

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

ASHLEY R. EDWARD AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION
Complainants

Against

Docket No. 03 BEM 02605

911 ENTERPRISES, LTD
D/B/A DIRTY HARRY'S AND
STEVEN GIESTA,¹

Respondents

Appearances: Nancie L. Edgren, Esq., for Complainant Edward

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about September 24, 2003, Ashley R. Edward (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that she was subjected to sexual harassment by Steven Giesta, the manager of Dirty Harry’s Bar, where Complainant worked as a bartender.

The MCAD issued a probable cause finding and certified the case for public hearing on December 12, 2006. A public hearing was held on January 22, 2007.

¹ Respondent Giesta entered into a settlement agreement with Complainant which was reviewed and accepted by the Commission. Accordingly, this decision only applies to Respondent 911 Enterprises, LTD., d/b/a Dirty Harry’s.

Respondent 911 Enterprises, LTD., d/b/a Dirty Harry's, did not appear for the public hearing, resulting in a Notice of Entry of Default against Respondent 911 Enterprises, Ltd.² The defaulting Respondent failed to move to vacate the entry of default for good cause shown and, consequently, remains in default.

The Complainant and Steven Giesta testified at the public hearing. Counsel for Complainant Edward submitted a post-hearing brief on February 12, 2007.

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

II. FINDINGS OF FACT

1. Complainant Ashley Edward³ was employed by Respondent 911 Enterprises, LTD, d/b/a/Dirty Harry's, as a bartender from January 10, 2003 to March 27, 2003.
2. Respondent 911 Enterprises LTD, d/b/a Dirty Harry's, (now City Lights) is owned by Joseph Martin and Michael Perry. Its corporate address, according to the listing with the Commonwealth of Massachusetts Secretary of State's office, is 226 Union Street, New Bedford, Massachusetts.
3. Part-owner Joseph Martin managed the bar at the time that Complainant was hired as a bartender in January of 2003.
4. Steven Giesta was a bartender employed by Respondent at the time Edward was

² Respondent 911 Enterprises Ltd., d/b/a Dirty Harry's also failed to appear at the parties' conciliation conference and the certification hearing.

³ Since filing her complaint, Ashley Edward married and changed her name to Ashley Fullen. For the purposes of this proceeding, she will continue to be referred to as Ashley Edward.

- hired. In mid-February of 2003, Giesta was promoted by Martin to bar manager. After Giesta's promotion, he planned shifts, ordered alcohol, kept track of inventory, and supervised bartenders, including Complainant.
5. Complainant testified credibly that Giesta asked her repeatedly when she was going to get married and that his questions made her uncomfortable.
 6. Complainant testified credibly that during the first week of March, 2003, Giesta approached her from behind, rubbed her back, and slapped her buttocks. Complainant described her reaction as "freezing" and walking away.
 7. On two additional occasions in March of 2003, Giesta approached Complainant from behind, rubbed her back, and slapped or touched her buttocks. Complainant did not confront Giesta about his conduct although she walked away from Giesta each time it happened and told her then-boyfriend/current husband about the incidents.
 8. Complainant testified credibly about the following events which took place on St. Patrick's Day in 2003. During the evening shift, Complainant was tending bar and Giesta was on duty as the bar manager. Some time after closing, a female customer, who appeared to be intoxicated, was being served drinks by Giesta and the bouncer. The female began to dance on the top of the bar. As she danced, she pulled down her pants and the bouncer put dollar bills into her thong underwear. The female customer and a male companion subsequently moved to a pool table where the female performed oral sex on her companion. As she did so, the bouncer slapped the female's buttocks, and Giesta cheered on the three individuals.

9. Complainant described the incident to her then-boyfriend who called bar co-owner Joseph Martin to report that Giesta had touched Complainant's buttocks on several occasions and had permitted a female patron to dance on the bar counter and engage in sexual acts on the pool table.
10. When Complainant next appeared for a shift some time after March 22, 2003, she was told by Giesta that she had been terminated. Complainant called Martin about her termination. Martin initially said he would "handle it" but the following day he told her that he needed a manager more than a bartender. Complainant was replaced by Giesta's sister at the end of March of 2003.
11. Giesta testified that Complainant was terminated for having a "negative" attitude at the bar. According to Giesta, Complainant did not complain about being sexually harassed until after she was fired. Giesta asserted that Complainant threatened to press charges if she did not get her job back. I do not credit Giesta's testimony
12. After Complainant was terminated, she filed a criminal complaint against Giesta for indecent assault and battery. On September 23, 2003, Giesta was convicted of indecent assault and battery in the New Bedford District Court based on touching Complainant on the buttocks on three occasions.
13. Giesta denies that he touched Complainant inappropriately. I do not credit this testimony.
14. While working as a bartender for Respondent, Complainant earned approximately \$450.00 to \$480.00 per week. After quitting her job as bartender, Complainant was unable to find alternative employment for two months. Complainant

estimates that she lost approximately \$2,500.00 in wages. In June of 2003 Complainant found alternative employment as a bartender in Fall River and thereafter accepted a position at a residential school for adolescents with behavioral problems. Complainant took off four days from work to attend the Commission proceedings in her case, losing an additional \$173.00 per day in pay.

15. As a result of being sexually harassed at work, Complainant was unable to sleep, lost weight, cried, avoided socializing, experienced low self-esteem, and was depressed. These symptoms persisted until she obtained another job in June of 2003. Complainant sought medical treatment from a psychiatrist in Dartmouth and was prescribed the antidepressant, Effixor, which she took for approximately one month. Complainant stopped taking the medication because of side effects.

16. In accordance with Complainant's submission entitled, "Supplement to Request for Findings of Fact and Rulings of Law," Complainant's attorneys incurred \$23,417.50 in fees and \$831.65 in costs relating to Commission proceedings.

III. CONCLUSIONS OF LAW

A. Sexual Harassment

M.G.L. C. 151B, sec. 4, paragraph 1 prohibits workplace discrimination, including sexual harassment. See Ramsdell v. Western Bus Lines,, Inc., 415 Mass. 673, 676-77 (1993); College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987). Chapter 151B, sec. 4, paragraph 16A also prohibits sexual harassment in the workplace. See Doucimo v. S & S Corporation, 22 MDLR 82 (2000). Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or

physical conduct of a sexual nature when (a) submission to or rejection of such advances is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or sexually offensive work environment. M.G. L. c. 151B, sec. 1, para. 18. Complainant asserts that she was subjected to a sexually-hostile work environment.

In order to establish a "hostile work environment" sexual harassment claim, Complainant must prove by credible evidence that: (1) she was subjected to conduct of a sexual nature; (2) the conduct was unwelcome; (3) the conduct had the effect of creating an intimidating, hostile, humiliating or sexually offensive work environment; and (4) the conduct was sufficiently severe or pervasive as to interfere with Complainant's work performance or alter the conditions of employment. See MCAD Sexual Harassment in the Workplace Guidelines, II.C. (2002) ("Sexual Harassment Guidelines").

Sexual harassment must be objectively and subjectively offensive. See Sexual Harassment Guidelines II.C.3; Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 677-78 (1993). The objective standard means that the evidence of sexual harassment must be considered from the perspective "of a reasonable person in the plaintiff's position." Id. at 678. 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 means that an employee must personally experience the behavior to be unwelcome. An employee who does not personally experience the behavior to be intimidating, humiliating or offensive is not a victim within the meaning of the law, even if other individuals might consider the same behavior to be hostile. See MCAD Sexual Harassment in the Workplace Guidelines, II. C. 3 (2002); Ramsdell v. Western Bus Lines, Inc., 415 Mass. at 678-679.

The credible evidence in this case establishes that the conduct of Steven Giesta, a supervisory employee of Respondent, was both objectively and subjectively offensive. Although Giesta denied harassing Complainant, she testified convincingly that Giesta rubbed her back on three separate occasions in March of 200 and that on each occasion, he either slapped or touched her buttocks. Giesta's criminal conviction for indecent assault and battery is further proof of his misconduct.

Although Complainant did not confront Giesta about his conduct, she moved away from him each time he touched her. Complainant testified credibly that she "froze" in reaction to being touched. Nothing about Complainant's response can be interpreted as encouragement to Giesta.

On another occasion, Complainant was forced to watch a female patron engage in sexual activity with another customer and the bar's bouncer while Giesta cheered them on. Complainant reported all of this activity to her then-boyfriend who, in turn, called bar co-owner Joseph Martin to tell him about Giesta touching Complainant's buttocks and permitting the female patron to dance on the bar counter and engage in sexual acts on

the bar's pool table. The un rebutted evidence is sufficient to establish severe and pervasive sexual harassment that was both objectively and subjectively offensive.

B. Retaliation

In filing a charge of discrimination, Complainant did not identify "retaliation" as a category of violation to which she was subjected by Respondent. Nonetheless, her description of the events, submitted along with the charge, states, *inter alia*, that she was fired after reporting that Giesta had rubbing her back, touched her buttocks, and permitted a sexual encounter to take place at the bar. This description of the relevant events placed Respondent on notice as of September 24, 2003, that Complainant was asserting a claim for retaliation.

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. Retaliation is a separate claim from 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).

To prove a prima facie case for retaliation, Complainant must demonstrate that she: (1) engaged in a protected activity; (2) Respondents were aware that she had engaged in protected activity; (3) Respondents subjected Complainant to an adverse employment action; and (4) a causal connection existed between the protected activity, known by the retaliators, and the adverse employment action. See Morris v. Boston

Edison Company, 924 F. Supp. 65, 68-69 (D. Mass. 1996); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000).

Once a prima facie case is established, the burden shifts to the Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext for discrimination. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See id. Even if the trier of fact finds that the reason for the adverse employment action is untrue, the fact finder is not required to find discrimination in the absence of the requisite intent. See id.; Abramian v. President and Fellows of Harvard College, 432 Mass. at 117-118.

The report by Complainant's then-boyfriend to co-owner Martin about the unwelcome sexual activity taking place at the bar constituted protected activity. Complainant's termination shortly thereafter was an adverse employment action. Martin failed to attend the hearing and offer a legitimate, nondiscriminatory reason for firing Complainant. Although Giesta testified that Complainant was fired for having a bad attitude at work, his testimony was not credible. The real reason why Complainant was

fired was her objection to Giesta's conduct. Complainant has therefore established a causal relationship between protected activity and an adverse employment action which Respondent has failed to rebut.

C. Lost Wages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress Complainant has suffered as a direct result of Respondent's discriminatory actions. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

Insofar as lost wages are concerned, Complainant provided credible evidence that she lost \$2,500.00 in wages between March and June of 2003 as a result of being fired by Respondent. In June of 2003, just two months after her termination, Complainant succeeded in obtaining alternate employment. Complainant lost an additional \$692.00 in wages relating to taking four days off of work in order to attend Commission proceedings.

D. Emotional Distress Damages

Complainant's entitlement to an award of monetary damages for emotional distress does not need to be based on expert testimony; it can be based solely on her testimony as to the cause of the distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation is not necessary to sustain an award for emotional distress. See Stonehill, 441 at 576. An

award must rest on substantial evidence that is causally-connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id.

She testified convincingly that following her harassment and retaliatory termination at the end of March of 2003, she was unable to sleep, experienced low self-esteem, and depression. Complainant sought medical treatment and was prescribed antidepressants. I conclude that Complainant is entitled to \$20,000.00 in emotional distress damages. Since Complainant experienced emotional distress as a result of being sexually harassed during a three-week period in March of 2003 and emotional distress at being subjected to a retaliatory dismissal at the end of March of 2003, the two sources of her distress were so closely related in time that they can't be separated for the purpose of assigning a separate value to each.

E. Attorneys' Fees

Complainant has incurred attorneys' fees in the amount of \$23,417.50 in billable hours and of \$831.65 in costs. I conclude that these fees are reasonable and should be assessed against Respondent 911 Enterprises, LTD, d/b/a Dirty Harry's.

IV. ORDER

This decision represents the final order of the Hearing Officer. Respondent is hereby ORDERED to:

(1). Cease and desist from engaging in discrimination based on sex and in retaliatory conduct.

(2). Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$3,192.00 in lost wages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3). Pay to Complainant, within sixty (60) days of receipt of this decision, the sum of \$20,000.00 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

The parties shall notify the Clerk of the Commission as soon as payment has been made. If Respondent fails to comply with the terms of this Order within the time period allotted, Complainant should notify the Clerk of the Commission.

(4). Pay to Complainant's attorney, within sixty (60) days of receipt of this decision, the sum of \$23,417.50 in fees and of \$831.65 in costs plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

The parties shall notify the Clerk of the Commission as soon as payment has been made. If Respondent fails to comply with the terms of this Order within the time period allotted, Complainant should notify the Clerk of the Commission.

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 24th day of August, 2007.

Betty E. Waxman, Esq.
Hearing Officer

