

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

ANTHONY J. GULLA and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 00-BEM-3747

LOUIS, INC.,

Respondent

Appearances: Darell A. Mook, Esq. and Douglas M. Kalata, Esq. for Complainant Gulla;
David J. Kerman, Esq. and Robert H. Morsilli, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On December 20, 2000, the Complainant, Anthony J. Gulla, filed a complaint with the Massachusetts Commission Against Discrimination charging that he was a victim of sexual orientation harassment, retaliation, and perceived handicap discrimination in violation of G. L. c. 151B. In regard to the claim of a sexually hostile work environment, Complainant alleges that as a makeup artist at Louis, Inc., he was sexually harassed by fellow employees who made crude comments about his sexual orientation (homosexual) and used offensive sexual props in conjunction with

their sexual commentary. Complainant alleges that he reported the harassment to his supervisors but that the supervisors did not take appropriate action.

Probable cause issued in regard to Complainant's sexual harassment claim,¹ and the case was certified to public hearing on December 7, 2004. On July 27, 2005, the individually-named respondents Maria Fei, Morna Flanagan, Pamela Gechijian, and Jay Sweeney were dismissed.

A public hearing was conducted on August 1, 2 and 4, 2005 and on September 9, 2005. The Complainant testified on his own behalf. Respondent called the following witnesses on its behalf: Maria Fei, Vice President of Operations at Louis; Anthony Conti, Sales Consultant at Louis; Morna Flanagan, Human Resources Manager at Louis; Jay Sweeney, former Facilities Manger at Louis; Pamela Gechijian, Sales Manager of the Women's Department at Louis; Robin Shuman, a former part-time employee at Louis; Reginald Boyd, a part-time security employee at Louis; and Shane Flaherty, a former security employee and valet at Louis. Nineteen joint exhibits were entered into evidence.

To the extent the parties' proposed findings are not in accord with or irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or irrelevant to my findings, it is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

¹ The Commission did not find Complainant's claims regarding retaliation and perceived handicap discrimination to be supported by probable cause.

II. FINDINGS OF FACT

1. Complainant, Anthony Gulla, is a homosexual male who was hired by Louis, Inc. in 1997 to apply and to sell cosmetics to customers.
2. Respondent, Louis, Inc. ("Louis") is a retail store which sells clothing and related items, such as accessories and cosmetics. The store has been in business in Boston, MA since 1924.
3. Complainant received his cosmetology license in 1979 and his aesthetician license in 1980. Prior to working at Louis, Complainant worked as a counter manager for a makeup line at Jordan Marsh from 1984 to 1986, worked for Neiman Marcus in 1986, and worked in the cosmetics department of Henry Bendel from 1993-1994. Complainant was sued for sexual harassment by a co-worker at Henry Bendel and was fired by the store in 1994. After he was fired by Henry Bendel, Complainant sued the store for sexual harassment. The case ultimately settled.
4. During the time that Complainant was employed at Louis, he reported to Pamela Gechijian, manager of the ladies' department. Gechijian described Complainant as a good make-up artist.
5. Maria Fei is Vice President of Operations for Louis, Inc. She has held this position since 1991.
6. Jay Sweeney worked for Louis from 1995 to 2002. He commenced employment as a member of the valet parking staff and was promoted to head of security for the store.
7. Reginald Boyd is a part-time security employee at Louis who works on Saturdays and some weeknights.

8. Shane Flaherty worked in the shipping department on a part-time basis during the 1996-2001 period.
9. Anthony Conti has been a sales consultant with Louis, Inc. for fourteen years. His sexual orientation is homosexual, and he is openly gay. He worked with Complainant on the fourth floor.
10. In June of 2000, Morna Flanagan became the Human Resource Manager of Louis, succeeding Melissa McDonald.
11. Complainant testified that while he was employed at Louis, Jay Sweeney made repeated sexual references on the job, including the following remark to co-worker Kim Carle who assisted Mr. Sweeney in setting out the store's jewelry display: "How about I give you a pearl necklace?" According to Complainant, the remark referred to ejaculation. I do not credit Complainant's testimony based on the fact that Complainant did not report it to a supervisor, and Jay Sweeney credibly denied that he made sexually inappropriate comments to Carle while they put jewelry in the display case.
12. Complainant testified that on one occasion when Sweeney was performing a security search of the handbag of a hair salon employee, he pulled a breast pump out of the employee's handbag, waved it around for others to see, and said he would like to pump the employee's breasts himself. I do not credit this testimony. Instead, I credit the testimony of Jay Sweeney that he never took a breast pump out of the handbag of a female co-worker and that he did not make inappropriate comments about the breasts of female employees while he was at work.
13. Complainant accused Sweeney of making obscene gestures behind the back of

actress Bo Derek when she visited the cosmetics department at Louis and that Sweeney told another cosmetics client that she was “hot.” I do not credit Complainant’s testimony. Instead, I credit the denial of Jay Sweeney.

14. Complainant testified that Sweeney would, on occasion, turn the store’s security cameras on the breasts of cosmetic clients when they were having their make-up done. Complainant claimed that on one occasion, Sweeney put a security camera on Maria Fei’s buttocks when she was working on a ladder in the shoe department and zoomed in on her thong. I do not credit Complainant’s testimony. Instead, I credit the testimony of Jay Sweeney that he did not point the store’s security camera on the breasts and buttocks of customers or zoom in on Fei’s buttocks while she worked on a ladder in the shoe department. Sweeney testified credibly that there were legitimate security reasons to scan different areas of a customer’s body and denied that the security camera in the shoe department had a zooming function.

15. Complainant testified that Maria Fei once asked him to watch her niece at the store. According to Complainant, after the toddler became fussy, he banged on the door to Fei’s office, and Fei opened the door wearing her shirt inside out. Complainant testified that Sweeney’s sneaker was visible in the room and that Complainant saw Sweeney come out of the room after Fei left her office. I do not credit this testimony. Complainant did not mention the alleged incident in his 2001 deposition. Maria Fei testified credibly that she never left her niece in Complainant’s care at work. She denied engaging in a sexual encounter with Sweeney while Complainant watched her niece and answering the door to her

office with her shirt on backwards. I also credit the testimony of Jay Sweeney that he never hid in Fei's office after engaging in a sexual encounter with her.

16. Complainant testified that he sometimes had to go to the store's shipping area where he observed pictures of women wrestling each other in bikinis, a calendar with a naked woman beneath a clothed overlay, and a topless woman holding her breasts. I do not credit this testimony. Instead I credit the testimony of Jay Sweeney that there were no pictures of topless women in the shipping area although there were promotional materials in the area related to lingerie and stockings sold by the store.

17. Complainant testified that on a Saturday in February of 2000, when Complainant was setting up a display of candles, Reginald Boyd moaned and picked up a candle and said, I bet you'd like this, "to put in your ass." According to Complainant, Boyd then picked up a bigger candle and said, "This one might be better." At his 2001 deposition, Complainant testified that Boyd commented that Complainant could, "have a good time with [the candle] but did not explicitly mention anal sex. Complainant testified that several days later, he told his supervisor, Pamela Gechijian, that Boyd had made a sexual comment about a candle. According to Complainant, Gechijian told him that she was going to report the comment to Human Resource Manager Melissa McDonald and that Complainant should report the alleged incident to Boyd's supervisor, Jay Sweeney. Gechijian testified that she recalls Complainant reporting a candle incident to her but does not remember any details except that Complainant did not appear to be offended when he reported the matter. Gechijian did not investigate

the alleged comment. I credit Complainant's deposition testimony that Boyd pointed to a candle which Complainant was putting on display and said that Complainant could have a good time with it.

18. Complainant testified that on another occasion, Boyd discussed his trip to Germany in a sexually explicit manner by talking about the number of women he had sex with on his trip, the sex clubs he visited and the transsexuals he encountered with beautiful faces and big endowments with whom the Complainant could have sex. At Complainant's 2001 deposition, Complainant testified that Boyd had discussed various sexual activities he engaged in during a trip to Germany and told Complainant he would enjoy the male and female strippers and the sex shows there but that Boyd did not mention attending a transsexual show. Complainant did not report either version of the alleged conversation to his supervisor or to Human Resources. Reginald Boyd credibly denied at the public hearing that a sexually-explicit conversation about his trip to Germany ever took place between him and the Complainant. I do not credit Complainant's accusation about the alleged conversation.

19. Complainant testified that Boyd made a sexually suggestive comment to one of Complainant's make-up customers about "knock[ing] boots"; on another occasion, Boyd picked up a book with a picture of a man and woman embracing and said, "I'd like her and you can have him"; and on a third occasion he described his wife as a "Bitch" and a "Ho." Complainant acknowledged that he never reported these alleged incidents to a supervisor or to Human Resources and that he never mentioned the alleged comments about Boyd's wife at his

deposition. I do not credit these accusations against Reginald Boyd.

20. Complainant testified that Reginald Boyd behaved in a sexually inappropriate manner with a young store cashier. According to Complainant, Boyd upset the cashier by “pinning” her to a coke machine and kissing her on the face. I do not credit Complainant’s testimony about Boyd’s allegedly inappropriate conduct since the testimony is contradicted by the Complainant’s deposition testimony, the incident was never reported by Complainant to a supervisor, and the accusation was credibly denied by Boyd.
21. Complainant testified that Reginald Boyd behaved in a sexually inappropriate manner with part-time make-up artist Robin Shuman. According to Complainant, Boyd upset Shuman by hugging and kissing her on the face and neck at work and addressing her in the following fashion: “How’s my baby today?” “When are we going dancing” and “When are we going out?” I do not credit Complainant’s testimony about Boyd’s interaction with Shuman. During his deposition four years prior to the public hearing, Complainant only testified that Boyd hugged Shuman and that she hugged him back. At the public hearing, Shuman testified credibly that Boyd never engaged in behavior which she found to be sexually hostile or offensive, although she acknowledged that they were friendly at work and sometimes would greet each other with a hug. Shuman testified credibly that she didn’t recall being kissed by Boyd but, if it happened, it would have been a “non-sexual hello.” Tape 1 of 9/9/05. Shuman never complained about any conduct on the part of Reginald Boyd.
22. Despite the fact that Shuman did not consider Boyd’s conduct to be offensive and

never complained about it, Complainant reported to Sweeney, McDonald, and Gechjian that Boyd was sexually harassing Robin Shuman. At Fei's instruction, Sweeney interviewed Complainant on June 2, 2000 and prepared a summary of the conversation in a June 7, 2000 memorandum. Joint Exhibit 9. The memorandum states that Complainant accused Boyd of hugging Shuman and saying things that made her feel uncomfortable and accused Boyd of making inappropriate statements to Complainant. According to the memorandum initially drafted by Sweeney, Complainant made the following comment to Sweeney about Boyd during their interview: "I did everything that I could do so that I didn't call him a you know what (nigger)." Id.²

23. Sweeney and Fei met with Shuman on two occasions regarding Complainant's allegations that Boyd was sexually harassing her. According to the credible testimony of Sweeney and Shuman, Shuman said that she had a good relationship with Boyd, but that she had observed the Complainant and Boyd behaving in an unprofessional manner with each other.³ At the second meeting on June 19, 2000, Shuman was asked to sign a memo designed to memorialize the investigation into Complainant's allegations about Boyd. Joint Exhibit 9. Shuman signed the memo but asked that two references in the memo be deleted or changed. After the changes were made, Shuman signed a revised version of the memo on June 26, 2000. Joint Exhibit 8.

24. Complainant testified that Shuman called him after signing the memo and told

² According to the Complainant, it was Sweeney who used the "N" word when he allegedly commented to Complainant, "Wow, didn't you want to call him [Boyd] a Nigger and haul off and hit him?" I do not credit this testimony.

³ At the public hearing, Shuman testified that she also engaged in banter with Complainant and Boyd which she acknowledged to be "unprofessional" but not offensive.

him that she had been pressured to sign the document. I do not credit Complainant's testimony. Instead, I credit the testimony of Shuman that she signed the memo voluntarily and that she told Complainant that she was upset about the situation because she felt that her interactions with Boyd had been "blown into such a huge thing."

25. Complainant testified that towards the end of his employment, Flaherty, in the presence of Jay Sweeney, touched Complainant's buttocks with a cylindrical object that functioned as tubing for paper and said, "How do you like that?" According to Complainant, Sweeney laughed and said, "Oh, you loved it." During his deposition, Complainant said that he took the cylindrical object from Flaherty, pushed it towards him, and asked, "How would you like it?" which caused Flaherty to apologize. Flaherty and Sweeney credibly denied that the incident took place. Complainant acknowledged that he did not report it to a supervisor or to Human Resources. I find that it probable that the incident did not take place.

26. Complainant testified that on another occasion in the late spring or summer of 2000, he and Boyd were in the men's bathroom. According to Complainant's testimony at the public hearing, Boyd grabbed his genitals through his underwear and said, "did you see all that -- there's a lot of lovin in there" and referred to his penis as "a big black Cadillac." During his deposition in 2001, however, Complainant testified that in July of 2000 he saw Boyd at a urinal grabbing his genitals though his underwear and heard him say, "Look at all that." Complainant stated at the deposition that he responded, "Look at all what?" and left.

Complainant did not report this alleged incident to a supervisor or to Human Resources. I do not credit Complainant's deposition testimony or his testimony at the public hearing about the alleged bathroom incident.

27. Complainant received a warning at work in November of 1998 for discussing the sexual orientation and sexual activities of a client's husband, "Mr. G."

Complainant was overheard saying that Mr. G had a sexual preference for little boys. After receiving a written warning for his comments, Complainant responded in writing that he, "Acknowledge[s] [the] document, recognize[s] there is a problem and ... will take steps to improve the situation." Joint Exhibit 3.

Two other Louis employees were issued written warnings in connection with the incident.

28. Complainant received another warning on July 30, 1999 for telling a female co-worker that another employee had called her a dyke. The written warning stated that Complainant's comment promoted ill will within the store. Joint Exhibit 4.

29. According to the credible testimony of Anthony Conti, Complainant made sexual comments about male customers, such as, "Look at that fag, what is he buying today." Conti testified credibly that Complainant: 1) described certain male customers by stating, "I'm sure he's hung like a horse;" 2) said it would be fun to have sex with certain male customers; and 3) commented on how great a male cleaning employee looked in tight trousers. Tape 3 on 8/2/05. Conti also testified that Complainant made derogatory comments about various female customers, such as, "Oh, look at that douche bag coming towards me -- you know, there's not much I can do for her." Conti testified credibly that on other

occasions, Complainant picked up lipstick testers, raise the lipstick up to its full capacity to simulate an erect penis, and said to co-workers, “Wouldn’t you guys like this, nice, huh.” Id. Conti testified that despite his own openly gay sexual orientation, he has never been the target of any sexually inappropriate conduct by Sweeney, Boyd, or Flaherty.

30. Boyd provided credible testimony that Complainant once said about a male member of the housekeeping staff, “I’d like him to come clean my house” in a sexually suggestive manner. Boyd also testified credibly that Complainant once asserted he could make part-time employee Shane Flaherty “switch sides” in reference to Flaherty’s heterosexual orientation.
31. While Complainant was an employee at Louis, he was disciplined for attendance problems, tardiness, and excessive breaks, including a January 3, 1998 written warning for tardiness and excessive breaks and a March 7, 2000 final written warning for leaving his job for two and one-half hours without permission. Between February 1999 and June 2000 he called in five times to report he would be absent on Tuesdays, following days off on Sundays and Mondays. On the Labor Day weekend immediately prior to his termination on September 11, 2000, Complainant called in sick on Thursday, August 31, 2000; Friday, September 1, 2000; and on Saturday, September 2, 2000. Complainant failed to report to work on Tuesday, September 5, 2000, did not call in, and was observed in New York City eating in a restaurant. Complainant testified that his stomach was upset over the weekend and that he knew he was going to be fired.
32. Complainant testified that vendors preferred to ship product samples to his home

address rather than to Louis Inc. because Fei and Sweeney took the samples that were delivered to work for their own use. I do not credit Complainant's testimony concerning the reason why he requested the vendor to send merchandise directly to his home.

33. On Friday, September 8, 2000, Complainant was called into a meeting with Pamela Gechijian and Morna Flanagan. They questioned Complainant about his absences and a fax that he sent to a cosmetics vendor asking the vendor to ship free cosmetics samples to Complainant's home address. During the questioning, Complainant grabbed the fax, crumpled it into a ball, threw the paper on Flanagan's desk and walked out of the room. Flanagan followed Complainant and brought him back into the meeting. Gechijian, Flanagan, and Fei decided to suspend Complainant over the weekend and to terminate him on the following Monday, September 11, 2000. Several weeks prior to his termination, Complainant had received a satisfactory performance evaluation.

34. According to the credible testimony of Pamela Gechijian, Complainant never complained to her about being sexually harassed by Jay Sweeney or Sean Flaherty and never complained about inappropriate conduct on the part of Reggie Boyd after the candle incident.

II CONCLUSIONS OF LAW

A. The Six-Month Limitations Period

G.L. c. 151B, sec. 5, as it existed during the relevant time period, required Complainant to file his complaint of discrimination within six months after the alleged

act of discrimination.⁴ Complainant filed his complaint on December 20, 2000. Thus, in order for the complaint to be timely filed, an act of sexual harassment must have occurred on or after June 20, 2000. Despite describing a litany of alleged events during his employment at Louis, Complainant's testimony failed to pinpoint a single act of harassment as occurring within the six month period prior to filing charges at the Commission. Accordingly, Complainant's charges are barred by the statute of limitations.

In regard to the incidents of harassment which allegedly occurred closest in time to the filing of discrimination charges, Complainant testified at the public hearing that, "towards the end of his employment" Flaherty touched his buttocks with a metal cylinder and that, "in the late spring or summer of 2000" Boyd grabbed his genitals through his underwear and commented on them in a sexually explicit manner. Complainant neither identified the exact dates on which these alleged incidents took place nor estimated when they occurred with sufficient specificity to determine timeliness. Such general descriptions of time do not satisfy the requirements of the statute of limitations because they are too imprecise to place the alleged conduct within a six-month period prior to the filing of the harassment charge. See Carozza v. Blue Cross & Blue Shield of Mass., Inc., 14 Mass. L. Rep. 88, 2001 Mass. Super. LEXIS 506 at 27 (November 21, 2001) (vague assertions about dates were found to be insufficient to permit a finding that the conduct occurred within the statute of limitations).

The only sources which place any of the alleged incidents within the limitations

⁴ Per Chapter 223 of the Acts of 2002. August 7, 2002, G.L.c.151B, sec. 5 was amended in 2002, increasing the statute of limitations from six months to 300 days, but the expanded statute of limitations only applies to claims arising after the effective date of the act. The Complainant's claims arose prior to the effective date of the amendment.

period are Complainant's original charge of discrimination and his 2001 deposition. In the original charge to the Commission, Complainant asserts that the Flaherty incident took place on June 22, 2000, almost six months to the day prior to the expiration of the limitations period, and in his 2001 deposition, Complainant states that the alleged men's room comment by Boyd occurred in July of 2000. While these dates would have been sufficient to survive a statute of limitations challenge had they been presented as evidence at the public hearing, Complainant's testimony failed to specify a day, week, or month in which these alleged events took place. Thus, Complainant provides no credible evidence from which I may evaluate the timeliness of these charges as independent claims or as anchors for earlier incidents of alleged harassment. See Carozza v. Blue Cross & Blue Shield of Mass., Inc., 14 Mass. L. Rep. 88, 2001 Mass. Super. LEXIS 506 at 27 (November 21, 2001) *citing* Cuddy v. The Stop and Shop Supermarket Company, 434 Mass. 521, 533 (Plaintiff must show one incident within six-month limitations period which substantially contributes to continuation of a hostile work environment).

B. Sexually Hostile Work Environment

Even if Complainant's case were filed in a timely fashion, it nonetheless fails on the merits as a claim of employment discrimination based on sexual orientation under Massachusetts General Laws Ch. 151B, section 4, paragraph 1. Illegal discrimination based on sexual orientation includes the creation or maintenance of a hostile work environment. See Dodson v. Sandpoint, 20 MDLR 67 (1998). To establish a hostile work environment case based on sexual orientation, Complainant must prove that: 1) he is a member of a protected class based on sexual orientation; 2) he was subjected to

unwelcome verbal or physical conduct based on sexual orientation; 3) the unwelcome conduct was subjectively and objectively offensive; 4) the unwelcome conduct was sufficiently severe or pervasive that it altered the condition of Complainant's employment and created an abusive work environment; and 5) the harassment was carried out by an individual in a supervisory position, or a co-worker under circumstances in which a supervisor knew or should have known about the harassment and failed to take prompt remedial action. See Dukes v. NWI Investigative Group, Inc., 25 MDLR 468, 474 (2003) *citing* Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208 (2000); Beldo v. University of Massachusetts, 20 MDLR 111 (1998).

Much of Complainant's testimony pertained to sexual banter and conduct which was not directed at him or at his sexual orientation. For instance, Complainant testified about discovering two supervisors having an affair at work; observing Reginald Boyd's sexually-aggressive conduct toward female co-workers and customers and listening to Boyd make distasteful comments about his wife; viewing pictures of topless women in the shipping department; watching the head of security, Jay Sweeney, use the store's security cameras to focus on the breasts and buttocks of a female employee and wave around the breast pump of another female employee; overhearing Sweeney make an obscene remark about a pearl necklace to a female employee filling a jewelry case; and seeing Sweeney make obscene gestures behind the back of actress Bo Derek.

None of the alleged conduct cited above is sufficient to create a sexually-hostile environment based on Complainant's homosexual orientation. Even assuming, arguendo, that the conduct occurred as alleged,⁵ it was neither directed at Complainant nor at his

⁵ For the reasons set forth in the findings of fact, supra, I did not find these claims to be credible.

sexual orientation. See Dukes v. NWI Investigative Group, Inc. 25 MDLR 468, 475-76 (2003) (inappropriate pictures posted in the workplace pre-dated complainant and were not evidence of unwelcome conduct based on complainant's sexual orientation); Perotta v. Rivkind, Baker & Braverman, 24 MDLR 30, 34 (2002) (co-worker's comments about the mobility of the co-worker's sperm, the fact that he was "horny," and the nature of his sex life were overheard by complainant but did not create a hostile environment).

There are several alleged incidents which directly involve Complainant and arguably pertain to his sexual orientation. In the first, Complainant testified that Boyd picked up a candle and suggested that Complainant use the candle for anal sex. Complainant testified that on another occasion he and Boyd were in the men's bathroom and Boyd grabbed his genitals and said, "there's a lot of lovin in there" and referred to his penis as a "a big black Cadillac." In regard to a third incident, Complainant testified that in or around June of 2000, Sean Flaherty, in the presence of Jay Sweeney, touched Complainant's buttocks with a cylindrical object and said, "How do you like that?"

These matters are relevant to a claim for sexual harassment based on sexual orientation, but I do not credit Complainant's public hearing allegations in significant respects. Complainant's public hearing testimony about Boyd's alleged candle comment is considerably more lurid and less convincing than Complainant's deposition testimony, four years earlier, wherein he quotes Boyd as saying, "You could have a good time with [the candle]." ⁶ Complainant's public hearing testimony about Boyd's trip to Germany,

⁶ The fact that Robin Shuman, identified by Complainant as a witness to the alleged candle incident, could not recall the candle incident at all lends credence to my conclusion that it was less lurid than painted at public hearing. Shuman no longer works for Respondent yet maintains a cordial personal relationship with Complainant. These factors make her failure to corroborate Complainant's allegations all the more significant. See Owens v. JLS Mailing Service, Inc., 25 MDLR 1, 5 (2003) (rejecting complainant's assertion that conduct was unwelcome based on testimony of former co-workers who "had no incentive to

Boyd's alleged book jacket comment, and Flaherty's alleged actions with a cylindrical object is also less convincing than the denials of the alleged perpetrators that such incidents ever took place. I decline to give Complainant the benefit of the doubt in regard to these matters because he never reported them to his supervisors or to Human Resources when they allegedly occurred. The claims also fail to withstand comparison to the more convincing testimony of Anthony Conti, an openly gay sales associate on the fourth floor, who asserted that he has never been the target of sexually inappropriate conduct by Sweeney, Boyd, or Flaherty.

In light of the foregoing findings, the only matter which I deem likely to have occurred is a single comment consisting of Boyd saying that the Complainant could have a good time with a candle. Such a comment, even if uttered, however, does not establish a sexually hostile work environment that was severe or pervasive. It is settled that occasional instances of off-color comments are generally insufficient as a matter of law to create a sexually hostile environment. See Clark County School Dist. V. Breeden, 532 U.S. 268, 271 (2001) ("simple teasing, off-hand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment"); Robinson v. Am. Consumer Credit Counseling Corp.; 24 MDLR 275 (2002) (no hostile work environment even though company president commented on receptionist's physical appearance and tapped her on the buttocks with a file folder and put his hands on her shoulders); MCAD Sexual Harassment Guidelines, Sec. II (C)(3) stating that, "Minor, isolated conduct does not constitute sexual harassment."

There is also ample evidence that Complainant was a willing participant in the

slant or fabricate their testimony.").

sexually-charged atmosphere about which he now complains. In November of 1998, Complainant was given a warning at work for discussing the sexual orientation and sexual activities of a client's husband. Complainant received another warning on July 30, 1999 for telling a female co-worker that another employee had called her a "dyke." Complainant made repeated sexual remarks about male customers, claimed that it would be fun to have sex with certain male customers, and commented on how great a male cleaning employee looked in tight trousers. Complainant made derogatory statements about various female customers and made sexual jokes using cosmetic tubes as props. Complainant once said about a male member of the housekeeping staff, "I'd like him to come clean my house" in a sexually suggestive manner and another time asserted that he could make part-time employee Shane Flaherty "switch sides" in reference to Flaherty's heterosexual orientation. These are not the comments of an individual who is squeamish about sexual matters. As an active participant in creating a sexually-charged atmosphere, Complainant cannot claim as a matter of law that the environment was subjectively offensive to him. See Thomas v. King Arthur's Motel and Lounge, Inc., 24 MDLR 66, 73 (2002); Candilere v. Vanson Leathers Inc., 24 MDLR 228 (2002) (Complainant found not to be subjectively offended by nude pictures and massages of boss by another employee where Complainant told dirty jokes and inserted balloons under her shirt).

Finally, it is noteworthy that Complainant did not complain about his allegedly hostile employment environment until after he was terminated. This factor lends weight to the contention that he was not subjectively offended by the activity. Apart from evidence that in February of 2000 Complainant reported to Pamela Gechijian that Reggie Boyd had made a sexual comment about a candle, Complainant did not raise any other

concerns about Boyd, Sweeney, or Flaherty in regard to his own treatment. The only claim of sexual harassment Complainant made while employed at Louis was raised on behalf of Robin Shuman. At no time during his employment did Complainant express difficulty coping with the sexually-charged environment that he now alleges he unwillingly endured. Only after Complainant was terminated did he allege that he suffered a hostile work environment. This sequence of events is at odds with the Commission's requirement that, "[t]he employee must actually find the behavior offensive at the time it is occurring, not just several years later when other events have caused [him] to become dissatisfied with [his] work." Elie v. Taste of Italy, Inc., 19 MDLR 150, 153 (1997) *quoting* Couture Oil Co., 12 MDLR 1401, 1421-22 (1990).

Based on the foregoing, I conclude that the evidence fails to establish that the environment created an impediment to Complainant's full participation in the workplace, altered the terms and conditions of his employment, or unreasonably interfered with his work performance as required by the MCAD's Sexual Harassment Guidelines, Sec. II (C)(4).

III ORDER

For the reasons set forth in this decision, the Complaint is hereby dismissed.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 12th day of June, 2006.

Betty E. Waxman