

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

BETH ANN FAUNCE and
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 01-BEM-10717

CITY OF FALL RIVER ,

Respondent

Appearances: Neil Rossman, Esq. and Robert H. Clewell, Esq. for Complainant;
Albert R. Mason, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or around December 3, 2001, Beth Ann Faunce (“Complainant”), filed a complaint with the Massachusetts Commission Against Discrimination charging that she was a victim of sexual harassment and retaliation as a Paramedic for the City of Fall River. Complainant alleges that a co-worker made explicit references about sexual practices to her and made sexually-explicit comments about her family members. Complainant asserts that that after she complained to her supervisors, she lost overtime opportunities.

Probable cause issued in regard to Complainant's claims and on January 3, 2005, the case was certified to public hearing. A public hearing was conducted on February 22 and 23, 2006. Complainant submitted eleven (11) exhibits and Respondent submitted nine (9) exhibits. The Complainant and Respondent submitted post-hearing briefs on April 14, 2006 and April 18, 2006, respectively.

To the extent the parties' proposed findings are not in accord with or irrelevant to my findings herein, they are rejected. To the extent the testimony of the 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.

II. FINDINGS OF FACT

1. Complainant has been employed by the City of Fall River Emergency Medical Services ("EMS") Department since 1989. The EMS is a subdivision of the Fire Department. Complainant began as an entry Emergency Medical Technician. She was the first woman hired by the Fall River Fire Department on a full-time basis. In 1994, Complainant was upgraded to a Paramedic. As a Paramedic, Complainant responds to 911 calls and provides emergency medical assistance for such matters as chest pain, cardiac arrest, and injuries due to shootings and stabbings. From 1989 to 1999, she was the sole female employee of the Fall River Fire Department.
2. EMTs and Paramedics work in teams. In July of 2001, Complainant was

assigned a new partner, Tim Brown. For the first two to three weeks, Complainant did not have any problems working with Brown. However, in August of 2001, approximately three to four weeks after Complainant began to work with Brown, he made a comment about meeting Complainant's sister at the sister's work location. According to Complainant's credible testimony, Brown said that he could see her sister's nipples through her T-shirt and that she had nice nipples. He then asked Complainant if she could hook him up with her sister. Transcript, Volume I at 27- 28. Complainant responded that Brown's comments were not appropriate and that he was disgusting. Transcript, Volume I at 29. Complainant tried to walk away from Brown but he followed her and continued throughout the day to utter the same or similar comments about Complainant's sister. Transcript, Volume I at 28. Brown also talked about masturbation and having group sex with his girlfriend and other partners.

3. On the day that Brown made comments about Complainant's sister and about group sex, a paramedic intern, Shawn Samanica, was assigned to accompany Complainant and Brown in their rescue vehicle. It was his first training ride with Brown and Complainant. Samanica corroborated that Brown "got off on" commenting about the sexual attributes of Complainant's sister even though Complainant repeatedly asked him to stop. According to Samanica's credible testimony, Complainant appeared to be "most definitely" bothered by Brown's comments. Transcript, Volume I at 129; 131. Samanica testified that Brown appeared to enjoy tormenting Complainant. Id.

4. According to the credible testimony of both Complainant and Samanica, Brown repeatedly stated during the same shift that Samanica had a “nice ass” and that it looked good in his uniform. In response to these comments, Complainant admitted that she said to Brown something like, “What, are you gay?” Transcript, Volume 1 at 30.
5. On another occasion when Complainant, Brown, and others were at the Fire Station watching Baywatch on television, Brown repeatedly referred to the breasts of the women on the show. Complainant testified that she said in jest, “It doesn’t really matter, you’re gay anyway.” Transcript, Volume I at 121.
6. Complainant testified that when she and Brown were in an ambulance together on a night shift, Brown began to express an interest in her children. Brown asked about the college plans of Complainant’s son and asked why Complainant never let him meet her daughters. When Complainant received a phone call from a music store about a flute that she was having re-padded, Brown said, “Well, it’s good that you’re teaching your daughter to play the skin flute at a young age.” Transcript, Volume I at 32. Complainant interpreted this comment to have a sexual connotation. She told Brown that his sexual comments had to stop, but Brown did not stop making sexual comments. During the same shift on which Complainant told Brown that his sexual comments had to stop, he told Complainant that he would masturbate while speaking to Jehovah’s Witnesses on the phone. I credit Complainant’s testimony.
7. Complainant testified that on her next shift, she entered the dormitory of a fire

station and encountered Brown with his pants around his ankles, powdering himself. Complainant closed the door and walked out. I credit Complainant's testimony.

8. Complainant testified that the following morning she told senior Paramedic, Jack Duclos, that, "I can't do this anymore." She told Duclos that the more she became upset, the more Brown would engage in graphic sexual commentary. Complainant testified that Duclos told her that he had talked to Brown and told Brown to "knock off the offensive statements." Transcript, Volume I at 34. I credit Complainant's testimony.
9. On one or more occasions in August of 2001, Brown left in Complainant's car a plant, cards, and biology-related CDs for Complainant's son, who was applying to college. Transcript, Volume I at 102-104.
10. On a night shift shortly after Duclos spoke to Brown, personnel were congregated at one of the City's fire stations having a cake that Complainant had baked for retiring District Fire Chief Gene Abreu. Complainant was present as was Duclos, Brown, Abreu, Firefighter Lima, and Carl Duarte. Some or all of them were watching a movie. According to Complainant, Brown said to her, "Why don't you suck my cock" and grabbed himself in front of everyone, including District Fire Chief Abreu and senior Paramedic Duclos. Transcript, Volume I at 35. Duclos pulled Brown out of the room and spoke to him again. Transcript, Volume I at 36. I credit Complainant's testimony.
11. Complainant testified that after the cake incident, she went on vacation around

the second week of September of 2001. According to Complainant's credible testimony, Brown called her at her house while she was on vacation and asked, "What's the matter ... don't you miss me?" and "Why haven't you called me ... don't you like me anymore?" Transcript, Volume I at 36-37. I credit Complainant's testimony.

12. On September 11, 2001, Complainant went to the office of Fire Chief Edward Dawson to complain about Brown's conduct. She informed the Fire Chief that she wanted to file a complaint and that she didn't think she could continue to work with Brown. Chief Dawson said that he would investigate the matter. The Chief told Complainant he would transfer Brown to "Rescue 2" and that he wouldn't allow Brown to work with any females until the investigation was complete. *Id.* at 38. Chief Dawson asked Complainant to file a written complaint. Complainant did so the following day at which time Complainant and John Duclos spoke to the Chief. Transcript, Volume II at 32; Complainant's Exhibit 1. Complainant testified that she was "under the impression" that neither she nor Brown would get overtime until her complaint of sexual harassment was resolved in order to ensure that she and Brown did not end up working together. Transcript, Volume I at 45; 120.
13. After Complainant filed her complaint, she received a phone call at home from Brown. He asked Complainant what her problem was and said, "[you] need to grow up." Transcript, Volume I at 103.
14. The Chief interviewed various members of the Fire Department between September and December of 2001 concerning Complainant's charges.

Respondent's Exhibit 1; Complainant's Exhibit 11.¹

15. Complainant testified that after she filed her complaint with the Fire Chief, there was a lot of "chatter" about it. Transcript, Volume I at 41. Some people supported her, and some told her she was wrong to complain. Approximately a month after she filed the complaint, Complainant learned that Brown had been allowed to work with the Department's only other female, Joy Nichols. Complainant brought this matter to the Chief's attention.
16. Complainant testified that she spoke to the Chief in November of 2001 about the status of the investigation and was told by the Chief that he had not yet spoken to Brown. Transcript, Volume I at 79. Complainant testified credibly that the Chief told her she was the problem, not Brown. Transcript, Volume I at 79-80.
17. Complainant hand-delivered a letter to the Chief dated November 17, 2001 noting that she still had not received an answer to her sexual harassment charges against Brown and stating that Brown had been allowed to work with Joy Nichols. Complainant's Exhibit 2. Complainant informed the Chief that unless he responded to her within thirty days, she was going to file a Complaint with the MCAD. Transcript, Volume I at 43.
18. On November 29, 2001, Chief Dawson received an interoffice communication from John Ferland, then-Director of EMS, explaining that he had erroneously assigned Joy Nichols to work overtime with Brown. Ferland characterized the

¹ The Chief's notes pertaining to his investigation were accepted at the hearing for identification only, but are now accepted for substantive purposes. However, statements by Complainant's co-workers Peloquin and Duclos and a written cross-complaint by Brown were not accepted into evidence at the public hearing because Respondent failed to supply this evidence to Complainant during discovery.

error as a one-time occurrence due to misinterpreting the Chief's order separating Brown from Complainant. Respondent's Exhibit 5. Ferland did not schedule Brown to work with any female employees in the Department following clarification of the Chief's directive. Id.

19. According to Respondent's Exhibit 9, Complainant took overtime on 5 occasions in 1998 (refusing 28 overtime assignments) and on 3 occasions in 1999 (refusing 9 overtime assignments). Id. According to Complainant's Exhibit 9, Complainant took 6 overtime assignments in 2000, between 4-5 overtime assignments in 2001, 1 overtime assignment in 2003, and 4 overtime assignments in 2004. The scope of the overtime is indeterminate, ranging from \$13.84 for a two-week period beginning on 7/27/01 to \$1,090.73 for a two-week period beginning on 8/10/01. Id. These figures are not consistent with Complainant's testimony in which she estimated her overtime to be "maybe one per month." Transcript, Volume I at 40; 123. Although Complainant described overtime as the "opportunity to do extras for her kids," she also acknowledged that she had to accommodate the extra work with child care demands. Transcript, Volume I at 46. Following her complaint about Brown on September 11, 2001, Complainant did not work any overtime until December 14, 2002. Complainant's Exhibit 9.
20. Complainant filed a complaint with the MCAD on December 3, 2001 alleging that Brown had sexually harassed her and that she felt she was "punished" as a result of protesting his conduct. Complainant's Exhibit 3.
21. On December 15, 2001, Brown submitted his resignation, effective December

28, 2001. Respondent's Exhibit 3.

22. On December 26, 2001, Chief Dawson issued a memorandum entitled, "Proper Conduct in the Workplace." Complainant's Exhibit 8. It referred to reports of improper and unprofessional talk and actions of a sexual nature, highlighted the "general" nature of the alleged activity and warned of disciplinary action for future unacceptable conduct. Id. Chief Dawson also wrote Complainant a letter dated December 26, 2001 stating that she had contributed to the inappropriate atmosphere in the office by engaging in sexual banter including an alleged "gay" statement and that Brown's behavior may have been, "merely an 'acting out' . . . because of alleged statements by you." Complainant's Exhibit 4.
23. Complainant testified that during December of 2001, she began to receive anonymous telephone calls during the middle of the night and contacted the police about the calls. The police put a tracer on her telephone but said that the only way the caller could be identified was if the phone calls were made from the same location on a consecutive basis. Transcript, Volume I at 101. The calls stopped approximately six months after they began. Complainant never found out who made the calls.
24. Complainant testified that after Brown made sexual comments to her, she began to feel overwhelmed. She experienced what she described as a "total body meltdown." Complainant testified that she had trouble sleeping, was nervous, and had stomach issues. In January of 2002, Complainant contacted a counselor associated with the Fall River Employees' Assistance

Program (EAP) and attended three sessions with counselor Linda Gurney. Gurney's notes state that Complainant couldn't sleep, experienced stomach problems, had concerns about the safety of her daughter, and felt "re-victimized" by lack of support by the Chief. Complainant's Exhibit 6.

25. Complainant also contacted her primary care physician and received a prescription for tranquilizers and stomach medication. Complainant was referred to a treating psychologist, Dr. Weitzberg. Complainant attended two sessions with Dr. Weitzberg in January of 2002, two sessions in February of 2002, a session in March of 2002, and two sessions in 2004. Complainant's Exhibit 7. Dr. Weitzberg reported in a note dated 1/30/02 that Complainant was waking up during the night, sick to her stomach, tearful, short-tempered. She lost ten pounds in two to three weeks. Id.

26. Complainant sustained a work-related shoulder injury in January of 2002 which caused her to be out of work for over a year.

27. While Complainant was out of work in or around January of 2002, she received a telephone call from her father who requested that she drop her sexual harassment claim. Transcript, Volume I at 60-61; Complainant's Exhibit 7. Complainant's father was the Fall River Police Chief who retired in December of 2001. Id. at 84. Complainant declined to drop her sexual harassment claim at her father's request. Complainant testified that her refusal caused a "major rift" between herself and her father. Her father refused to take her telephone calls for a period of weeks. Transcript, Volume I at 61. Complainant described her emotional state at the time as being

“beside myself.” Id. at 62. Complainant testified that as of the date of public hearing, her relationship with her father remained “distant.” She described her relationship as “more distant” than it was prior to their disagreement about her sexual harassment claim. She testified that their differences have never been resolved. Id. at 67-68.

28. Complainant had shoulder surgery in April of 2002. She testified that the surgery involved major reconstruction of her left shoulder. Transcript, Volume I at 62. Complainant testified that the City of Fall River initially disputed that her injury was work-related but that after an independent medical evaluation, the City agreed that her injury should be covered by Worker’s Compensation. Id. at 64.
29. On February 22, 2004, Complainant was promoted to senior Paramedic and Robert Turgeon became Director of EMS. John Duclos became principal Paramedic at or prior to that time. Complainant testified that as a senior Paramedic, she documents in writing misconduct by individuals working under her and sends the documentation to her immediate supervisor. According to Complainant, decisions regarding discipline are made at the Chief’s level.
30. Complainant testified that as of the date of public hearing she still felt some discomfort over the way her co-workers reacted to her sexual harassment claim. For a period of time she heard comments at work such as, “Watch yourself. You can’t say that with her in the room.” Transcript, Volume I at 68. She described such comments as continuing into 2004 on an occasional

basis. Id. at 69.

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). 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 alleges that she was subjected to the latter type of sexual harassment as a result of her co-worker’s conduct.

In order to establish a “hostile work environment” sexual harassment claim, Complainant must prove by credible evidence that: (1) she was subjected to sexually demeaning conduct; (2) the conduct was unwelcome; (3) the conduct was objectively and subjectively offensive; (4) the conduct was sufficiently severe or pervasive as to alter the conditions of her employment and create an abusive work environment; (5) her employer knew or should have known of the harassment and failed to take prompt and effective remedial action. See College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156,

162 (1987); Parent v. Spectro Coating Corp., 22 MDLR 221 (2000); MCAD Sexual Harassment in the Workplace Guidelines, II. C. (2002).

Sexual harassment must be objectively and subjectively offensive. See 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 See Scionti v. Eurest Dining Services, 23 MDLR at 240 *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 harassment in this case was both objectively and subjectively offensive. Brown discussed the anatomy of Complainant’s sister in graphic detail. He made comments about group sex and masturbation. On one occasion, he grabbed himself in front of Complainant and others and said, “Why don’t you suck my cock.” Brown advised Complainant to teach her daughter sexual techniques. None of these matters

constituted appropriate workplace banter. As far as Complainant's subjective reaction is concerned, she testified convincingly about how much Brown's sexual commentary bothered her and how she entreated him to stop discussing sexual matters at work. Complainant's reaction illustrates that she did not consider Brown's commentary to be light-hearted conversation, but, rather, to be behavior that was exceedingly disturbing to her. Contrast *Candeliere v. Vanson Leathers, Inc.* 24 MDLR 228 (2002) (alleged harassment found not to be subjectively offensive where complainant told dirty jokes on the job, inserted balloons under her shirt and wore blue jeans to work with holes in the crotch and buttocks). EMT intern Shawn Samanica corroborated Complainant's testimony by describing her as "most definitely" bothered by Brown's sexual references. In Samanica's opinion, Brown appeared to enjoy tormenting Complainant.

Against the backdrop of Brown's outrageous behavior, Complainant's two attempts to tease Brown about allegedly being gay must be interpreted as no more than misguided attempts to discourage him from continuing to make sexually-offensive statements at work. Complainant resorted to this tactic on two occasions, first in response to Brown's repeated statements about Samanica's buttocks and second in response to Brown's commentary about the breasts of women on television. Complainant's remarks were clearly inappropriate, but are not sufficient to neutralize the sexually-hostile environment created by Brown. 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"); MCAD Sexual Harassment Guidelines, Sec. II (C)(3) stating that, "Minor, isolated conduct does not constitute sexual harassment."

Complainant's attempt to joke about Brown's sexuality was in poor taste, but does not wipe out Brown's responsibility for sexually harassing Complainant in August and September of 2004. The ongoing, unwelcome, and salacious commentary which Brown engaged in despite Complainant's entreaties that he stop was sufficiently severe or pervasive to alter the conditions of Complainant's employment and create a hostile and abusive work environment.

The evidence further supports a finding that management knew of the harassment in August of 2001, but failed to take prompt and effective remedial action, until after September 11, 2001 when Complainant lodged a formal complaint with the Fire Chief. Such knowledge derives from the involvement of senior Paramedic Jack Duclos who was aware of Brown's conduct and warned him twice in August of 2001 to stop harassing Complainant. Fire Chief Dawson acknowledged that the first such warning occurred on or around August 12, 2001 when Duclos told Brown if he made such a statement again he would be "written up." Respondent's Exhibit 2. Retiring District Fire Chief Gene Abreu also witnessed Brown sexually harass Complainant during the "cake incident" in August of 2001 and took no action to stop the behavior.

Duclos, as a senior Paramedic in August of 2001, was on the first rung of the EMT supervisory ladder. Complainant's Exhibit 10. He was aware of the totality of Brown's harassing conduct and attempted, albeit unsuccessfully, to intervene on Complainant's behalf. In doing so, Duclos represented to Complainant that he had the authority to address the problem. The Fire Chief disputed that a senior Paramedic could effectuate discipline, but he acknowledged that a senior Paramedic could report an incident in order for discipline to be taken. Respondent's Exhibit 2. According to the job

specifications for the position, a Senior Paramedic is responsible for the “discipline and efficiency of company members” as well as for reporting accidents involving department vehicles, determining responsibility for accidents, distributing general orders, approving job switches, and giving instruction about the first responder law. Complainant’s Exhibit 10. Based on the foregoing I conclude that Duclos was a supervisor under Chapter 151B. See Noviello v. City of Boston, 398 F. 3d 76 (2005) (test for supervisors is whether employee is entrusted with actual supervisory powers); Fluet v. Harvard University, 23 MDLR 145 (1997) (characterizing as supervisor one who has authority to recommend as well as to undertake tangible employment decisions affecting an employee). Duclos’s awareness of Brown’s harassing conduct, his instructions that Brown cease such conduct, and his inability to stop the conduct, have the effect of rendering Respondent vicariously liable for Brown’s harassment of Complainant during August and September of 2001. See College-Town Division of Interco v. MCAD, 400 Mass. 156, 165 (1987).

B. 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) Respondent was aware that she had engaged

in protected activity; (3) Respondents subjected her to an adverse employment action; and (4) a causal connection existed between the protected activity 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 Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, non-discriminatory reason for its actions. See Weber v. Community Teamwork, Inc. 434 Mass. 761, 768-769 (2002); Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive, or state of mind. See Weber, 434 Mass. at 777; Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant may meet this burden through circumstantial evidence including proof that “one or more of the reasons advanced by the employer for making the adverse decision is false.” Lipchitz, 434 Mass. at 504. However, Complainant retains the ultimate burden of proving that Respondent’s adverse actions were the result of retaliatory animus. See id; Abramian, 432 Mass. at 117.

By going to the Fire Chief on September 11, 2001 to complain about Brown’s sexual harassment, Complainant engaged in protected activity. See Augburg v. American Drug Stores, 21 MDLR 238, 242 (1999) (voicing of informal complaint protected under chapter 151B); Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997) (same). After receiving the report of sexual harassment, the Chief separated Complainant and Brown as partners, as Complainant undoubtedly desired. However, the Chief also

gave an order that both Brown and Complainant were to be denied overtime assignments pending the results of an investigation, in order to ensure that they did not end up working together. Pursuant to that order, Complainant received no overtime until December 14, 2002. The punitive nature of denying Complainant overtime is underscored by the fact that the Chief told Complainant in November of 2001 the “she was the problem, not Brown.” Chief Dawson also wrote Complainant a letter dated December 26, 2001 stating that Brown’s behavior may have been, “merely an ‘acting out’ . . . because of alleged statements by you.”

By denying Complainant overtime opportunities following her allegations of sexual harassment and by characterizing Brown’s behavior as a reaction to alleged statements of Complainant, the Chief blamed the victim for the actions of the harasser. It was wholly unnecessary to deprive Complainant of overtime opportunities in order to ensure that she and Brown would not work together. The same objective could have been accomplished by limiting Complainant’s overtime shifts to those with other Paramedics. The Chief’s comment in November of 2001 and his December 26, 2001 letter to Complainant hold her responsible for Brown’s outrageous behavior. The Chief’s reaction magnifies Complainant’s perceived misconduct and minimizes Brown’s accountability. It miscasts Complainant as the initiator of sexual commentary and paints a distorted picture of mutual involvement in sexual banter which was not supported at the public hearing. Thus, rather than respond to the complaint of discrimination in a fair and measured manner, Respondent punished Complainant in word and deed.² I conclude that

² Several allegations pertaining to retaliation did not withstand public hearing scrutiny. For instance, Complainant alleged that Brown continued to work overtime with female partners, but there is only one documented instance of a female working with Brown after September 11, 2001. Complainant also alleged that during December of 2001, she began to receive anonymous telephone calls during the middle of the

Respondent has failed to articulate and produce credible evidence to support a legitimate, non-discriminatory reason for its actions and that Complainant has shown by a preponderance of the evidence that Respondent acted with retaliatory intent, motive, or state of mind.

IV. REMEDY

A. Damages

Lost Overtime

Although the facts establish that Complainant lost some overtime between September 11, 2001 and January of 2002 when she sustained a work-related shoulder injury and left work for over a year, the evidence is not sufficient to establish the amount of lost income. Complainant took approximately four overtime assignments per year between 1998 and 2004. Based on this calculation, Complainant lost no more than one overtime assignment between the time she complained about sexual harassment in September of 2001 and left work in January of 2002 because of her shoulder injury. The scope of the single lost overtime opportunity cannot be determined with any reasonable certainty since examples of Complainant's overtime income in 2001 range from \$13.84 for a two-week period beginning on 7/27/01 to \$1,090.73 for a two-week period beginning on 8/10/01. Based on my inability to calculate the loss of overtime income and the minimal amount of the loss, I decline to award damages for lost overtime.

Emotional Distress Damages

Turning to the issue of emotional distress damages, Complainant's entitlement to

night but the police were not able to identify the caller.

an award of monetary damages does not need to be based on expert testimony; it can be based solely on the Complainant's testimony as to the cause of his 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 Mass. 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 the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id.

Complainant testified that after Brown made sexual comments to her, she began to feel overwhelmed. She experienced what she described as a "total body meltdown." Complainant had trouble sleeping, was nervous, and had stomach issues. In January of 2002, Complainant contacted a counselor associated with the Fall River Employees' Assistance Program (EAP) and attended three sessions with counselor Linda Gurney. Gurney's notes state that Complainant couldn't sleep, experienced stomach problems, had concerns about the safety of her daughter, and felt "re-victimized" by lack of support by the Chief.

Complainant also contacted her primary care physician and received a prescription for tranquilizers and stomach medication. She was referred to a treating psychologist, Dr. Weitzberg, and attended two sessions with him in January of 2002. Dr. Weitzberg reported in a note dated 1/30/02 that Complainant was waking up during the night, sick to her stomach, tearful, short-tempered. She lost ten pounds in two to three

weeks.

Complainant sustained a work-related shoulder injury in January of 2002 which required major reconstructive surgery in April of 2002 and caused her to be out of work for over a year. Thus, after January of 2002, Complainant had other sources of stress in her life which I have considered in my award. See Raffurty v. Keyland Corp., 22 MDLR 125 (2000) (victims of harassment simultaneously experience more than one source of emotional distress). While Complainant was out of work in or around January of 2002, she received a telephone call from her father, the retiring Fall River Police Chief, who requested that she drop her sexual harassment claim. Complainant declined to drop her sexual harassment claim which caused a “major rift” between herself and her father. Her father refused to take her telephone calls for a period of weeks. Complainant described her emotional state at the time as being “beside myself.” As of the date of public hearing, her relationship with her father remained “distant” and their differences have never been resolved.

Based on the foregoing evidence, I conclude that Complainant is entitled to an award of emotional distress in the amount of \$50,000.00.

B. Injunctive Relief

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under M.G.L. ch. 151B, sec. 5, Respondent is ordered to immediately cease and desist from further acts of discrimination, including conduct which tolerates or facilitates retaliatory conduct towards victims of discrimination.

C. Training

Respondent shall conduct basic annual training sessions concerning sexual harassment and retaliation for all employees and supervisors in accordance with the following requirements:

1. All training sessions must be at least four (4) hours in length. All employees and supervisors are required to attend. Respondent shall repeat this training at least one time for all new supervisors and employees who were hired or promoted after the date of the initial training session.
2. Within thirty (30) days of the receipt of this decision, Respondent shall select a trainer to conduct the initial training sessions. The training may be provided by the Commission, or may be provided by a trainer who is a graduate of the MCAD's certified "Train the Trainer" course. Alternatively, Respondent may submit a resume of a potential trainer to be approved by the Commission's Director of Training. Within one week of Respondent's selection of a trainer, a copy of this hearing decision must be forwarded to the trainer for his or her review.
2. At least one month prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval and provide the Director of Training with one-month's advance notice of the training date(s) and location(s). If the Commission decides to send a

representative to observe the training session(s), Respondent will provide the Commission representative with unfettered access to the training.

3. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic(s), the names of persons required to attend the training, the names of persons who attended the training, and the date and time of each training session.
4. For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

D. Fines

1. Respondent shall pay to Complainant \$2,160.00 for attorney's fees and \$400.00 for lost employment opportunities as ordered by the Investigating Commissioner Walter Sullivan on June 22, 2005 for the non-appearance of Respondent and Respondent's counsel at a mandatory conciliation on February 24, 2005.
2. Respondent shall pay \$2,500.00 to the Commission as a sanction for the failure to supply documentary discovery consisting of statements by co-workers Peloquin and Duclos and a written complaint by co-worker Brown.

V. ORDER

This decision represents the final order of the Hearing Officer. Respondent shall pay Complainant, within sixty (60) days of receipt of this decision the sum of \$ 50,000.00 in damages for emotional distress. The parties shall notify the Clerk of the Commission

as soon as the ordered payments have 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. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may seek review by the full Commission by filing a notice seeking review within ten (10) days of receipt of this decision, and a petition for review within thirty (30) days of receipt of this decision.

So ordered this 30th day of August, 2006.

Betty E. Waxman, Esq.