Respondent often make a gesture with his fist, shaking it up and down, which she did not perceive as offensive or directed toward anyone in the room. She likened the gesture to him "rolling his eyes." (T. 2, p. 83) Hygienist Tarozzi-Ryan testified that Respondent and others occasionally made a similar gesture while displaying impatience and saying, "Let's go." Tarozzi-Ryan did not perceive the gesture as simulating masturbation. (T.2, p. 30-32)

20. Office Manager Fiedler observed Respondent and co-workers make the described hand gesture "a couple of times" over a period of 30 years. She viewed the gesture as non-threatening, not sexual, and not directed at anyone in particular. She understood it was intended to express frustration, and nothing more. (T.1, p. 20-25)

21. Dr. Lee testified that he observed Respondent make a gesture simulating masturbation on multiple occasions as “kind of an office joke.” (T. 2, p. 9-10, 13-14)

22. Periodontal Assistant Hill, who rarely worked with Respondent after 2008, stated that Respondent and co-workers made a hand gesture simulating masturbation as an expression of frustration and anger, three or four times in her 38 years working for the practice. (T.3, p. 22-23) When she observed Respondent making the gesture, she “may have” rolled her eyes and turned away and “probably” said, “Why do you do that? That’s not nice.” (T. 3, p.9-10) Hill testified that Respondent occasionally told “dirty jokes” to a few patients who liked it, but was “non-threatening” and more often made stupid, silly comments to make people laugh. (T.3, p.24)

23. Respondent testified that the hand gesture was meant to convey “get moving.” He claimed it was not intended to simulate masturbation and stated he would never have done it had he known that anyone took offense and would have apologized to the entire office. (T. 2, p.212-215)

24. Complainant testified that in May 2009 she informed Respondent that she was going to have surgery, and he asked her if she was having a breast reduction. When she responded that it was bunion surgery, he asked, “What size are you anyway?” (T. 1, 102, 104)

25. Complainant stated that she had never discussed breast reduction surgery with Respondent and was offended by the comment. I do not credit her testimony in this regard, as it contradicts the credible testimony of several witnesses who testified that Complainant frequently discussed having breast reduction and other plastic surgeries and had asked Respondent about his wife’s plastic surgeon. (T. 2, p.114-115-Cirelli; T.2, p. 26-30- Tarozzi-Ryan; T. 2, p. 128-181-Respondent; T.2, p.80-81- Moriarty) Complainant once suggested to Cirelli that they explore



getting a group discount with Respondent's wife's plastic surgeon who was a patient of the practice. (T.2, p.114-115) Sometime around 2010, Complainant asked Respondent to introduce her to the plastic surgeon when he was in the office and after a short private meeting she told staff that he had advised her to schedule a consultation with him. (T.2, p. 26-30-Tarozzi-Ryan; T.2, 181-182- Respondent) Complainant denied meeting with the plastic surgeon but I do not credit her testimony in this regard.

26. Complainant testified that Respondent referred to another local dentist by a name that was an obscene reference to female genitalia, and referred to a female dentist who had worked briefly for the practice in the past by an offensive name referencing feminine hygiene products. (T. 1, p. 117-118) No other witnesses could recall such comments although Lee stated that Respondent "may have" used one of the references. Respondent denied making one reference and claimed that when he first met one of the dentists, that dentist made fun of his own name using an obscenity. (T. 2, p. 255) I do not credit Respondent's testimony in this regard.

27. Complainant testified that, in late 2010 or early 2011, she had a disagreement with Respondent in his office but could not recall the substance of the disagreement. After she returned to her office, Respondent approached her from behind, put his hands on her shoulders, kissed her on the cheek and apologized for their argument. She testified that she was stunned and shocked by his action and thought it was "really creepy." (T. 1, p. 122-123) I credit her testimony that this occurred. Respondent acknowledged that he could have kissed Complainant on the cheek by way of apologizing after the argument. He stated that he wanted to make things right because he did not want to lose her as an employee. (T. 3, p. 186-187) Cirelli was in Complainant's office and observed the kiss, which she described as "a peck on the cheek" given

in an attempt to make amends and said that it was not sexual in any way. (T. 2, p.120-121) I credit her testimony.

28. Complainant testified that when Respondent saw a “well-endowed” woman he would gesture toward his chest and say she’s got a “great personality.” Dr. Lee observed such comments and gestures which he considered inappropriate for the work place. Others would mimic Respondent’s comments and gestures as an office in-joke. (Testimony of Fiedler, T. 1, p.22-23) Respondent acknowledged making such gestures and remarks as “a joke.” (T. 2, p. 247)

29. Complainant testified that she considered Respondent’s conduct “gross” and that it made her feel humiliated, violated and victimized. Complainant testified that from 2010 to 2012 she frequently complained to Witzenberger, who said he had never witnessed such conduct, but told her she should “pursue it.” I credit Complainant’s testimony that she found Respondent’s conduct inappropriate, but I do not credit her testimony that she felt humiliated, violated and victimized by such conduct, nor do I believe that she complained to Witzenberger about the conduct.

#### Events of 2011

30. Complainant testified that by 2011, Respondent and Witzenberger were discussing splitting up the practice and she was caught between the two. Both doctors had discussed with her the possibility of her working for them when the practice split up. (T.1, p. 133, 134) Other staff were concerned about losing their jobs. (T. 1, p. 130) According to Tarozzi-Ryan, the formerly pleasant and cohesive atmosphere had become anxious and tense. She stated that Complainant, once friendly, became moody and curt and shunned co-workers. (T.2, p. 35-37)

31. Complainant saw a therapist six times from January 19, 2011 to April 13, 2011. These sessions dealt primarily with Complainant's adult children's problems with drug and alcohol addiction. She also mentioned her "toxic" work environment that she attributed to conflict between the dentists and the chaos of potentially splitting the practice. On March 3, 2011, Complainant told her therapist she was taking on more work responsibilities due to co-workers' poor performance. (Ex. J-2)

32. Respondent testified that in 2011, Complainant told him several times that she was retiring because she wanted to visit her daughter who then lived out of state, but she would not give him a date certain. Respondent did not want Complainant to retire because she was very competent. In August 2011, Complainant told Respondent that she was leaving in September and advised him to fill her position. He chose a candidate whom he introduced to Complainant for her approval, but because Complainant remained working with no date certain for her departure, his attempt to fill the position was stymied. Respondent told Cirelli about the situation and Cirelli advised him to ask Complainant for a written letter of resignation with a date certain so that he could fill her position. (T. 2, p. 216-221)

33. Complainant testified that on September 1, 2011, Respondent came into her office "demanding" that she put her resignation in writing so he could plan for her replacement. (T. 1, p.137-139) Complainant responded by saying, "Screw you. I'm not leaving the practice. I'm leaving you. I'm going to work for Witzenberger." According to Respondent, he told Complainant if that were the case she would no longer be office manager. Complainant arranged that same day to work solely under the direction of Witzenberger. (T.1, p. 144) Hill testified that Complainant told her she would no longer work under the direction of Respondent because

they had a fight. (T. 3, p. 28) Complainant never spoke to Respondent, nor did she work under his direction after September 1, 2011.

34. Moriarty and Tarozzi-Ryan were present during Complainant's altercation with Respondent on September 1, 2011. They recalled that Complainant was angry and stood up and said she would no longer work under Respondent's direction. (T.2, p. 86-88-Moriarty; T.2, p.36-37 -Tarozzi-Ryan)

35. Once Complainant began working solely under Witzenberger's direction her pay was cut by \$5 per hour and she was required to travel to whichever office he was working in on a particular day.

36. Thereafter, Complainant refused to book appointments for Respondent and tried to refer those patients who called for Respondent to Witzenberger. She referred to employees as either on "Team Moini" or "Team Witzenberger." The practice continued with Witzenberger and Respondent working in the same offices as before, but with some employees working under the direction of only one dentist and other employees continuing to work under the direction of both dentists.

37. After Complainant began working solely under Witzenberger's direction, Tarozzi-Ryan continued to work in the Springfield office under both dentists. On Tuesdays and Thursdays, when Witzenberger and Complainant were in the Springfield office, the atmosphere was stressful. According to Tarozzi-Ryan, who had been friends with Complainant, Complainant was now "all business," was short-tempered, made negative comments about Respondent and others and booked Tarozzi-Ryan's patients with other hygienists. (T. 2, p.38-39)

38. Cirelli testified that when Respondent and Witzemberger were planning to dissolve the practice, she began working in all three offices under both Respondent and Witzemberger. She described the atmosphere as not cohesive. According to Cirelli, Complainant became edgy, lashed out at co-workers, and was disrespectful toward anyone who worked solely for Respondent. She also testified that Complainant critiqued Respondent's surgery and said he was too aggressive and took advantage of people. (T. 2, p. 123-124)

39. Moriarty testified that Complainant became critical of her and their relationship deteriorated. According to Moriarty, Complainant called her a "dumb-ass" and an "idiot," and falsely accused her of removing items from Complainant's office. (T. 2, p. 90-91) Complainant told Moriarty that Moriarty would no longer be working under Witzemberger and that Moriarty could not book Witzemberger's patients. On one occasion when Moriarty came to work in the Springfield office when Witzemberger and Complainant were working there, Complainant told Moriarty to leave or she would call the police. Moriarty was humiliated by this interaction and lost a day of work. (T. 2, p.92-3) This prompted Moriarty to inform Witzemberger that she would no longer be a "pawn" in their game, and ask that he restrain Complainant's harassing behavior. Witzemberger responded that Complainant was not his problem and Moriarty was on her own. (T.2, 90-91)

40. On one occasion, when Complainant was working in the Hadley office, she refused to fax the file of a walk-in patient to Springfield. The chart was eventually sent by Hill but did not arrive until after the patient left. (Testimony of Tarozzi-Ryan, T. 2, p.41-42); Testimony of Cirelli, T. 2, p. 126-127)

41. On February 8, 2012, Complainant resigned from the practice because of tension with the staff. (T.1, p. 17) Cirelli was present in the Hadley office on that day. She recalled that it was a tense and stressful day. She observed Complainant go into Witzenberger's office, heard loud voices and saw Complainant leave Witzenberger's office. She did not hear what they were saying and never learned why Complainant quit. Afterwards Cirelli discussed the matter with Witzenberger who agreed with her assessment that Complainant was not in a great frame of mind and was "over the edge." (T. 2, p. 127-129)

42. According to a number of staff, after Complainant resigned from the practice, there was a sense of relief and the atmosphere became much less contentious and was more harmonious. (Testimony of Testimony of Cirelli-T.2, p.131); Testimony of Tarozzi-Ryan -T. 2, p. 49)

43. On February 9, 2012 Complainant filed for unemployment compensation and a week later she filed her MCAD complaint.

44. Complainant resumed therapy on February 10, 2012 and had four visits on February 10, 14, and 22 and on March 7, 2012. According to the therapist's notes, she told her therapist about pressures at work referencing unspecified unethical and illegal behaviors and unspecified sexual harassment. (Ex. J-2)

45. In April 2012 Complainant traveled out of state to visit her daughter who had just had a baby. She also made at least one subsequent visit to her daughter in 2012. Complainant received unemployment compensation and did not work for the remainder of 2012.

46. In September 2013, Complainant returned to work for the practice, under the direction of Witzenberger. She retired in 2016 when Witzenberger retired.

### III. CONCLUSIONS OF LAW

M.G.L. c. 151B s. 4(4A) makes it an unlawful practice for any person to ...interfere with another person in the exercise or enjoyment of any right granted or protected by the statute. The Commission has held that individuals may be liable under M.G.L.c.151B§4 (4A) if they interfere with a Complainant's right to be free from discrimination in the workplace. The language of the statute explicitly requires that the right exercised or enjoyed must be one that is granted or protected "by this chapter." Where, as in the instant matter, the right asserted is the right to be free from sexual harassment in the workplace, Complainant's workplace must be subject to the provisions of M.G.L. c. 151B. The evidence presented at public hearing established that the practice, Drs. Moini, Witzenberger & Assoc., P.C., was Complainant's employer and had the requisite six employees to constitute an "employer" within the meaning of M.G.L. c. 151B. Thus, Complainant had an employment right that is protected by the statute, rendering Moini's alleged conduct as an individual subject to the jurisdiction of section 4(4A). See Tunstall v. Acticell Cosmetics, 25 MDLR 301 at 302.

#### Timeliness of Complaint

M.G.L. c. 151B§5 requires that complaints alleging unlawful conduct must be filed within 300 days of last act of discrimination. An exception to this rule exists where the Complainant proves that the conduct constitutes a continuing violation. Cuddy v. The Stop & Shop Supermarket Company, 434 Mass. 521 (2001); Couture v. Central Oil Company, 12 MDLR 1401, 1419(1990). For actions that occur 300 days prior to the filing of a complaint to be actionable, there must be at least one incident of discriminatory conduct within the statute of limitations period which substantially relates to, or arises from, earlier discriminatory conduct

and anchors the related incidents, thereby rendering the entirety of the claim timely. See Cuddyer, supra. at, 531-532; 804 C. M.R. §1.10(2). I conclude that Complainant's allegations of hostile work environment sexual harassment are untimely for the following reasons.

Complainant testified to several acts of alleged harassment that occurred not later than "early 2011." She filed her complaint on February 15, 2012, thus there must be at least one incident of harassment on or after April 21, 2011 in order for her complaint to be timely. Complainant's allegations regarding Respondent's use of offensive nicknames for dentists indicate that the conduct occurred no later than 2010. The kiss from Respondent occurred in "late 2010 or early 2011." The one purported comment referring to Complainant's breast size occurred in 2010. The comments about women's chest sizes and their "personalities" and Respondent's allegedly obscene hand gestures were spoken of vaguely as occurring between 2008 and 2011. The offensive nicknames Respondent used to refer to other dentists occurred in around 2010. As a threshold matter, I conclude that Complainant has failed to establish that any of the alleged later incidents of workplace discord occurring within the 300 day statute of limitations period substantially relate to, or arise from, the earlier conduct that was purportedly sexual in nature and unwelcome. Therefore Complainant's claim of hostile work environment sexual harassment must be dismissed as untimely.

Assuming that the complaint was timely and that Complainant can establish Respondent's individual liability arising from her underlying right under the statute to be free from workplace sexual harassment, I must next determine if Respondent's conduct rises to the level of sexual harassment proscribed by M.G.L. c. 151B. Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when ...such advances requests or conduct have the purpose or effect of unreasonably



interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment." G.L. c. 151B§1(18); College-Town Division of Interco v. MCAD, 400 Mass. 156, 165 (1987). See Massachusetts Commission Against Discrimination, Sexual Harassment in the Workplace Guidelines (2002) at II(C).

In determining whether speech or conduct creates a hostile work environment, the standard is whether a reasonable person in the complainant's position would interpret the behavior "as offensive and an interference with full participation in the workplace." Baldelli v. Town of Southborough Police Dept., 17 MDLR 1541, 1547 (1995); Harris v. International Paper Co., 765 F.Supp. at 1512-16 and notes 11 and 12; See Gnerre v. Massachusetts Commission Against Discrimination, 402 Mass. 502, 507 (1988) (sexual harassment in housing).

The unwelcome conduct must be both subjectively and objectively offensive. See College-Town supra. at 162; Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass. 673, 678 (1993). The objective standard of sexually unwelcome conduct considers the evidence from the perspective of a reasonable person in the plaintiff's position. The reasonable woman inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating, whether it unreasonably interfered with the worker's performance, and what psychological harm, if any, resulted. See Scionti v. Eurest Dining Services, 23 MDLR 234, 240 (2001) citing Harris v. Forklift Systems, Inc., 510 U.S.17 (1993); Lazure v. Transit Express, Inc., 22 MDLR 16, 18 (2000). The subjective standard of sexual harassment requires that the employee to whom the conduct is directed personally experiences the behavior to be unwelcome. See Couture v. Central Oil Co., 12 MDLR 1401, 1421 (1990) (characterizing subjective component of sexual harassment as "in the eye of the beholder.")

I conclude that Respondent's conduct when viewed in its entirety over a period of many years, from the time Complainant was re-employed by the practice in 2006 until sometime before the filing of her complaint in February 2012, does not support a claim for hostile work environment sexual harassment. There is a strong argument to be made that the behavior was not objectively offensive given that the majority of the all-female employees viewed it as inoffensive, non-sexual, and for the most part joking. Most of behavior cited by Complainant while sophomoric and inappropriate was undertaken in a light-hearted manner. The employees clearly understood the behavior was not meant to intimidate, frighten or sexually harass them and they did not perceive it as such. The hand gestures used by Respondent and others in the workplace, which Complainant characterized as simulating masturbation, were intended to indicate impatience or frustration with a situation and were not intended or construed as overtly sexual or referring literally to masturbation. Every witness, *including Complainant*, uniformly testified that the gesture was meant to convey frustration, impatience or incredulity with a situation or an individual, similar to what the gesture of an eye-roll might convey. The gestures were not intended or perceived as sexual in nature and were never directed at an employee.

I conclude that the other conduct cited by Complainant including using crude nicknames for other dentists, kissing Complainant once on the cheek, by way of an apology, once questioning Complainant about her breast size and occasionally gesturing about large breasts did not create a sexually hostile work environment for Complainant. I am not persuaded that this conduct was sufficiently severe and pervasive so as to humiliate, threaten, or interfere with Complainant's ability to perform her job or that she found the conduct subjectively offensive, as further discussed below.

While the conduct at issue may be deemed inappropriate in the workplace and should not be encouraged or condoned, I find that, given the circumstances, it does not support a claim of unlawful sexual harassment. "A few isolated remarks over a period of time" are generally insufficient to meet the pervasiveness standard. Prader v. Leading Edge Products, Inc., 39 Mass. App. Ct. 616, 619-20 (1996). Chapter 151B is not a clean language statute and does prohibit all use of profane or offensive language. Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 214 (2000); Prader, supra, at 619-20 (1996). Moreover, this was a work atmosphere where employees and Respondent had long-standing, casual, and close relationships with each other and often ate lunch together and discussed personal matters, including breast reduction surgery. The workplace atmosphere was permeated by discussions of personal and private matters and riven by professional rivalries, questionable business practices on the part of some and tension between dentists competing for income. Complainant and others ultimately fell victim to the tensions within the practice and the eventual breakdown of relationships between the dentists and those working for them. I find that it was these circumstances unrelated to allegations of sexual harassment that ultimately lead to Complainant's resignation and gave rise to the allegations in her complaint.

Finally, even if the conduct was found to be timely and sufficiently pervasive to satisfy the definition of harassment, Complainant has not convinced me that she was particularly distressed or offended by Respondent's behavior. She continued to work for Respondent over a period of many years and did not complain and returned to the practice after several years away. She did not raise issues of sexual harassment until after her resignation from the practice and long after she had stopped working for Respondent. I do not believe Complainant would have returned to work for the practice had she been so offended by Respondent's conduct. I conclude

that she embellished her testimony about Respondent's behavior in an ex post facto attempt to enhance her claim. The evidence also demonstrated that Complainant held a position of relative authority and influence at the practice. By all accounts she was a highly respected and competent employee who largely controlled the business side of the practice and did not hesitate to speak her mind. She was outspoken and quite willing to voice her opinion and argue with Respondent about work-related matters. In addition, Complainant had a close relationship with Respondent and confided to him intimate details of her personal life. All of this leads me to conclude that Complainant was not intimidated by Respondent and would not have hesitated to go directly to him with concerns about his conduct, had she truly found it offensive. Moreover, Complainant's stated reason for resigning in February 2012 after having not worked directly with Respondent for the previous six months was the tension among the employees.<sup>2</sup> She told Linda Hill that she was leaving because of a fight with Respondent. The office tension was exacerbated by Complainant herself, according to the credible testimony of co-workers who described Complainant as angry and "over-the-edge." There is scant evidence that any of these tensions were caused by Respondent's alleged sexual harassment. Further, Complainant treated with a mental health professional for several months in 2011, at which time she attributed her anxiety to problems with her adult children and office tensions related to the potential rupture of the practice. Only when Complainant resigned from the practice in 2012 did she return to therapy and assert for the first time that a source of her anxiety was about pressures at work related to unspecified "unethical and illegal" behaviors and unspecified sexual harassment. From the belated timing, I draw the inference that her references in therapy to unspecified sexual harassment were disingenuous and likely calculated to bolster her claim. I also conclude that Complainant's stress during 2011 and 2012 resulted primarily from workplace tensions entirely

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<sup>2</sup> Complainant's counsel explicitly stated that she was not asserting a claim for constructive discharge.


unrelated to sexual harassment and from intractable family problems. The latter were unrelated sources of emotional distress that likely also adversely affected Complainant's workplace relationships at the end of her employment. I therefore conclude from the entirety of the evidence that Respondent did not interfere with Complainant's employment by creating a sexually hostile work environment and did not violate M.G.L.c.151B§4(4A).

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed.

This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with 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 26th day of February, 2018

  
JUDITH E. KAPLAN,  
Hearing Officer