



were unsuccessful, the case was certified for public hearing. A public hearing was held before me on January 15, 16, 2002. The parties have submitted Proposed Findings of Fact and Conclusions of Law.

In reaching my decision, I have considered the entire record including the post-hearing briefs of the parties. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

## II. FINDINGS OF FACT

1. Complainant was hired as a part-time waitress/counterperson by Respondent in August 1992. In the spring of 1993, she began working full-time alongside Bernard McShane, the owner of The Donut Shop, in the "back room" of the shop cooking on the grill. (Tr., Day 1).

2. Complainant testified that after she began working next to McShane, the two began to grow closer, getting to know each other and "talking a lot." (Tr., Day 1).

3. McShane told Complainant that she was his best friend, that he was "in like" with her and that he was very unhappily married. McShane soon began to leave Complainant cards, flowers and notes, asking her out repeatedly and being "extremely nice" to her. Complainant testified that

McShane "showered her with gifts" and she admitted that in exchange, she bought him gifts as well. (Tr., Day 1).

4. Complainant testified that she eventually did go out with McShane "for a couple of months" and had sexual relations with him "a couple of times," but said that she felt "uncomfortable because he was married" and decided not to go out with him anymore. (Tr., Day 1).

5. Complainant admitted that she sent McShane Valentine's Day cards with affectionate notes written in them, that she accompanied him to Christmas parties and other social events with friends, and that in January 1995, she wrote him a very warm and grateful letter of thanks for Christmas gifts he had given her and her children. (Tr., Day 1).

6. Complainant testified that after she went out with McShane, "he began to act like he owned her" and also began making more explicit sexual advances toward her. He called her on the phone and told her he was masturbating, he followed her to her car often, he called her at home and told her that he loved her and wanted to marry her. Complainant says that McShane showed her his penis while at work and told her repeatedly that he was sexually aroused by her. (Tr., Day 1).

7. Complainant testified that she became very uncomfortable with McShane's advances, that she expressed her discomfort to him and asked him to stop numerous times. She told McShane to go back to his wife and she confided in

her sister, her brother and her sister-in-law about what was going on at work. However, Complainant admitted that she did not complain to anyone at the Donut Shop, whether in a position of authority or not, about McShane's behavior. (Tr., Day 1).

8. Complainant testified that McShane began to appear depressed and she observed him crying every day. She suggested that he seek professional help and he began treatment with a psychiatrist. Complainant testified that subsequently McShane "was on (her) case about work all the time" and Complainant believed that he was either going to fire her or was trying to get her to quit. McShane would call her at home and follow her around the store, complaining that she was talking to too many men and not performing her job. (Tr., Day 1).

9. Complainant testified that she walked off the job several times after McShane "yelled and screamed" at her in front of customers or threatened her, but that she continued to work there because she was not able to find another job. (Tr., Day 1)

10. Complainant testified that on May 13, 1996, she was threatened and pushed by another female employee named Lori Tarbox, with whom McShane had become friendly. When Complainant pleaded with McShane to intervene during the altercation, he ignored her. Complainant left the store immediately after the incident, fearing for her safety, and never returned to the Donut Shop. (Tr., Day 1).

11. Bernard McShane testified that his relationship with Complainant began in the early summer of 1993 and continued steadily until the summer of 1994. He said that they saw each other outside of work daily and that their relationship included regular sexual activity. After the summer of 1994, McShane said that the two saw each other outside of work sporadically until March 1995, when their romantic relationship ended for good and he reconciled with his wife. (Tr., Day 1).

12. McShane denied making any sexual comments or advances towards Complainant while they were at the Donut Shop and he denied ever following her anywhere or yelling at her while she was working. McShane also testified that Complainant wanted their romantic relationship to continue, but that he finally decided to end it in 1995 in order "to work things out" with his wife. (Tr., Day 1).

13. McShane testified that Complainant had "walked out" of the shop three or four times before May 13, 1996, but that she had always return, asking for her job back. According to McShane, on May 13, 1996, after Complainant had the altercation with Lori Tarbox and left the shop abruptly, she again called him, asking for her job back. McShane testified that this time, however, he refused to let her come back. (Tr., Day 1).

14. Both Complainant and McShane testified that neither Complainant's hours nor her pay were reduced during

the time that she worked for Respondent, and that her position and duties remained unchanged. (Tr., Day 1).

15. Judy Bullock, Lisa Collins and Lori Tarbox, all former employees of Respondent, testified that they were aware that Complainant and McShane had a romantic relationship for more than a year, that it appeared to be a mutual relationship and that Complainant never complained to them about any inappropriate behavior by McShane at work. They testified that in fact, McShane actually treated Complainant better than the other employees and, because of that, she had trouble getting along with some of her co-workers. (Tr., Day 2).

16. Tarbox testified that during the altercation she had with Complainant on May 13, 1996, Complainant never asked for McShane's help and that there was no physical contact during the incident, only yelling and name-calling between Tarbox and Complainant. (Tr., Day 2).

### III. CONCLUSIONS OF LAW

#### A. *Sexual Harassment*

M.G.L. c. 151B, § 4(16A) 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 is made explicitly or implicitly a term or condition of employment or as a basis for employment decisions. 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. M.G.L. c. 151B, § 1(18).

In order to establish a prima facie case of sexual harassment in the workplace, a complainant must show that she was subjected to unwelcome and unsolicited sexual advances, resulting in an intimidating and humiliating atmosphere which interfered with her ability to perform her job. *College-Town div. of Interco, Inc. v. Massachusetts Commission Against Discrimination*, 400 Mass. 156, 162; 508 N.E. 2d 587 (1987).

Complainant has failed to prove that she was subjected to sexual harassment by McShane, because I do not find her version of events credible. I find that her relationship with McShane lasted more than a "couple of dates," and that their sexual relationship was more than just "a couple" of encounters. I believe that their feelings for each other were mutual, that any sexual comments or advances made by McShane were part of their romantic relationship and were not unwelcome or unsolicited by Complainant and were not offensive to her at the time they were made. During Complainant's romance with McShane, which I find lasted at least a year, from mid-1993 to mid-1994 (and probably longer), her work environment was anything but abusive, hostile and intimidating. As evidenced by the cards, letters and gifts that were exchanged between the two, it

appears that Complainant's working environment during that time was enjoyable to her.

Complainant continued working at the Donut Shop for nearly two years after her romantic relationship with McShane ended and during much of that time, she remained friendly with him, accepted gifts from him and felt grateful to him. The January 1995 letter Complainant wrote to McShane demonstrates this. I do not find credible Complainant's claims that McShane screamed at her, harassed her and criticized her work performance "all the time" after their relationship ended. Therefore, I do not credit Complainant's claims that McShane created an abusive and hostile work environment and I find that she failed to prove her claim of sexual harassment under M.G.L. c. 151B, § 4(16A).

B. *Constructive Discharge*

In order to establish a constructive discharge, a complainant must show that her working conditions were so intolerable that a reasonable person in her circumstances would have felt compelled to resign. *Norman v. Andover Country Club*, 15 MDLR 1394 (1993). Because I do not credit Complainant's claims that McShane was abusive and intimidating towards her after their relationship ended and that she feared for her own safety after the altercation with the co-worker, I find that her abrupt departure from the Donut Shop was not a constructive discharge, but was

rather a voluntary abandonment of her job. *See Smith-Pereira v. Coffees of the World Corp., d/b/a Timothy's Coffees of the World*, 20 MDLR 229, 234 (1998).

Complainant admitted that she never complained to anyone at the Donut Shop about McShane's alleged inappropriate sexual behavior and she worked for Respondent for nearly two years after her romantic relationship with McShane ended. During some of that time, she admitted to socializing with McShane, exchanging gifts with him and remaining on friendly terms with him. Complainant is the one who had gotten angry and "walked off the job" several times before the May 13, 1996 altercation with her co-worker and McShane had always allowed her to come back to the Donut Shop. McShane's permitting her to return after she left on those occasions is inconsistent with Complainant's claim that he was trying to force her out of her job.

On May 13, 1996, McShane considered Complainant's abrupt exit from The Donut Shop to be yet another abandonment of her job and he was justified in refusing to take her back as an employee. I find that Complainant has failed to show that she was constructively discharged by McShane.

C. *Sex Discrimination - Terms and Conditions*

Complainant offered no evidence to show that McShane treated her differently from males in The Donut Shop. She did not allege that he reduced her pay or hours or altered

the terms and conditions of her employment in any way. Therefore, she failed to establish a prima facie case of sex discrimination in the terms and conditions of her employment with Respondent.

IV. ORDER

Therefore, Complainant's claims of sexual harassment and sex discrimination are hereby dismissed.

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

SO ORDERED, this 25<sup>th</sup> day of November, 2002.

---

Walter J. Sullivan, Jr.  
Hearing Commissioner