

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION AND CATALINA OWENS

*
*
*
*
*
*
*
*
*
*
*
*
*

Complainant,

v.

DOCKET NO. 99- BEM-0192

JLS MAILING SERVICE, INC.

Respondent.

Appearances: Melissa M. Tzanoudakis, Esq., for the Complainant
Duncan J. MacCallum, , Esq., for the Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE HEARING COMMISSIONER

I. PROCEDURAL HISTORY

On January 20, 1999, Complainant Catalina Owens filed a complaint with this Commission charging Respondent JLS Mailing Services, Inc. with unlawful discrimination in employment on the basis of her sex and sexual harassment in violation of Massachusetts General Laws (M.G.L.) Chapter 151B, sections 4(1) and (16A).

The Investigating Commissioner issued a finding of probable cause with respect to the allegations in the complaint. Attempts to conciliate the matter were unsuccessful and the case was certified for public hearing.

A public hearing was held before me on July 16, 17, 18 and 19, 2002. I have duly considered the entire record before me in making the following findings. Certain proposed findings and conclusions have been omitted as not relevant or as unnecessary to a proper determination of the material issues presented. To the extent that testimony of the witnesses is not in accord with the findings herein, such testimony is not credited. To the extent the proposed findings of either party comport with my analysis and determination in this matter, they have been adopted.

II. FINDINGS OF FACT

1. Complainant Catalina Owens is a female who resides in Cambridge, Massachusetts. Complainant, a native of the Dominican Republic, left that country and moved to the United States in 1993. Complainant married Charles Owens in 1994.

2. Respondent JLS Mailing Services, Inc. is a company located in Boston, Massachusetts. Respondent is in the business of providing mail handling and mail processing services to commercial businesses. Respondent is an employer within the meaning of M.G.L. Chapter 151B, section 1(5).

3. James W. Clark is the founder and president of Respondent. Maryann Clark, his wife, is the Human Relations Director of Respondent. At all times relevant to this matter, Ms. Clark was second in authority to her husband, James Clark, and was responsible for overseeing and enforcing Respondent's anti-discrimination policies. At all times relevant to this matter, Respondent had in place and published on its premises a policy prohibiting "Sexual and Other Unlawful Harassment." The policy provided, in relevant part, that sexual harassment and all other forms of discrimination were strictly

prohibited and that violators of the policy would be subject to discipline, up to and including termination.

4. Complainant started working as a temporary employee at Respondent on July 17, 1998. Complainant was placed at Respondent by New Boston Select Staffing ("New Boston "), a temporary employment agency. Complainant's wages were paid to her directly by New Boston, which in turn was paid by Respondent.

5. Complainant worked the 3:30 p.m. to midnight shift as a clerk in Respondent's presorting division. Soon after she commenced employment with Respondent, Complainant met Francois Milord, a regular, full-time employee of Respondent. At the time Complainant commenced working at Respondent, Milord was a supervisor trainee, also known as a "temporary presort supervisor." Previously a machine operator, Milord was being considered for a promotion to supervisor in Respondent's presorting division. However, as a trainee, Milord lacked the authority to hire, fire, promote or demote employees in the presorting division. He also lacked the authority to grant pay raises or dock an employee's pay.

6. Complainant testified that within two weeks of the commencement of her employment at Respondent, Milord asked Complainant to go to a hotel with him. Complainant testified that Milord told her he would help her get a permanent position with Respondent if she accompanied him to a hotel. Complainant stated she refused Milord's offer of a sexual liaison. Milord denied that he ever offered Complainant any assistance in attaining a permanent position at Respondent, stating that he would never have made such an offer since he had no authority to do so. Milord testified that he did ask Complainant out on a date and that, in response, she told him she shared an apartment

with her cousin, indicating that her living situation might interfere with a date. Milord testified it was at this point that he suggested to Complainant they go to a hotel for their date. Milord testified that when he asked Complainant out on a date, she did not inform him that she was married.

7. Milord testified that immediately after they discussed going out on a date, Complainant gave him her home telephone number for the purpose of discussing such a date. Complainant testified that she gave Milord her home telephone number so that he could reach her with information about a permanent position at Respondent.

8. On the evening of July 29, 1998, Maryann Clark received an anonymous telephone call at her home. The male caller informed Ms. Clark that a female employee was being sexually harassed at the workplace by a male employee. The caller asked Ms. Clark about Respondent's procedure for lodging a sexual harassment complaint. The caller refused to identify either himself, the alleged harasser or the alleged victim. Ms. Clark testified that she told the caller Respondent had a strict policy against sexual harassment and advised the caller to urge the alleged victim to come forward and voice her complaint to management. Ms. Clark told the caller that the alleged victim had nothing to fear in coming forward and that neither sexual harassment, nor retaliation would ever be tolerated at Respondent.

9. The anonymous caller was Charles Owens, Complainant's husband, but Ms. Clark was unaware of the caller's identity until months later.

10. On July 30, 1998, Ms. Clark commenced an investigation into the alleged report of sexual harassment. After questioning several members of Respondent's presorting division, she learned that the parties most likely involved in the alleged

incidents were Complainant and Milord. Ms. Clark immediately summoned Complainant to Respondent's conference room for a private meeting. The meeting was held on July 30.

11. Complainant testified that when she met with Ms. Clark on July 30, Ms. Clark asked merely whether Complainant had been "pushed" by someone at work. Complainant, whose native language is Spanish, stated that she understood Ms. Clark's questions that day as having to do with "pushing" only, and that she, Complainant, told Ms. Clark that nobody had pushed her at work. Ms. Clark's account of the meeting is markedly different from Complainant's. Ms. Clark testified that she told Complainant specifically about the telephone call she had received the night before, and that she believed Complainant was the alleged victim of the behavior described in that call. Ms. Clark stated that she told Complainant she wanted to know if Complainant was in fact being sexually harassed by anyone at Respondent. Ms. Clark also explained to Complainant that Respondent had a strong policy against sexual harassment and that if Complainant were being harassed or otherwise bothered in any way at work, she should not hesitate to come forward, that there would be no reprisals whatsoever for doing so, and that anybody guilty of harassing her would be punished. Ms. Clark testified that Complainant should feel free to complain directly to her or, alternatively, she had the option of complaining to anyone else in Respondent's management. Ms. Clark testified that in response to her repeated and direct questions to Complainant regarding whether or not Complainant was experiencing sexual harassment in the workplace, Complainant responded that she was not having any problems at work. Ms. Clark testified that while she believed Complainant understood exactly what the meeting was about, she sensed

that Complainant was not being entirely candid with her. Ms. Clark proceeded to reiterate Respondent's policy against sexual harassment and to urge Complainant to come forward and complain, without any fear of recrimination, if she believed she was being harassed.

12. Testimony at the hearing revealed that Complainant has lived in the United States since 1993 and that she speaks English. Complainant has been married since 1994 to an American-born husband whose native language is English and who speaks and understands Spanish only to a very limited extent. Most of the conversations Complainant and her husband have at home are in English. Ms. Clark testified that since a large percentage of Respondent's workforce consists of foreign-born individuals whose primary language is not English, she took great pains during the July 30 meeting with Complainant to ensure that she was making herself clearly understood to Complainant.

13. Also on July 30, 1998, Ms. Clark interviewed Milord about the substance of the telephone call she received. This interview was conducted in the presence of Forrest King, Respondent's then operations manager. During this meeting, Milord revealed that he had invited Complainant to go to a hotel with him. As a direct consequence of this admission, Milord was immediately reprimanded by both Ms. Clark and Forrest King. He was issued a written warning concerning his conduct, which he was required to countersign. He was also demoted from his position of supervisor trainee, removed from consideration for promotion, and returned to his former position of machine operator. In this capacity, Milord was also ordered to station himself at a different location within the presorting division from Complainant, so that any contact he might have with her might be minimized. In addition, King and Ms. Clark reminded Milord of Respondent's strict

policy against sexual harassment and explained to him that if there were any recurrence of any behavior on his part that could be construed as sexual harassment, his employment would be immediately terminated.

14. Milord testified at the hearing that he did not realize that asking Complainant out for a date and then to a hotel, in response to her remarks about her living situation interfering with a potential romantic rendezvous, constituted sexual harassment. However, Milord stated that after he was warned about his conduct, reprimanded and demoted by Respondent on July 30, 1998, he avoided Complainant so as not to jeopardize his position at Respondent.

15. On August 1, 1998, Complainant began working the 12:00 noon to 8:30 p.m. shift in a different part of the presorting division. Forrest King initiated this shift change as part of Respondent's effort to minimize Complainant's contact with Milord, who worked the 3:30 to midnight shift. On her new shift, Complainant reported directly to Rosita Colon, a team leader in the presorting division.

16. Complainant testified that she believed Milord was her supervisor even after August 1, 1998. Complainant asked Milord to sign her time slips on several occasions during the month of August. Milord testified that he had been stripped of any and all temporary supervisory authority when he was demoted on July 30. Milord stated that Complainant continued to approach him and specifically sought him out to ask him to sign her time slips, just as she had prior to July 30. Testimony at the hearing revealed that in order to seek out Milord, Complainant was required to go out of her way and walk the full length of a mail sorting machine that was approximately the size of four conference rooms.

17. Complainant's time slips were issued by, and returned to, New Boston Select Staffing, Complainant's employer. Time slips from temporary agencies were customarily signed by supervisors, except when supervisors were not available to sign them. During the 3:30 to midnight shift, supervisors were in short supply, so temporary employees often had their time slips signed by co-employees who were employed full time by Respondent.

18. Complainant testified that Milord did not sexually harass her for the first three weeks of August, but that he began to harass her during the last week of that month. Complainant stated that Milord rubbed Complainant's buttocks while brushing up against her, that he once grabbed her buttocks and thighs, and that he once grabbed her breast. Milord denied that he ever rubbed, grabbed, or in any other way touched Complainant's buttocks, thighs, or breast.

19. Complainant testified that she did not socialize with Milord after July 30, 1998. Milord testified to the contrary. He testified that Complainant frequently approached him during August, engaged in friendly conversation with him and flirted with him. Other testimony received from several of Complainant's co-workers at Respondent revealed that Complainant openly flirted with Milord and that their relationship was a "two-way street." These co-workers also stated that Complainant flirted with other male co-workers, that she gave her telephone number to some of these co-workers, and that she failed to inform such individuals that she was married. One former co-worker of Respondent testified specifically that he had asked Complainant out on a date and that she had reacted favorably to the idea.

20. On Friday, September 4, 1998, Complainant's husband, Charles Owens arrived at Respondent with the intention of confronting Milord and personally lodging a complaint to Respondent's management on Complainant's behalf.

21. On September 4, 1998, James and Maryann Clark were on vacation together for the upcoming Labor Day Weekend and therefore unavailable to address Charles Owens' complaint. The complaint was relayed to William Zollo, who was then head of Respondent's sales department. Zollo was Respondent's most senior official on the premises on September 4. Zollo immediately convened a meeting among Charles Owens, Complainant, himself, and several other individuals employed by Respondent.

22. The September 4, 1998 meeting was attended by Complainant, Charles Owens, William Zollo, William Sleeper and Bridget Conway. At all times relevant to this matter, Mr. Sleeper was the manager of the presorting division and Ms. Conway was a human resources representative. Ms. Conway commenced her employment with Respondent on August 17, 1998 and therefore, at the time of the September 4 meeting, had been employed for a period of less than one month. Ms. Conway's function at the meeting was to take notes and record what was said by the attendees.

23. During the September 4, 1998 meeting, Charles Owens stated that Milord was still harassing Complainant. In response to Mr. Owens' complaints, Zollo suggested that Complainant's shift be changed so that she would not have any contact whatsoever with Milord. Complainant and her husband protested this suggestion, stating that such a shift change would interfere with Complainant's second job. Complainant and her husband also opposed such a shift change on the ground that Complainant had done nothing wrong and thus should not have to change her schedule. Upon hearing the strong

opposition to his suggestion, Zollo immediately dropped the subject of a proposed shift change and offered Complainant the opportunity to take the rest of the day off from work with full pay. Complainant accepted Zollo's offer and left the premises. Zollo also sent Milord home for the rest of the day on September 4, 1998.

24. Zollo worked almost exclusively in Respondent's sales department. He knew Milord only casually, and he did not know Complainant at all. At the close of the meeting on September 4, he decided to send both Complainant and Milord home for the balance of the work day pending the return of James and Maryann Clark, as well as the completion of a full investigation into Mr. Owens' allegations.

25. On or shortly after September 4, 1998, Ms. Conway prepared a document memorializing the meeting. In this document, Conway refers to Milord variously as "presort supervisor" and "temporary presort supervisor." Conway testified in her deposition that as a new employee at Respondent, she had no idea on September 4, 1998, what Milord's actual job title was. She referred to Milord as a supervisor on the basis of Charles Owens' repeated assertions during the meeting that he believed Milord was Complainant's supervisor.

26. Ms. Clark returned from her vacation on Tuesday, September 8, 1998, which was the first business day following the Labor Day Weekend. Upon learning of the events that had transpired during her absence, Ms. Clark immediately suspended Milord and commenced an in-house investigation into Mr. Owens' allegations.

27. Also on September 8, Ms. Clark telephoned Stephanie Staples, a principal at New Boston Select Staffing. Ms. Clark advised Staples that Respondent had a strict policy against sexual harassment and that Complainant was welcome to return to her

position at Respondent. Ms. Clark assured Staples that Complainant would not be bothered by Milord. In response, Staples informed Ms. Clark that Complainant had already asked to be reassigned and that she had, in fact, accepted a position with another employer.

28. On September 10, 1998, Ms. Clark met with Complainant and Charles Owens in order to hear a complete, firsthand account of Complainant's grievances. The meeting was attended by Ms. Clark, Complainant, Mr. Owens, Stephanie Staples and Richard Keels, another representative from New Boston. During this meeting, Ms. Clark reiterated Respondent's policy against sexual harassment. She also reiterated Respondent's invitation to Complainant to return to work at her former position, with no change in her shift. Ms. Clark informed Complainant and Mr. Owens that while she had not yet had an opportunity to interview Milord himself, and therefore the investigation was as yet incomplete, Complainant did not have to worry about being bothered in any way by Milord.

29. During the September 10 meeting, Complainant declined Ms. Clark's offer of reinstatement. She told Ms. Clark that she had already accepted a different position with another employer.

30. At the conclusion of the September 10 meeting, Ms. Clark told Complainant and Mr. Owens that once the in-house investigation was completed, Complainant would be notified of the results of the investigation and of any disciplinary action taken against Milord. The parties present agreed that Richard Keels would assume responsibility for notifying Complainant of this information. This arrangement was made because Respondent did not have Complainant's telephone number and Complainant had

indicated that she preferred that all communication be conducted between New Boston and herself, rather than directly from Respondent.

31. Following the September 10 meeting, Respondent conducted an in-house investigation of Complainant's allegations. Respondent interviewed individuals who worked with both Complainant and Milord.

32. On September 11, 1998, Mr. and Ms. Clark met with Milord. At this meeting, Mr. Clark formally terminated Milord's employment with Respondent. Richard Keels from New Boston also attended this meeting. Keels and the Clarks once again agreed that Keels would assume the responsibility for notifying Complainant that Milord's employment with Respondent had been terminated. At the close of the meeting, Keels specifically stated that he would, in fact personally inform Complainant of the outcome of the meeting.

33. Complainant and her husband both testified at the hearing that nobody ever informed them that Milord's employment had been terminated. Keels testified to the contrary. Keels stated that he was fairly sure, although not entirely certain, that he telephoned Charles Owens and informed him of Milord's termination shortly after it occurred.

34. Neither Complainant nor her husband ever contacted Respondent or New Boston after September 10, 1998, to determine the outcome of Respondent's investigation or whether Milord's employment had been terminated.

35. On November 14, 1998, an attorney representing Complainant sent a demand letter to Respondent charging it with sexual harassment. Respondent issued a formal written response to Complainant's demand letter, in which it largely denied the

allegations of the letter but, nevertheless, offered to compensate Complainant in certain respects. Specifically, Respondent offered (1) to reinstate Complainant to her former position at Respondent with no change in shift and with liberal accommodation for her schedule; (2) to compensate Complainant in full for time lost at work as a direct result of Milord's alleged misconduct; and (3) to pay all psychiatrists', psychologists' and other medical bills for consultation and/or treatment occasioned by the alleged misconduct. Respondent's offer was unconditional, with the caveat that Complainant be required to furnish underlying documentation to establish that any bills for which she sought reimbursement by Respondent were, in fact, related to her encounter with Milord.

36. Despite repeated formal requests from Respondent, through counsel, Complainant repeatedly refused to furnish Respondent with underlying medical documentation for the reimbursement she sought for medical bills. Complainant also refused to sign releases authorizing Respondent to obtain copies of her records.

37. After protracted discovery and contempt proceedings in the instant matter, Respondent obtained certain medical records relating to Complainant in May and July of 2002. On June 22, 2002, Respondent submitted to Complainant's counsel checks in the amounts of \$190.00 and \$2,108.76, payable to two separate health care providers. On July 19, 2002, Respondent submitted to Complainant's counsel a check in the amount of \$817.19, payable to a health care provider.

38. Testimony at the hearing revealed that officials at Respondent harbored serious reservations about making the aforementioned payments to Complainant's health care providers, as they doubted the legitimacy and/or relevance of the medical bills to the instant matter. They had serious questions as to whether Respondent could ever be held

liable for the charges in the bills, since the medical records contained substantial evidence that the emotional distress, anxiety, depression, and medical problems for which Complainant was treated long predated Complainant's contact with Milord. In addition, the bills also referred to anxiety Complainant suffered as a result of having her deposition taken in this matter. However, Respondent made the decision to pay all bills which were, in its judgment, even arguably related to the alleged sexual harassment of which Complainant complained.

39. Complainant acknowledged at the hearing that all medical bills relating to her complaint of sexual harassment that she submitted to Respondent have been paid.

40. After leaving Respondent's employ, Complainant accepted a job offer, through New Boston, at Diringo Spice, a company located in Boston. Complainant's wages at Diringo Spice were higher than those she received when she worked at Respondent.

III. CONCLUSIONS OF LAW

Massachusetts General Laws Chapter 151B, section 4, paragraph 16(A) prohibits sexual harassment in employment. 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, requests or conduct 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, humiliating or sexually offensive work environment."

Complainant alleges in this case that she was the victim both of quid pro quo harassment, as described in subsection (a) and of harassment based on a hostile work environment, as described in subsection (b), above.

In order to prove a claim of sexual harassment under either subsection of the statute's definition, Complainant must establish that the sexual conduct of which she complains was unwelcome. Conduct may not be considered unwelcome if (1) a Complainant initiates conduct of a sexual nature or (2) if a Complainant is a willing participant in a sexually charged environment. Ramsdell v. Western Massachusetts Bus Lines, Inc., 415 Mass. 673 (1993). Federal and state discrimination laws do not prohibit sexual advances and conduct in the workplace per se: only unwelcome sexual advances or instances of conduct are forbidden. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986); Ramsdell, supra. Complainant bears the burden of proving by a preponderance of the evidence that the conduct of which she complains is truly unwelcome. See, e.g., Chamberlin v. 101 Realty, Inc. 915 F.2d 777 (1st Cir. 1990); Ramsdell, supra.

Testimony received at the hearing was sharply divided on the issue of whether Milord's conduct, to the extent that it actually occurred, was unwelcome. While it is undisputed that Milord asked Complainant out on a date, it is disputed whether or not Complainant regarded the invitation as welcome and acted accordingly. Complainant and her husband testified that Milord's conduct was unwelcome, while Milord insisted that Complainant reacted favorably and, indeed, encouraged his overtures by failing to inform him she was married, pointing out the shortcomings of her apartment for a potential rendezvous, and giving him her home telephone number. With respect to Complainant's allegations that Milord grabbed her buttocks, thighs and breasts, the

evidence was also sharply conflicting. Milord denies that he ever committed such acts, while Complainant insists that he did. Complainant's testimony is corroborated by her husband, while Milord's testimony is corroborated by several co-workers who witnessed no untoward behavior, but stated that Complainant flirted openly with Milord.

I find that Complainant failed to sustain her burden to prove by a preponderance of the evidence that the conduct she complains of was unwelcome. The fact that Complainant refused to complain of sexual harassment to Maryann Clark during the July 30 meeting, despite numerous invitations to do so, suggests that Complainant was not in fact offended by Milord's invitation for a date. It is incomprehensible why Complainant would have refrained from complaining and why she forcefully denied being sexually harassed to Ms. Clark during this meeting, in which she was explicitly and repeatedly asked if she was being sexually harassed in any fashion by Milord, if she had truly found Milord's overture offensive, harassing and/or unwelcome. Similarly, as to Complainant's allegations of inappropriate grabbing by Milord, I am not persuaded by a preponderance of the evidence that, if it did occur, this conduct was unwelcome. Milord testified credibly that he stayed away from Complainant after July 30, since he had been demoted because of his prior conduct and because he was afraid of losing a job he had held and at which he had thrived for ten years. Milord testified credibly that it was Complainant, not he, who persisted in finding ways for their paths to cross in the workplace. Several of Complainant's former co-workers, who no longer worked at Respondent at the time of the hearing and therefore had no incentive to slant or fabricate their testimony, testified convincingly that Complainant's friendship with Milord was a "two-way street," and that Complainant had flirted openly and been receptive to romantic overtures from Milord and

other men during her short tenure at Respondent. Based on the above, I conclude that Complainant was not the victim of sexual harassment.

IV. ORDER

Based on the foregoing, it is hereby ordered that the Complaint be dismissed.

This decision represents the final decision of the Hearing Commissioner. Any party aggrieved by the decision may file a notice of appeal with the Full Commission within ten (10) days of receipt of this decision and a petition for review within thirty (30) days of receipt.

So Ordered this 8th day of January, 2003.

Dorca I. Gomez
Hearing Commissioner