

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

BETH CITRON AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 05-BEM-00067

G-2 SYSTEMS, THOMAS GREEN, JR.,
STEVEN SHEPARD, HENRY SHEPARD, JR.,
SALLY SPARKES,

Respondents

Appearances: Simone Liebman, Esq., for Complainants
Timothy F. Stark, Esq., and Ellen Shimer, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 14, 2005, Beth Citron (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that she was subjected to discrimination by Respondents in the form of sexual harassment and constructive discharge.

The MCAD issued a probable cause finding and certified the case for public hearing on June 22, 2007. Prior to Public Hearing, the case was bifurcated into a liability phase of the proceedings and, if necessary, a relief phase. A public hearing relative to liability was held on May 13-16, May 19, July 9 and July 25, 2008.¹ The Complainant testified on her own behalf as did her mother, Carolyn Citron. Testifying on behalf of Respondents were: Thomas Greene, Jr., Henry Shepard, Jr., Sally Sparkes, Robert LeBlanc, Joseph Vitka, Steven Shepard, and Jose Cabral. The parties submitted three (3) joint exhibits. Complainant submitted an additional ten (10) exhibits, and Respondents submitted an additional three (3) exhibits. Some exhibits were accepted at the public hearing on a de bene basis subject to further consideration. The parties submitted post-hearing briefs in November of 2008.

To the extent the parties' proposed findings are not in accord with or irrelevant to my findings, they are rejected. To the extent the testimony of various 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. The Complainant, Beth Citron, resides in Haverhill, MA. She graduated from high school in 1997.
2. Respondent G-2 Systems (hereafter "Respondent") is a Massachusetts corporation with its principal place of business at 55 Chase Street, Methuen.

The company employed more than six employees from September of 2004

¹ The proceedings on May 12, 2007 were devoted to pre-hearing evidentiary matters and are not considered a public hearing date.

through January of 2005. Respondent is a provider of Sun Microsystems products and designs.

3. Respondent Thomas (“Tom”) Green, Jr. is the owner and manager of Respondent G-2 Systems. His wife, Dodie Greene, worked in the office on a sporadic basis. Transcript II at 118.
4. Respondent Steven (“Steve”) Shepard is a manager at Respondent G-2 Systems. While Complainant was employed there, he was company controller and a salesperson. He assisted with buying and oversaw the technical part of the company. Transcript VII at 44-46.
5. Respondent Henry (“Hank”) Shepard, Jr. was the purchasing manager of Respondent G-2 Systems for domestic sales and parts during the time Complainant was employed there. Transcript II at 109, VI at 104. Hank Shepard is the brother of Steve Shepard. Hank Shepard, Steve Shepard and Tom Greene all went to the same high school and are friends. Hank Shepard’s wife, Kathy Shepard, also worked at Respondent when Complainant was employed there. At all relevant times, Hank Shepard’s duties included buying domestic products for sales orders, buying products to stock the inventory, and making sales. He assigned work to Complainant.
6. Respondent Sally Sparkes was the office manager at the time that Complainant was employed there. As office manager, Sparkes handled the payroll, accounts receivable, sales orders, and purchase orders. Transcript V at 58. Sparkes testified that she was responsible for personnel issues and participated in interviews but said that she “really can’t do anything ... it

would have to go through Tom [Greene].” Transcript V at 66. Sparkes did not receive any human resource or sexual harassment training by Respondent. Transcript V at 104. Sparkes is a close personal friend of Hank Shepard and Rob LeBlanc.

7. Robert (“Rob”) LeBlanc was the international sales representative for Respondent G-2 Systems at the time that Complainant was employed there.
8. Prior to working for Respondent G-2 Systems, Complainant only worked sporadically between December of 2001 and September of 2004. Joint Exhibit 3; Transcript II at 23, 50-51. Her resume lists Professional Staffing Group and Moore Staffing, but Complainant had no ongoing assignments from either temp agency. Transcript II at 41, 51; Joint Exhibit 3.
9. At her pre-employment interview, Complainant met with Tom Green, Sally Sparkes, and Steven Shepard. Complainant was told at her interview that casual dress was permitted at the office. Transcript I at 56.
10. Complainant was hired by Respondent for the position of administrative assistant in September of 2004. Her job duties included answering the phone, entering purchase and sales orders into the computer for Hank Shepard and Rob LeBlanc, data processing, filing, faxing, doing errands for Tom Greene, distributing mail, stuffing envelopes with invoices, printing up packing lists, and mailing invoices. Complainant reported to Sally Sparkes who was her immediate supervisor. Complainant interacted with Hank Shepard, Rob Leblanc, and Tom Greene on a daily basis. Transcript V at 64-65, 74. Complainant did not work with Steve Shepard on a daily basis although he

helped to train her. Id. at 73.

11. Complainant was a competent and hard worker who learned quickly, had good computer and office skills, was organized, and worked well with vendors.

Greene described Complainant as having “very, very good” office skills and a good work ethic but difficulty taking correction and a “bit immature.”

Transcript V at 130-131. Hank Shepard testified that Complainant did her job well and that he never had any concerns about her work. Transcript IV at 125, 128. He described Complainant as quiet, shy, and not temperamental.

Transcript IV at 140-141. According to Rob LeBlanc, Complainant did not engage in flirtatious conduct and did not have a problem with authority.

Transcript VI at 88, 107. Steve Shepard testified that he found Complainant to be very competent, a quick learner, and a hard worker. Transcript VII at 63. Sally Sparkes thought Complainant was a “good worker” with above average work performance, but testified that there were a few times when Complainant “had to be spoke [sic] to.” Transcript V at 100.

12. Complainant received a bonus in the amount of \$891.41 from Tom Greene at some point during her three months of employment. Transcript III at 64, IV at 9.

13. Complainant wore a suit to work on her first day of work but thereafter was told to dress more casually and began to wear her everyday clothes, consisting of jeans, a tank top, and boots. Transcript I at 61-62, II at 67. Her tank tops did not show cleavage if a person were eye to eye with her but would show some cleavage if an individual were “hovering over her” or if she “bent over

too much.” Transcript II at 71, 76. Complainant and male employees alike were instructed not to dress casually when business with outsiders was being conducted in the office. On those occasions, Sparkes told Complainant not to wear tank tops. Transcript V at 68-70.

14. Complainant sat at the reception desk in front of the offices of Rob LeBlanc and Tom Greene. Joint Exhibit 2. Complainant’s chair at the reception desk faced Sparkes’s cubicle which was approximately eighteen to twenty feet away. Transcript I at 71, 75-76.
15. Respondent did not have a sexual harassment policy while Complainant was an employee. Complainant was never informed how to file an internal complaint of sexual harassment. Respondent never provided sexual harassment training for its employees.
16. It was a common office practice to drink alcoholic beverages at work after 4:00 p.m. Transcript I at 92-93, 115. Complainant testified that she observed Greene, Hank Shepard, Sally Sparkes, and Rob LeBlanc drink alcohol in the office. Transcript I at 133. Hank Shepard admitted that he, Sparkes, Green, and LeBlanc drank about twice a week in the office. Transcript IV at 147. Complainant did not participate in the office drinking except that she had two beers with Kathy Shepard and Sally Sparkes on one occasion while working for Respondent. Transcript IV at 23.
17. Complainant testified that her work conditions were not objectionable during the first two weeks of her employment, but after that, Tom Greene and Hank Shepard started making comments about her clothes and body. Hank Shepard

began to comment on her breasts daily, asked if her “ass” looked just as good,” and told her that she had “a very nice ass.” Transcript I at 83, 89, 90, II at 71, 111. According to Complainant, he would look down at her body rather than make eye contact. Transcript I at 84. When Complainant approached him at his desk to ask questions about purchase orders, he said, “I’m sorry, I didn’t hear a word that you said, I was too mesmerized by your breasts.” Transcript I at 85, II at 101,104. Complainant either ignored the comments or else told Shepard he was “disgusting” “gross” and to “knock it off.” Transcript I at 86, 91. The comments made her feel embarrassed, humiliated, and “uncomfortable in [her] own skin.” *Id.* at 86, 91.

Complainant asserts that Sally Sparkes witnessed these comments. I credit Complainant’s testimony over Shepard’s denials that he ever commented on Complainant’s clothing or body. Transcript IV at 165, 167, 168-169, 182-183; V at 12. I do not credit Hank Shepard’s testimony that he never commented on Complainant’s breasts or backside, but “probably” said “nice tits” to his wife in the office on one occasion and on another occasion asked his wife how her “tits” were feeling. Transcript IV at 169, 178.

18. On one occasion as Complainant walked out of the bathroom in the shipping area and was zipping up her sweatshirt, Hank Shepard said, “Oh, stop giving the guys the show down here. I saw you stripping for them” or something to that effect. Complainant testified that the incident made her feel humiliated and aggravated. Transcript I at 88-89. I credit Complainant’s testimony. Complainant repeatedly told Hank Shepard to stop making these comments.

Transcript I at 92.

19. On another occasion, Hank Shepard approached her desk to collect money for an office betting pool and said, “Okay girly give it up.” Transcript III at 24. As Complainant bent underneath her desk to get money from her purse, Shepard said that showing her “tits” would not get her out of it. Id. at 24. Complainant pointed out that her sweatshirt was zipped so high that it was practically a turtle neck, to which Shepard said, “Oh, I thought your tit was hanging out.” Id. Hank Shepard denies the incident (Transcript IV at 182), but I credit Complainant’s testimony that it occurred. After commenting that his wife would not like his comment, Complainant handed Shepard the money and went back to work. I credit Complainant’s testimony.

20. At times, Tom Greene stood in the doorway of his office, looked at Complainant’s breasts, and said that when she bent over to file, it gave him a “good view.” Transcript I at 97, II at 86, 95. Complainant was wearing tank tops when Greene made these comments. On one occasion when Complainant wore a three-quarter sleeve Patriots jersey, Greene commented, “What’s up with the shirt? I don’t like that” and told Complainant to wear something more revealing on the following day. Transcript I at 99-100. II at 115-116. Complainant testified that she was wearing the shirt because she did not want to receive any more unwanted comments about her breasts.

Transcript I at 100.

21. Joseph Vitka is a friend and business associate of Tom Greene. Vitka owns Michaura Systems Corporation, which has significant business interactions

with Respondent involving the purchase of equipment. Transcript VII at 5, 42. Vitka came to Respondent's office at least five or six times while Complainant worked there. At the beginning of Complainant's employment, Green introduced Vitka to her. When Complainant extended her hand, Vitka asked for a hug. He continued to press for a hug after Complainant declined to give him one, saying, "I'm a taken woman" and "it wouldn't be appropriate." Transcript I at 104. Vitka asked if she was married and when Complainant said no, he said, "Well, then you're not a taken woman." Transcript I at 105. Greene said, "What's the big deal?" Complainant then gave Vitka a quick hug, during which he squeezed her and rubbed her lower back, and commented about her body. Id. I credit Complainant's testimony that the incident took place and that it made her feel humiliated. Id. I do not credit Vitka's testimony that he never hugged Complainant but that she "leaned in" to him a couple of times. Transcript VII at 13.

22. Complainant testified that when Vitka called the office and she answered the phone, he would say, "baby, baby, baby, if only I wasn't married" or, before he was married, he would say, "If only I wasn't getting married, you don't know what I would do to you." Transcript I at 119. He would also say this on the dock at Respondent's office. Id. I credit Complainant's testimony and I discredit Vitka's denials.

23. Vitka testified about an alleged incident in late September of 2005 in which he was conversing with Complainant on the loading dock of Respondent's office, and Complainant mentioned that her boyfriend did not earn enough money for

them to have their own place. Transcript VII at 8. According to Vitka, Complainant said, “I like rich, older men.” Id. at 8-9. Vitka testified that he felt this comment indicated that Complainant wanted to establish a relationship with him. Id. at 9, 21-22, 26. I do not credit Vitka’s testimony because of Complainant’s credible denial and because Vitka never mentioned the incident prior to the public hearing. Id. at 27.

24. On another occasion, Tom Greene and Joe Vitka stood near Complainant’s desk discussing the “good old days” when they had offered money to a woman to take off her clothes at a party. Transcript I at 102, 107, II at 127. Either Greene or Vitka asked Complainant how much it would take to get her to take her clothes off, to which Complainant responded “zero” and “it’s not going to happen.” According to Complainant, they kept offering her more money and she kept refusing. Transcript I at 102, 108-109, II at 127-128. I credit Complainant’s testimony.
25. Vitka denied ever witnessing a stripper at Respondent’s office. Transcript VII at 16. However, Green testified that Vitka had been present at a strip show which took place at Respondent’s office in Woburn in 2000. Transcript V at 193. I credit Greene’s testimony over Vitka’s.
26. In addition to the strip show which took place at Respondent’s Woburn office in 2000, there was a bachelor party for Hank Shepard at the warehouse of Respondent’s Methuen office in 2002. Transcript V at 14. At the MCAD public hearing, Greene admitted that he hired a stripper to perform at the

warehouse as part of a bachelor party, although in his deposition Greene said that he didn't hire the stripper. Transcript V at 17, 192; VI at 37; Complainant's Exhibit 8 at 43.

27. Vitka testified that Complainant was intoxicated at Respondent's 2004 Christmas party. Although he has attended two or three such holiday parties, Vitka testified that Complainant was the only person he ever recalled seeing intoxicated at a holiday party given by Respondent. Transcript at VII at 10, 40-41. I do not credit Vitka's testimony that Complainant was the only person he ever saw intoxicated at an office holiday party since Tom Green testified that it is common for employees to become drunk at such parties and have their wives drive them home. Transcript VI at 22.
28. Complainant testified that she went to the 2004 office Christmas party on November 19, 2004 accompanied by her sister, that she drank alcohol at the party because her sister was the designated driver, and that she became "buzzed," i.e., "fuzzy in the head a little, not falling down drunk." Transcript I at 134, II at 144. In her deposition, Complainant said that she was "tipsy." Transcript II at 147. According to the testimony of Rob LeBlanc and Jose Cabral, Complainant was so intoxicated that she fell "head first" into the lap of one of the guests. Transcript VI at 115, 139. According to Complainant, she left the party during dinner because her sister didn't feel well as a result of her pregnancy. Transcript I at 134, II at 149. Complainant denied that she passed out. Id. at 135. Her sister drove home. Id. I find it probable that Complainant was inebriated at the 2004 office holiday party, but there is no

evidence that she acted in a sexually-provocative manner.

29. There was a mouse problem at the office. Transcript II at 158. Complainant testified that one day in November of 2004, Greene was standing by the door of Hank Shepard's office and said that he was going to capture a mouse and allow it to live if she took off her shirt and bra, but kill it with a hammer if she didn't. Transcript, I at 110-111, II at 137. Complainant responded by saying that she was disgusted by his idea and walked away. Transcript I at 111.

Greene subsequently said that he was going to fill up a bucket of water about halfway and put a platform full of food in the bucket in order to attract a mouse. Transcript, II at 162. According to Complainant, Greene thereafter made the following comments in her presence or by fax: "mouse and hammer," "I'm getting that mouse today," "I've got that hammer ready," and "help, I'm drowning signed the mouse." Transcript I at 112, II at 171.

Greene admitted that he talked with Complainant about capturing mice in a bucket of water but testified that he proposed to do so as a humane way of getting rid of mice. Transcript VI at 34. According to Greene, he proposed to put water in a bucket to break their fall and intended to take them out of the bucket the following morning and release them alive, away from the building. Transcript I at 112, II at 162, VI at 34-35. I credit Complainant's testimony about the mice over that of Greene's testimony.

30. Complainant testified that Sparkes told her that if she wanted to make Green stop talking about mice, she should ask him, "what do you think Dodie [Greene's wife] would think of this?" Transcript I at 113, 130; II at 168.

According to Complainant, she asked Sparkes to say it for her, but Sparkes refused. Transcript I at 113, II at 168. Sparkes denies mentioning Greene's wife in relation to a mouse incident. Transcript V at 56. I credit Complainant's testimony over the testimony of Sparkes. Transcript V at 56.

31. Steve Shepard taught Complainant how to enter purchase orders into the computer, process receivables, document shipping, and make computerized data entries for sales reports. Rather than sit next to Complainant while he trained her on the computer, Shepard stood next to her or right behind Complainant. Complainant described Steve Shepard as frequently "hovering" over her, leaning into her at a distance of approximately six to ten inches, and touching her hands, arms, lower back and upper back. Transcript I at 117. Complainant expressed her discomfort by trying to move away from Shepard and saying, "hoverer, hoverer." *Id.* Steve Shepard acknowledged that there was sufficient room for two people to sit next to each other behind the reception desk, but stated that he declined to sit because it would have been uncomfortable and because he would have had to go to another room and get a chair and bring it into the area. Transcript V at 13, 183, VII at 65.

32. According to Sally Sparkes, she had to correct Complainant twice on November 11, 2004 about errors she made regarding shipping procedures. Transcript V at 54; Complainant Exhibit 9, Exhibit B. Sparkes testified that after she pointed out the second error, Complainant told her to "fuck off" or said "fuck you." Transcript V at 55, 79, 119. Complainant denied that she told Sparkes to "fuck off." Transcript I at 128. I credit Sparkes that

Complainant used profanity in their conversation.

33. On one occasion, Rob LeBlanc criticized Complainant for the way in which she handled commercial invoices for a shipment to Germany. Transcript I at 125, II at 184. Complainant followed the method taught to her by Kathy Shepard, but LeBlanc wanted her to do it his way. Transcript VI at 111. LeBlanc testified at the MCAD public hearing that Complainant told him to “go fuck [himself] or “fuck off” and that, in response, he told her she could “go fuck herself,” although LeBlanc denied using such language at Complainant’s unemployment hearing on May 19, 2005. Transcript VI at 79, 111, 116, 120. LeBlanc described the incident as a “little flare-up” or “tiff” and stated that he had no problem with Complainant aside from that one incident. Transcript VI at 81, 88, 112. Tom Greene testified that he overheard Complainant and LeBlanc swear at each other during the incident and asserts in his Position Statement that Complainant called LeBlanc “a fucking asshole.” Complainant’s Exhibit 9. Complainant denies that she used an obscenity in speaking to LeBlanc. She testified that following the incident, Sparkes told her to follow LeBlanc’s method and write on the paperwork “per Rob.” Transcript I at 127, II at 207, III at 5, V at 103; Complainant’s Exhibit 9 at Exhibit B. I find that LeBlanc and Complainant each swore at the other concerning the handling of commercial invoices.
34. Complainant testified that a few days after she argued with LeBlanc about the invoices, everybody seemed to be mad at her. Transcript III at 19, VI at 112. She asserts that Sparkes ignored her and that Hank Shepard began to slam

purchase orders on her desk. Transcript I at 131; III at 19, 27. Complainant testified that she asked LeBlanc if everybody was mad at her because she was wearing sweatshirts and sweaters. Transcript I at 131, III at 29, 86.

According to Complainant, LeBlanc responded that people were angry because she had told Sparkes to “fuck off,” and that it was Complainant’s fault for being sexually harassed because she never said “no” and did not complain to Sparkes. Transcript I at 131-2, III at 86, 111. LeBlanc denied discussing the issue of sexual harassment with Complainant but acknowledges that he told Complainant that there was a problem between her and Sparkes and urged Complainant to talk to Sparkes in order to straighten things out. Transcript VI at 84-85, 96, 114. I credit LeBlanc’s testimony over Complainant’s testimony.

35. Complainant testified that during a cold and snowy day in December of 2004, she was taking a cigarette break on the shipping/receiving dock. Tom Greene joined her on the dock and expressed concern about the ramp being snowy. Complainant offered to shovel snow off the ramp where the delivery trucks dock. Greene brought her a shovel, after which Complainant said, “Well, better get the camera ready cause I’m pretty sure I’m going to fall on my ass.” Transcript I at 11; III at 135. Greene said he would only photograph her if she took off her clothes, except for her hat and boots. Id. Complainant shoveled the snow and did not respond to Greene’s comment although she testified that she was embarrassed by the remark. Transcript III at 137.
36. Complainant testified that the sexual harassment she experienced at work

made her feel “embarrassed, disgusting, uncomfortable in my own clothes.” Transcript I at 137. She testified that on Tuesday, January 4, 2005, she left work shortly after arriving because she experienced symptoms of an anxiety attack including a pounding heart, a knot in her stomach, dizziness, a feeling like she was going to die, and difficulty breathing. *Id.*; III at 140.

Accompanied by her mother, Complainant went to see her internist, Dr. Peter Moran MD. His medical note from January 4, 2005 indicates that Complainant reported “knots” in her stomach, the “usual diarrhea,” “no vomiting,” hands “clammy,” and “sleeps poorly,” “not eating well.” Complainant told Dr. Moran that her job was “stressful” and that her “stomach gets upset at work more.” Complainant’s Exhibit 1. Complainant had previously been treated by Dr. Moran for Irritable Bowel Syndrome. Dr. Moran prescribed Klonopin for anxiety. Complainant’s Exhibit 1. The January 4, 2005 medical note does not mention sexual harassment but Complainant testified at her unemployment hearing that she told Dr. Moran at the January 4, 2005 visit that her job was stressful because of sexual harassment at work. Complainant’s Exhibit 10 at 25.

37. Complainant returned to work on Wednesday, January 5, 2005, did not work on January 6 or 7, 2005, and quit on Friday, January 7, 2005. Complainant’s Exhibit 10 at 11-12, 23. Transcript III at 181; VII at 58. I do not credit Greene’s testimony or the time card tracking system to the effect that Complainant terminated her employment on January 14, 2005. Complainant subsequently filed for, and received, unemployment compensation. Tom

Greene testified at the MCAD public hearing that Complainant sought compensation for the sick days she took immediately prior to quitting, and that when he refused, she threatened him by saying, “You’ll get yours.” Transcript V at 203. Greene did not raise the alleged threat at the unemployment hearing nor did he include it in Respondents’ Position Statement filed at the MCAD on or about February 25, 2005. Complainant credibly denies that she threatened Greene. Transcript III at 164-165

38. Complainant had a follow-up visit with Dr. Moran on January 18, 2005. The visit’s medical note indicates that Complainant is “going through sexual harassment” and is experiencing anxiety, abdominal pain, dizziness, and headaches, that Complainant “feels on edge,” is “driving boyfriend up-a-wall,” and “can’t sit still.” Complainant’s Exhibit 2.
39. According to Complainant’s mother Carolyn Citron, with whom Complainant lived in 2004-2005, Complainant reported that Tom Greene and “a Mr. Shepard” kept talking about how nice her breasts were and how they’d like to see more of them and that “another gentleman” use to lean over her and rub her neck and arm when he showed her something on the computer. Transcript IV at 53-55. Complainant’s mother testified that she accompanied Complainant to see Dr. Moran on January 4, 2005 and heard Complainant talk to Dr. Moran about sexual harassment. According to Complainant’s mother, Complainant never mentioned being sexually harassed at another job and has never brought another lawsuit.

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.

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 employment and create an abusive work environment; and (5) the 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 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. It is a personal one related to Complainant's own reaction to the harassing conduct. See Couture v. Central Oil Co., 12 MDLR 1401, 1421 (1990) (characterizing subjective component to sexual harassment as ... "in the eye of the beholder."). 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 Complainant was subjected to sexual harassment by Tom Greene, Hank Shepard, and Joe Vitka. Shortly after she began working for Respondent, company owner Tom Green and company manager Hank Shepard began to make comments about Complainant's clothes, breasts and buttocks. Shepard told Complainant that she had "a very nice ass," that he was "mesmerized by

[her] breasts,” and that he thought he saw her “tit hanging out.” Greene stared at Complainant’s breasts and commented that when she bent over to file it gave him a “good view.” He told her to not to wear a baggy shirt to work but, rather something “more revealing” and said he would photograph her shoveling snow if she took off her clothes except for hat and boots. Greene and his friend, Joe Vitka, badgered Complainant with questions about much it would take to get her to take her clothes off. When mice appeared in the office, Greene threatened, facetiously, to kill them with a hammer or drown them if Complainant did not take off her shirt and bra. In addition to make sexually explicit comments of his own, Green facilitated the Complainant’s sexual harassment by his friend Joseph Vitka insofar as he encouraged Complainant to submit to Vitka’s unwanted physical advances which consisted of hugging, squeezing, and rubbing Complainant’s lower back. Greene and Vitka also discussed with Complainant the “good old days” when they offered money to a woman to take off her clothes at a party and asked Complainant how much it would take to get her to take her clothes off.

Hank Shepard, Tom Greene, and Joe Vitka were not credible in denying that these or other incidents occurred. Shepard’s assertion that he mentioned “tits” in connection to his wife’s breasts rather than Complainant’s was so lacking in credibility that it cast all of his testimony in doubt. Greene’s explanation that he proposed putting water in a bucket to humanely break the fall of mice as they fell into the bucket and permit them to be released alive, was so absurd as to undermine the rest of his testimony. Vitka’s claim that he never attended a strip show at Respondent’s office -- an assertion credibly denied by Greene -- cast into doubt everything that he said, as did his unbelievable assertion that Complainant was the only person he ever saw drunk at a Christmas party given by

Respondent. The unconvincing nature of their testimony is reinforced by their wholesale denial that any conversation or actions of a sexually-charged nature occurred at the office between September of 2004 and January of 2005. Such a sweeping assertion is at odds with evidence that two strip shows took place on office property in 2000 and 2002 and that employees regularly drank alcohol in the office at the end of the work day.²

The sexually-demeaning conduct of Tom Greene, Hank Shepard, and Joe Vitka was subjectively offensive to Complainant as well as objectively offensive. Complainant testified credibly that she attempted to discourage the sexual banter by calling Hank Shepard “disgusting” and “gross” and by repeatedly telling him to “knock it off,” and to stop making sexual comments. She also reminded Shepard that his wife would not like his sexually-charged conversation, informed Vitka that she was a “taken woman” i.e., had a boyfriend and did not feel it was appropriate to hug him, and terminated the discussion about her disrobing by saying the chances of her doing so were “zero” and “it’s not going to happen.” Complainant testified credibly that the sexual comments at work made her feel embarrassed, humiliated, and “uncomfortable in [her] own skin.” Aside from expressing her distaste at the sexually-harassing behavior, there was little that Complainant could do to stop the objectionable conduct because Sparkes refused to intervene on Complainant’s behalf, there was no office sexual harassment policy to rely on, and Greene was part of the problem.

In addition to denying that many of the allegations of sexual harassment occurred, Respondents argue that Complainant did not find sexual banter to be unwelcome, as

² Although I consider strip shows and alcoholic beverages on business premises to be relevant circumstantial evidence of a permissive office atmosphere, I decline to give evidentiary weight to the driving record of Hank Shepard relative to his charges and convictions for driving while intoxicated because these matters occurred outside the office and do not involve accusations of sexual harassment. See Complainant’s Exhibits 3-6, accepted de bene.

evidenced by the fact that she wore tank tops to work, expressed concern that males in the office would be angry if she did not dress provocatively, became intoxicated at the office Christmas party, and occasionally swore at work. While these matters may be true, they do not detract from the subjective offensiveness of the sexual harassment directed at Complainant nor do they render the harassment welcome. Complainant acknowledged that her tank tops showed some cleavage if an individual were “hovering over her” or if she “bent over too much” but testified convincingly that she was told she could dress casually at work, that she wore tank tops because she was frequently hot at work and tended to perspire, and that her tank tops were not revealing if a person was eye to eye with her. Complainant acknowledged that she expressed concern about whether men in the office were angry with her for switching to sweatshirts and sweaters, but I conclude that Complainant’s concern was an expression of insecurity or a reaction to Greene’s disapproval of her wearing baggy clothes. As for the degree of Complainant’s inebriation at the 2004 office Christmas party -- whether she was “buzzed,” “tipsy” or “drunk” -- her state of intoxication is irrelevant to the issue of sexual harassment in the weeks and months before and after the party. Complainant was not the only guest who drank alcohol at the office Christmas party. Greene testified that it is common for employees to become drunk on such occasions and have their wives drive them home.

Regarding the allegation that Complainant swore at work, the evidence supports Respondent’s assertion that Complainant may have used some form of the “F” word in several arguments with Sparkes and LeBlanc about the handling of office invoices. However, Complainant’s use of an occasional swear word is no more relevant to the issue of sexual harassment than the utterance of obscenities by Tom Greene, Hank Shepard,

and Joe Vitka, which I also find to be irrelevant. Chapter 151B is not a clean language statute and the use of swear words on occasion is not relevant to sexual harassment. Contrast, Coppenrath v. Casey, 28 MDLR 119 (2006) (where complainant introduced the terms “dickhead” and “peckerhead” into the office lingo, wrestled with Respondent at the office, and made gestures consisting of swinging the office phone between her legs and under her armpit she could not claim to be subjectively offended); Candelieri v. Vanson Leathers, Inc., 24 MDLR 228 (2002) (complainant who told dirty jokes and inserted balloons under her shirt at work was not subjectively offended by alleged activity of her employer). In short, Complainant’s behavior and dress were not sufficiently provocative to be deemed an invitation for sexual harassment.

Turning to the claim of sexual harassment against Steve Shepard, I conclude that there is insufficient evidence that his habit of standing next to or right behind Complainant while conducting computer training or the possibility that he may have touched her hand, arms, or back while doing so constituted sexual harassment. There was insufficient evidence that any such touching on his part was intentional rather than inadvertent, that Complainant was offended by his conduct, or that it created a hostile work environment. One of Shepard’s explanations for standing near Complainant rather than sitting next to her during training was that in order to sit, he would have had to go to another room, get a chair, and bring it into the reception area. A photograph of Complainant’s work station supports this rationale.

The evidence is also insufficient to conclude that Sally Sparkes should be held liable for sexual harassment based on her supervisory relationship over Complainant. Sparkes was the office manager while Complainant worked for Respondent, but her

duties were primarily limited to bookkeeping matters. She was not trained in human resource or sexual harassment matters. Although Sparkes testified that she was responsible for personnel issues and participated in interviews, she also stated that she “really [couldn’t] do anything ... it would have to go through Tom [Greene].” I interpret this to mean that Sparkes may have handled some personnel matters such as conducting initial interviews of job candidates but that personnel decisions came under the authority of Respondent’s owner, Tom Greene. Such an arrangement is consistent with the small size of the office and Greene’s active role in managing the company. The fact that Sparkes lacked authority to make personnel decisions is also illustrated by the advice she gave to Complainant relative to the mouse incident, i.e., to speak directly to Greene and remind him that his wife would be upset to hear about the matter. Based on these circumstances, I cannot infer that Sparkes had a duty to take steps to prevent Complainant’s sexual harassment or that her failure to do so evidenced an intent to discriminate or an intent to interfere with Complainant’s exercise of rights. See Woodason v. Town of Norton School Committee, 25 MDLR 62, 65 (2003) (employee with the authority or duty to act on behalf of an employer may be held individually liable if engaging in conduct that implicated rights under c. 151B and demonstrated an intent to discriminate or interfere with complainant’s rights).

Respondents acknowledge that Complainant was a competent and hard worker who learned quickly, had good computer and office skills, was organized, and worked well with vendors. Greene described Complainant as having a good work ethic. Hank Shepard testified that she was quiet, shy, and not temperamental. Rob LeBlanc affirmed that Complainant did not engage in flirtatious conduct and did not have a problem with

authority. Steve Shepard testified that he found Complainant to be very competent, a quick learner, and a hard worker. Sally Sparkes thought Complainant was a “good worker” with above average work performance. These descriptions render irrelevant Respondent’s focus at the MCAD public hearing on whether Complainant’s prior employment was episodic or continuous, whether her resume clearly depicted her work history, and whether or not Complainant had any history of alcohol abuse. The evidence of Complainant’s job performance with Respondent supports her contention that she did not instigate sexually-charged interactions and that she was sincerely offended by them. I conclude that the sexual harassment Complainant experienced was sufficiently severe or pervasive as to alter the conditions of employment and create a sexually-hostile work environment.

The sexually-abusive conduct was perpetrated by company owner Tom Greene, purchasing manager Hank Shepard, and business associate Joe Vitka. Many of the sexually-offensive comments were uttered in the reception area of the office where they could be heard by Complainant’s immediate supervisor Sally Sparkes. By virtue of the supervisory status of the perpetrators and the public nature of their conduct, there can be no question that the Employer knew or should have known of the harassment and failed to take prompt and effective remedial action. In sum, Complainant has proven the elements of a sexual harassment claim.

B. Constructive Discharge

In order to establish constructive discharge, Complainant must prove that her working conditions were so intolerable that a reasonable person would have felt

compelled to resign. See GTE Products Corp. v. Stewart, 421 Mass. 22, 34 (1995) (constructive discharge in sexual harassment context); Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171 (1997) (same); Said v. Northeast Security, 18 MDLR 255, 259 (1996) (constructive discharge in racial discrimination context). See generally MCAD Sexual Harassment in the Workplace Guidelines, VIII - Constructive Discharge. Constructive discharge can occur even if the employer does not act with the specific intent of forcing an individual to resign. See Langford v. Division of Unemployment Assistance, 17 MDLR 1043, 1063 (1995), *aff'd*, 18 MDLR 36 (1996) (Full Comm'n). A claim of constructive discharge under chapter 151B does not arise, however, when Complainant resigns due to general dissatisfaction with the workplace or as a result of other conduct that does not violate chapter 151B. See GTE Products, 421 Mass. at 35 (citations omitted). Adverse working conditions must be unusually “aggravated” or amount to a “continuous pattern” in order to be deemed “intolerable.” Id.; see also Robinson v. Hafner’s Service Stations, Inc., 23 MDLR 283 (2001) (no constructive discharge despite allegations of pornographic material in work area, solicitation that complainant show her breasts and pull up her skirt, and placement near complainant of carved peach in shape of a female sex organ).

An employee is expected to make a reasonable attempt to straighten out any misunderstandings before claiming constructive discharge. See Pio v. Kinney Shoe Corp., 19 MDLR 127, 131 (1997). An unwillingness to compromise cannot be grounds for a claim of constructive discharge. See GTE Products v. Stewart, 421 Mass. at 34.

The standard to prove a constructive discharge is an objective one; an employee's subjective perceptions do not govern. See Lee-Crespo v. Schering-Plough del Caribe, 354 F.3d 34, 45-46 (1st Cir. 2003).

I conclude that the evidence is insufficient to establish a constructive discharge cause of action. Although Complainant was subjected to comments about her clothes, breasts and buttocks, there is no indication that the harassment became increasingly intolerable towards the end of her employment. Moreover, Complainant had a history of working sporadically and being unemployed for significant periods of time. In light of this work history, the fact that Complainant quit her job in January of 2005 does not raise a red flag about the conditions at work. Complainant also had a history of Irritable Bowel Syndrome and other ailments which could account for the symptoms she experienced on Tuesday, January 4, 2005, when she abruptly left work because of an anxiety attack. It is significant that Complainant's January 4, 2005 medical note dictated by Dr. Moran does not mention sexual harassment. Finally, it must be noted that the final weeks of Complainant's employment were fraught with ill will between Complainant and other members of the office staff. Complainant expressed concern that her co-workers disliked her. This concern, as much if not more than concern about being sexually harassed, contributed to Complainant terminating her employment.

IV. REMEDIES AND DAMAGES

Since the liability phase of the proceedings have been bifurcated from the damage phase, a further hearing will be conducted regarding remedies and damages.

This decision represents the final order of the Hearing Officer on the issue of liability.

So ordered this 6th day of March, 2009.

Betty E. Waxman, Hearing Officer