

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MASSACHUSETTS COMMISSION )  
AGAINST DISCRIMINATION and )  
DONNA MORRISSEY )  
Complainant )  
v. ) DOCKET No. 96-BEM-0975  
HOLIDAY INN )  
Respondent )

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Appearances:

Thomas J. Canavan, Esq., for Complainant  
Richard D. Armstrong, Esq. and Donna Porter, Esq., for  
Respondent Holiday Inn

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 1, 1996, Complainant Donna Morrissey filed a complaint charging Holiday Inn-Dedham with discrimination based on her gender (female) in violation of Massachusetts General Laws, Chapter 151B, § 4(1). Complainant alleged that Gary Orswell, her immediate supervisor, subjected her to a hostile work environment that resulted in her constructive discharge on November 9, 1995.

Attempts to conciliate this matter were unsuccessful. On October 17, 1997, Investigating Commissioner Charles E. Walker, Jr., certified this case for a public hearing. I conducted a public hearing in this case on

June 19-21 and July 14, 2000. On September 18, 2000, the parties submitted post-hearing memoranda with proposed findings of fact, conclusions of law and exhibits.<sup>1</sup>

I have carefully reviewed and considered the entire record before me, all proposed findings of fact, conclusions of law and supporting argument. To the extent the parties' proposed findings and conclusions are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings and conclusions as not relevant or as unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions to render them acceptable.

My findings of fact are based on the complaint filed in this case, Respondent Holiday Inn's Answer, the testimony presented at the public hearing held on June 19-21 and July 14, 2000 and the parties' post-hearing submissions. Based on the credible evidence and reasonable inferences therefrom, I make the following findings of fact, conclusions of law, and order.

## II. FINDINGS OF FACT

### Background

1. Complainant Donna Morrissey is a female who lives in Bridgewater, Massachusetts, with her 9-year-old son.

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<sup>1</sup> After reviewing and fully considering the parties' written submissions, I am denying Respondent Holiday Inn's Motion to Admit Complainant's Deposition Transcript, dated October 17, 2000, and granting Complainant's Motion to Strike Exhibit A of Attorney Armstrong's Affidavit, as of the date of this decision.

2. Complainant graduated from Bridgewater-Raynham Regional High School in 1978 and earned an Associates Degree in business from Quincy Junior College in 1998. Complainant is currently pursuing a bachelor's degree in business administration from Anna Maria College in Paxton, Massachusetts.

3. Philip Glidden is the General Manager at the Holiday Inn-Dedham (hereafter: Respondent Holiday Inn), 55 Ariadne Road, Dedham, Massachusetts. He has held this position since 1980. Among his duties, Mr. Glidden oversees management and operation of Respondent Holiday Inn, a 203-room hotel facility.

4. The Midland Hotel Corporation d/b/a Holiday Inn owns and operates Respondent Holiday Inn, which has approximately 180 full- and part-time employees. At all times relevant to this discrimination complaint, Respondent Holiday Inn was an employer within the meaning of G.L. c. 151B, §1, paragraph 5.

1. Complainant worked as a Corporate Sales Manager at Respondent Holiday Inn from April 1989 until November 1995. When Complainant left her position, her hourly compensation rate was \$13.00. Complainant's additional employment benefits included a commission of 0.5% for old and new preferred customers, a mileage allowance, a small expense account (for lunches outside the hotel facility) and a dry cleaning allotment (\$10 @ week).

1. Complainant reported to Kimberly (Monroe) Kazantis, Director of Sales, from April 1989 until August 1994. Complainant reported to Gary R. Orswell from August 1994

until November 1995. Mr. Orswell assumed the Director of Sales position when Ms. Kanzantis left Respondent Holiday Inn.

2. Mr. Orswell spent approximately 15-20% of each work-day outside of the hotel facility making outside sales calls or attending business meetings. His activities included attending various functions such as a Chamber of Commerce breakfast or a Greater Boston Convention Visitor's Bureau morning function or meeting.

3. The Director of Sales managed all room sales at the Respondent Holiday Inn and established new accounts. At all times relevant to this complaint, Ms. Kazantis and Mr. Orswell reported directly to Mr. Glidden.

4. In 1993, Respondent Holiday Inn hired Jeralyn Sullivan as a Front Desk Clerk. Ms. Sullivan reported to Joanne Lawler, Front Office Manager.

5. In January 1994, Ms. Sullivan assumed new duties as Mr. Glidden's administrative assistant (AA). In her AA position, Ms. Sullivan reported to Mr. Glidden and performed general secretarial (typing) and administrative services for him and the Sales Office staff, including Mr. Orswell and Complainant. Ms. Sullivan also maintained the Sales Office database, made room reservations and occasionally gave tours of the hotel facility. Ms. Sullivan spent approximately 50% of her time performing job duties outside the Sales Office.

6. Except for a brief period in November 1995, Ms. Sullivan held her AA position until she left Respondent

Holiday Inn in April 1997. Ms. Sullivan's work schedule was Monday-Friday, 9:00 a.m. to 5:00 p.m.

Complainant's Activities and Duties as Corporate Sales Manager

7. During her employment at Respondent Holiday Inn, Complainant worked on Tuesday, Wednesday and Thursday from 9:00 a.m. to 5:00 p.m. Complainant also filled in for Ms. Kazantis or Mr. Orswell when they were on vacation and as needed.

8. As Corporate Sales Manager, Complainant generated corporate sales among businesses and organizations in the area surrounding Respondent Holiday Inn. Complainant solicited bookings for Respondent Holiday Inn's 203 hotel rooms and small function rooms, at a corporate rate, by businesses for use by their out-of-town business clients. Complainant made presentations to potential accounts outside the hotel, made "cold calls" on potential accounts and held luncheons with potential accounts in the hotel facility. (Respondent's Exhibit 2).

9. Complainant spent approximately 80-90% of her work-day "on the road" contacting or "calling on" potential accounts. Complainant generally left the hotel facility between 10:00 a.m. and 1:00 p.m. and returned between 4:00 and 4:30 p.m.

10. Despite her "on the road" activities, Complainant reported to the hotel facility each day prior to making her client visits. During 1994-1995, Complainant met with Mr. Orswell in the Sales Office for approximately 10

to 30 minutes each morning to review her sales or marketing activities for the day.

11. Mr. Orswell required Complainant to return to the hotel facility each afternoon to meet with him for approximately 10 minutes prior to completing her workday at 5:00 p.m. During their afternoon meetings, Complainant submitted a written sales report that summarized her customer contacts for that day and reviewed her next day's schedule.

12. While Complainant's primary activities included on-the-road solicitation, she often remained in the hotel facility to perform her administrative duties and conduct telemarketing and/or follow-up calls. When Complainant made "telemarketing" calls to prospective or existing accounts, she used a telephone in the Sales Office (including Mr. Orswell's telephone in his absence), other vacant hotel offices, the hotel lounge or an unoccupied hotel room.

13. Complainant coordinated hotel visits by prospective clients so that they could see the features and benefits of the hotel facility. She often arranged for on-site luncheons with prospective clients. Complainant also ensured that the hotel rooms chosen for inspection by prospective clients were clean and well organized and that the gym, lobby and restaurant were in "perfect" condition.

14. Mr. Glidden saw Complainant several times each day. He reviewed Complainant's daily sales call reports with her in his office or the Sales Office. Mr. Glidden

sometimes discussed housekeeping issues with Complainant in preparation for prospective client visits to the hotel facility.

15. In 1994-1995, Complainant made joint outside sales calls with Ms. Kazantis and Mr. Orswell. In the spring and summer of 1995, Complainant went on three or four outside sales calls with Mr. Orswell. Their sales calls lasted approximately one-half day because they visited several businesses during each trip. Mr. Orswell immediately discussed each outside sales call with Complainant and made recommendations regarding her presentation or sales approach.

16. Mr. Orswell held supervision meetings with Complainant in the hotel restaurant or lounge. These meetings took place in the morning when the hotel lounge was closed or had few customers, if any. Mr. Orswell did not maintain written records of these meetings and did not impose any discipline on Complainant during or after these meetings.

17. Mr. Orswell testified that Complainant was generally easy to supervise but was occasionally defensive. He felt that Complainant sometimes acted as if he questioned her integrity when he asked a question about her activities. Mr. Orswell believed Complainant did not always react well to his verbal correction. He testified that Complainant sometimes told him that he should fire her if he did not like her job performance. On one occasion, Complainant told Mr. Orswell that she felt he was "talking down" to her.

### Complainant's Concerns About Ms. Kazantis' Health

18. Sometime before August 1993, Complainant met with Mr. Glidden to discuss Ms. Kazantis' work activities and behavior. During the meeting, Complainant told Mr. Glidden that she believed Ms. Kazantis was addicted to pre`scription drugs and needed help. Complainant told Mr. Glidden that she could no longer work with Ms. Kazantis because of her behavior or conduct in the hotel facility and during client "calls." Complainant told him that she saw Ms. Kazantis falling down stairs, slurring her words and staggering through the hotel lobby. Complainant was concerned about her personal safety because she had to drive with Ms. Kazantis to client calls during times when Complainant felt Ms. Kazantis was "drugged up." She asked Mr. Glidden to get help for Ms. Kazantis.

19. Mr. Glidden told Complainant that he "would take care of it" although he could not discuss the actions he intended to take because of confidentiality. After the meeting with Mr. Glidden, Complainant felt that "nothing changed" regarding Ms. Kazantis' behavior.

20. Mr. Glidden granted Ms. Kazantis' requests for medical leaves of absence in 1993-1994, including a request to attend a day hospital program for detoxification and treatment of her medical and psychiatric problems. (Respondent's Exhibit 10).

### Mr. Orswell's Alleged Harassment

21. Respondent Holiday Inn's Sales Office is located off a corridor on the first floor of the hotel facility. Complainant described the Sales Office as a "fishbowl"

because two of its walls were glass. Hotel employees and customers were able to look directly into the Sales Office. The dimensions of the Sales Office were approximately 14 x 14 feet. (Respondent's Exhibit 12).

22. During Mr. Orswell's tenure as Director of Sales, the Sales Office had two L-shaped desks. One was assigned to Mr. Orswell and the other was assigned to Ms. Sullivan. If Mr. Orswell and Ms. Sullivan were working at their desks, Complainant sat on a chair using a corner or the edge of Mr. Orswell's desk. Mr. Orswell testified that he would be approximately six inches to one foot away from Complainant while she worked at his desk.

23. Complainant did not have a desk or workstation in the Sales Office. She kept her personal belongings and business materials, including her sales reports, forms, brochures and other customer materials, in a wall closet that was located on the wall opposite the entrance door to the Sales Office.

24. During the time period relevant to the instant complaint, Ms. Sullivan's desk was located to the right of the closet and parallel to the wall where the closet was placed. When seated at her desk, Ms. Sullivan looked in the direction of the front door to the Sales Office. Mr. Orswell's desk was located to the left of the closet at the back of the room and was perpendicular to the wall. His desk directly faced Ms. Sullivan's desk with only a couple of feet between them. Mr. Orswell usually placed a chair at the end of his desk. (Respondent's Exhibits 1 and 12).

(a) Personal Hygiene

25. Complainant and Ms. Sullivan testified that, beginning in or about September or October 1994, they observed that Mr. Orswell was disheveled, always wore wrinkled shirts and dirty suits, smelled of urine, did not neatly comb his hair and had a body odor. Complainant and Ms. Sullivan also testified that Mr. Orswell's had offensive personal habits such as picking his nose, rolling the nasal mucous on his fingers and handling equipment in the Sales Office that they had to use. Ms. Sullivan testified that Mr. Orswell constantly sneezed in his hands and rubbed his hands together. Mr. Orswell engaged in this conduct several times a week during his employment at Respondent Holiday Inn.

26. Mr. Orswell denied that he smelled of urine, wore dirty shirts, stained pants or failed to shower while employed at Respondent Holiday Inn. Mr. Orswell also denied that he picked his nose, played with nasal mucous or sneezed on his hands while using Ms. Sullivan's computer keyboard. Mr. Orswell testified that he always had fresh shirts and clean suits each day because Respondent Holiday Inn gave him a weekly cash allotment for his dry cleaning needs.

b) Fondling or Manipulation

27. Complainant and Ms. Sullivan testified that they saw Mr. Orswell constantly grope or manipulate his genitals with his hands inside his pants (through his pockets) and with his hands on the outside of his pants. Ms. Sullivan saw Mr. Orswell "manipulate" or "grab his private parts"

several times each day, beginning in September or October 1994 and continuing through November 1995.

28. Complainant and Ms. Sullivan stared at Mr. Orswell when he fondled himself so that he knew they were aware of his actions. On these occasions, Mr. Orswell smirked, stopped his behavior for a short period and began his manipulation again. Complainant and Ms. Sullivan were annoyed and repulsed by Mr. Orswell's actions. Complainant felt that Mr. Orswell's actions were sexually offensive and responded by walking away "in disgust."

29. Ms. Sullivan saw Mr. Orswell "hump" the corner of his desk by placing his "private areas" against the desk and moving his body. Ms. Sullivan testified that Mr. Orswell often "stationed" his crotch against the edge of his desk or on her chair and rubbed it against her desk or chair.

30. While Complainant did not see Mr. Orswell "hump" a desk, she saw Mr. Orswell "rub up against" the back of Ms. Sullivan's chair several times while Ms. Sullivan was seated in her chair. Complainant does not recall whether these incidents occurred in 1994 or 1995.

31. Mr. Orswell did not recall manipulating his private parts or groin area, making eye contact with Complainant or Ms. Sullivan and purposely smirking. Mr. Orswell also denied that he "humped" Ms. Sullivan's chair or any other Sales Office furniture.

c) Leering

32. Ms. Sullivan saw Mr. Orswell repeatedly attempt to look up Complainant's dress or skirt when she bent over to retrieve items from the Sales Office closet. Ms. Sullivan saw Mr. Orswell move his chair (with rollers) away from the end of his desk, bend at his waist and turn his head to look. Ms. Sullivan told Complainant about Mr. Orswell's attempts to look up her skirt on 15 occasions although she saw more attempts by Mr. Orswell. Ms. Sullivan saw Mr. Orswell's attempts to look up Complainant's dress in 1995 but she did not recall any attempts after August 1995.

33. Complainant never saw Mr. Orswell look up her dress or attempt to look up her dress. Complainant did not recall whether Ms. Sullivan told her about Mr. Orswell's attempts to look up her dress in 1994 or 1995.

34. After learning about Mr. Orswell's attempts to look up her dress, Complainant testified that Mr. Orswell often "invaded" her personal "space" and made her feel uncomfortable during their meetings in the hotel lounge. She testified that Mr. Orswell attempted to sit very close to her and stared at her breasts. Complainant felt uncomfortable and responded by covering herself with her arms, moving away from Mr. Orswell and pulling her skirt or clothes down.

35. Complainant testified that Mr. Orswell stared at her breasts weekly and sometimes more often, beginning in 1994 or 1995 and continuing until she left Respondent Holiday Inn in November 1995. Complainant told Ms. Sullivan that Mr. Orswell tried to sit very close to her—within one inch—during their meetings in the lounge and

stared at her breasts. Complainant also told Ms. Sullivan that she was very uncomfortable with this behavior.

6. Ms. Sullivan saw Mr. Orswell try to look down Complainant's blouse on one occasion. She also saw Mr. Orswell stare at Complainant's breasts a couple of times when he was standing next to her in the Sales Office. Ms. Sullivan does not recall whether these instances occurred in 1994 or 1995.

7. Ms. Sullivan twice told Complainant that Mr. Orswell tried to look down her blouse but she did not recall whether she told Complainant in 1994 or 1995. After Ms. Sullivan told Complainant about Mr. Orswell's attempts to look down her blouse, Complainant saw him attempt to look down her blouse on several occasions, continuing until she left Respondent Holiday Inn in November 1995.

8. Ms. Sullivan testified that Mr. Orswell always "had to be right up against" Complainant when he spoke to her in the Sales Office. Ms. Sullivan testified that Complainant responded by moving away from Mr. Orswell.

9. Mr. Orswell denied that he looked down Complainant's blouse, stared at her breasts or tried to look up Complainant's skirt while she was in the Sales Office. Mr. Orswell testified that he sat directly opposite Complainant whenever he verbally corrected her and never on the same side of the table.

d) Verbal Comments

10. Complainant testified that Mr. Orswell made weekly comments about her physical appearance and body. Mr.

Orswell told Complainant that she had "nice legs," that he liked the shape of them and that she had a "good or nice body." While Complainant did not recall whether Mr. Orswell's comments began in 1994 or 1995, she testified that they continued until she left Respondent Holiday Inn in November 1995. Complainant responded to Mr. Orswell's comments by telling him that he was "sick" and a "pig."

11. Ms. Sullivan testified that she overheard two comments by Mr. Orswell that Complainant had "nice legs" and two comments that Complainant had a "nice body." Ms. Sullivan does not recall whether these comments occurred in 1994 or 1995.

12. Complainant testified that Mr. Orswell referred to her breasts as big "ta tas" on one or two occasions. Complainant did not recall whether these instances occurred in 1994 or 1995 but believed that they occurred after Mr. Orswell had held his position for several months. Ms. Sullivan did not hear Mr. Orswell refer to Complainant's breasts as "ta tas."

13. Mr. Orswell told Complainant she looked "nice" many times because he felt Complainant dressed well and was pleasant. Mr. Orswell denied that he made comments about Complainant's body and legs, made references about Complainant's breasts or used the words, "ta tas." Mr. Orswell also denied that Complainant called him a "pig" or told him that he was "sick."

14. Sometime in 1994 or 1995, Complainant ended a conversation with Ms. Sullivan by sticking out her tongue at Ms. Sullivan. Mr. Orswell looked at Complainant and

told her that he "bet [she] could really use [her] tongue" and that "if she was a prostitute, she could make a lot of money." Complainant responded by telling Mr. Orswell that he was "sick," and was a "pig." Ms. Sullivan overheard Mr. Orswell's comment about Complainant's use of her tongue.

15. Complainant never invited Mr. Orswell's sexual comments and did not make sexual comments or remarks in his presence. Mr. Orswell did not direct sexual remarks at Ms. Sullivan or stare at her breasts.

16. Ms. Sullivan and Mr. Glidden testified that Complainant always dressed appropriately in business attire while she worked at Respondent Holiday Inn. Ms. Sullivan never heard Complainant have a conversation of a sexual nature or discuss her romantic life in front of Mr. Orswell.

17. Complainant and Ms. Sullivan never complained to Mr. Orswell about his sexual comments or innuendos to them or about his creating a sexually hostile work environment.

e) Cyber Sex

18. Ms. Sullivan testified that Mr. Orswell showed her women having sex on his office computer that was dialed into the modem on his home computer. Ms. Sullivan was offended and told Mr. Orswell that he was "disgusting." Ms. Sullivan also told Mr. Orswell that she planned to report his actions to Mr. Glidden. She testified that Mr. Orswell turned off his computer, laughed and said, "prove it."

19. Ms. Sullivan did not recall when this incident occurred. She did not tell Mr. Glidden because he had failed to take any action on her earlier complaints against Mr. Orswell.

20. Mr. Orswell denied using his office computer to show cyber sex to any hotel employees. Mr. Orswell testified that his hotel computer could only log onto Holiday Inn's Worldwide Reservation System and Respondent Holiday Inn's property management system. He also testified that Respondent Holiday Inn's computers did not have Internet access during his employment at Respondent Holiday Inn.

f) Physical Touching

21. In or about Christmas 1994, Mr. Orswell moved toward Complainant to hug her as she was preparing to leave the office to go on vacation. Complainant testified that Mr. Orswell shook her hand and "grabbed" or "fondled" the side of her breast with his hand. Complainant was startled but stepped back and pushed Mr. Orswell's hand away. She told him, "Gary, you just grabbed my breast." Mr. Orswell laughed in response to her statement.

22. Complainant testified that this incident was "extremely offensive" to her. She later told Ms. Sullivan that she "could not believe that Gary grabbed her breast."

23. Ms. Sullivan saw Mr. Orswell touch Complainant's breast and Complainant immediately back away from him. Ms. Sullivan could not determine whether Mr. Orswell had

squeezed Complainant's breast. She overheard Complainant tell Mr. Orswell, "Gary, you touched my breast." Ms. Sullivan did not see Complainant laugh or smile during this incident or give any indication that she felt the incident was funny or amusing. Ms. Sullivan saw Mr. Orswell laugh.

24. Mr. Glidden came into the Sales Office immediately after this incident. Ms. Sullivan told Mr. Glidden that Mr. Orswell had just "grabbed" Complainant's breast. Ms. Sullivan testified that Mr. Glidden merely "chuckled" or "laughed."

25. Mr. Glidden testified that he saw Complainant and Mr. Orswell smiling and laughing when he walked into the Sales Office. He responded to Ms. Sullivan's statement by telling them that "Mr. Orswell was a lucky man." Mr. Glidden walked out of the office without making any further inquiry or conducting an investigation. Complainant never discussed this incident with Mr. Orswell after he left the Sales Office.

26. Mr. Orswell claimed that he inadvertently touched Complainant's breast during the hug with his left hand and that Complainant laughed. Mr. Orswell testified that he apologized for his accidental touching and told her that he "did not mean to do that." Mr. Orswell denied that he squeezed, fondled or grabbed Complainant's breast.

#### Complaints to Mr. Glidden About Mr. Orswell's Conduct

27. Ms. Sullivan complained to Mr. Glidden at least four or five times about Mr. Orswell's hygiene and his "grabbing" and "rubbing" himself on the back of her chair and the corner of her desk. Ms. Sullivan also showed Mr. Glidden how Mr. Orswell "rubbed" himself.

28. Mr. Glidden denied that Ms. Sullivan told him about Mr. Orswell's alleged "humping" of her desk and chair during their meetings.

29. Ms. Sullivan made her first complaint to Mr. Glidden about Mr. Orswell's conduct within a few months after Mr. Orswell began his employment at Respondent Holiday Inn. After her first complaint, Ms. Sullivan did not recall what action Mr. Glidden told her he intended to take.

30. Within one week after his initial meeting with Ms. Sullivan, Mr. Glidden met with Mr. Orswell to discuss Ms. Sullivan's concerns. Mr. Glidden told Mr. Orswell that the "people in the Sales Office" had complained that he was grabbing or scratching himself in his groin area and that these actions were offensive to them. Mr. Glidden also told Mr. Orswell that he had to stop scratching and use tissues when he blew his nose.

31. During the meeting, Mr. Orswell told Mr. Glidden that he had a vasectomy in early May 1995 that required stitches in his genitals. According to Mr. Orswell, his stitches dissolved over a one-month period but that they probably caused him to unconsciously scratch his genital area. Mr. Glidden told Mr. Orswell that his conduct was inappropriate and directed him to stop immediately.

32. Mr. Orswell testified that he began to apply anti-itch cream to relieve his condition. Mr. Orswell also testified that he apologized to Complainant and Ms. Sullivan, told them about his vasectomy and that he would make every effort to stop scratching. Mr. Orswell also testified that he discussed this issue with Complainant and Ms. Sullivan within 24 hours of meeting with Mr. Glidden. Ms. Sullivan denied that Mr. Orswell apologized to her or told her that he had a vasectomy.

33. In late May or early June 1995, Ms. Sullivan returned to Mr. Glidden and reported the same conduct by Mr. Orswell. Ms. Sullivan also met with Mr. Glidden in July or August 1995. During these meetings, Ms. Sullivan told Mr. Glidden that Mr. Orswell had resumed his scratching. Mr. Glidden told her that he would speak with Mr. Orswell again.

34. Mr. Glidden spoke to Mr. Orswell a second time about his conduct when he saw Mr. Orswell "scratching" himself. Mr. Glidden testified that Ms. Sullivan told him, at some point, that Mr. Orswell's hygiene habits had improved.

35. Ms. Sullivan testified that Mr. Orswell's conduct did not change despite her three meetings with Mr. Glidden. During her fourth meeting in early November 1995, Ms. Sullivan tendered her resignation to Mr. Glidden, effective November 17, 1995. Ms. Sullivan resigned because of Mr. Orswell's poor hygiene, his offensive personal habits and Mr. Glidden's failure to take effective action to stop his conduct.

36. During her four meetings with Mr. Glidden, Ms. Sullivan did not tell him about Mr. Orswell's conduct toward Complainant; specifically, looking down her blouse, looking up her dress or his unwelcome remarks about Complainant's body. Ms. Sullivan did not complain to Mr. Glidden about these harassing acts because they were not directed at her and did not offend her.

37. Ms. Sullivan told Complainant about her complaints to Mr. Glidden and his failure, in her opinion, to take effective action. Complainant understood that Ms. Sullivan complained to Mr. Glidden about Mr. Orswell groping and grabbing himself and "humping his desk." Complainant did not recall the specific dates of Ms. Sullivan's disclosures but she believes they began about halfway through Mr. Orswell's employment at Respondent Holiday Inn. Complainant understood that Ms. Sullivan did not discuss Mr. Orswell's alleged sexual harassment of Complainant during her meetings with Mr. Glidden. Ms. Sullivan told Complainant that Mr. Glidden had accepted her resignation rather than terminating Mr. Orswell's employment or taking effective action to stop his inappropriate conduct.

38. Mr. Glidden recalled three meetings with Ms. Sullivan during which she raised concerns about Mr. Orswell's personal hygiene: (a) picking or rubbing his nose and using Ms. Sullivan's keyboard; (b) "scratching" himself inside his pants. Mr. Glidden did not recall Ms. Sullivan telling him that Mr. Orswell smelled.

39. Mr. Orswell told Complainant that he had "control" over her and could get her fired if he wanted to. Mr.

Orswell told Complainant that he could get Ms. Sullivan fired but it would not be as easy as Complainant because Ms. Sullivan was Mr. Glidden's favorite employee. Complainant did not recall the specific date of Mr. Orswell's statement but believed it occurred within six months of his employment at Respondent Holiday Inn.

40. Shortly after Mr. Orswell made these comments, Mr. Glidden came into the Sales Office. Complainant asked him whether Mr. Orswell had the authority to fire her. Complainant testified that Mr. Glidden stated, "Mr. Orswell could do whatever he wanted because he was her boss." Ms. Sullivan overheard this conversation between Complainant and Mr. Glidden.

41. Mr. Glidden testified that he told Complainant that each hotel department head had authority to hire, discipline or terminate an employee for just cause. He also told Complainant that Mr. Orswell could not fire her without just cause. He denied telling Complainant that Mr. Orswell could do "anything he wanted."

42. Ms. Sullivan overheard Mr. Orswell constantly tell Complainant that she had "to do what he said" or he could have her fired at any time. Mr. Orswell told Ms. Sullivan that he could also get rid of her but that it would be a little harder because Mr. Glidden liked her.

43. Mr. Orswell told Ms. Sullivan and Complainant that he would be like a Postal worker if he lost his job because of them, and would come back to "blow their heads off." Mr. Glidden denied that Ms. Sullivan reported this statement to him.

44. Mr. Orswell denied using the term "going Postal" while working at Respondent Holiday Inn. He also denied telling Complainant and Ms. Sullivan that he would "blow their heads off" if they did anything that resulted in his termination.

45. Mr. Glidden told Mr. Orswell, upon his hire, that he had the authority, with Mr. Glidden's approval, to discipline or terminate Complainant if she was not adequately performing her job.

46. During Mr. Orswell's employment at Respondent Holiday Inn, Complainant did not complain to Mr. Glidden or any other Respondent Holiday Inn manager or supervisor about Mr. Orswell's unwelcome conduct or behavior. Complainant did not tell Mr. Glidden about Mr. Orswell's offensive conduct for several reasons: (a) her belief that Mr. Glidden failed to take prompt action to address Ms. Kazantis' alleged abuse problems; (b) Mr. Glidden's failure to take any action when she complained to him that Mr. Orswell had "grabbed" her breast; (c) Ms. Sullivan's report to her regarding her repeated complaints to Mr. Glidden about Mr. Orswell's manipulations and personal hygiene and Mr. Glidden's failure to take effective corrective action; (d) Mr. Orswell's statement to her and Ms. Sullivan that he "could get them both fired," and that Complainant was "required to do what he wanted;" (e) her belief that Mr. Glidden did not respect her as an employee.

47. Complainant felt Mr. Glidden did not respect her as a woman and told her that she talked "ragtime." Com-

plainant testified that Mr. Glidden repeatedly talked to her in a sarcastic manner and called her "ditzy" and an "airhead."

48. Mr. Glidden denied that he referred to Complainant as an "airhead." Mr. Glidden sometimes used the term "ragtime" when he did not understand an individual's point or comment. He did not recall using the term "ragtime" in reference to Complainant.

#### November 9, 1995 Handshake

49. On November 9, 1995, Complainant received a telephone complaint from a tour group operator about its bill and the hotel's services. In Mr. Orswell's absence, Complainant attempted to handle and resolve this complaint by discussing it with Mr. Glidden and Mr. McMahan.

50. Mr. Orswell came to the Sales Office during the afternoon on November 9, 1995. He was preparing to leave on a business trip and was scheduled to be out of the office from November 10 through 20, 1995. Mr. Orswell briefly discussed the tour group's concern with Complainant and Mr. McMahan.

51. After Mr. McMahan left, Mr. Orswell walked over to Complainant who was standing next to his desk, and said to Complainant, "Let's shake on it." When Mr. Orswell extended his hand, Complainant said, "Weak handshake. I wonder how you would be at arm wrestling."

52. Complainant and Mr. Orswell began to arm wrestle with their hands in the air. Ms. Sullivan testified that she could not determine whether Complainant or Mr. Orswell was the first person to lift his or her hand.

53. During their arm wrestling, Mr. Orswell squeezed Complainant's hand very hard and twisted her arm around her back. Mr. Orswell then stepped forward, pushed Complainant face first into the filing cabinet and pinned her against the filing cabinet with the weight of his body. Complainant tried to push Mr. Orswell off. She asked him to stop and let her go. Despite Complainant's actions, Mr. Orswell used his body weight to hold Complainant against the filing cabinet for approximately one minute. Complainant and Ms. Sullivan testified that Mr. Orswell was smiling and laughing when he finally let Complainant go.

54. Complainant told Mr. Orswell, "Gary, you hurt me," and he responded by laughing. Complainant repeated her statement that he hurt her, and Mr. Orswell replied, "its because I am so strong."

55. When Mr. Orswell finally released her, Complainant was trembling, upset and distraught. Complainant's entire arm was "red" and "bruised." When Complainant directed Ms. Sullivan's attention to her arm, Ms. Sullivan saw that it was red and white where Mr. Orswell had held her. Ms. Sullivan looked and told Complainant, "So what." Ms. Sullivan replied in this manner because she only had one hour to work with Mr. Orswell and she did not care what was happening.

56. Ms. Sullivan did not feel that Complainant was in "danger" during the handshake incident and did not attempt to intervene. Ms. Sullivan did not report this incident to Mr. Glidden.

57. Mr. Orswell was 5 feet, 10 inches and weighed approximately 215-200 pounds in 1995.

58. After the handshaking incident, Mr. Orswell returned to the Sales Office and made a telephone call. After Mr. Orswell completed his telephone call, Complainant raised the tour group's complaint. Mr. Orswell was upset and began yelling at her that she "did not need to talk to anyone in the hotel except him" and that "he was her boss." Mr. Orswell started yelling at Complainant to repeat to him what he told her about not speaking to anyone in the hotel. Mr. Orswell also told Complainant that she should not have involved herself in the tour group operator's complaint since he had secured its contract.

59. Complainant replied to Mr. Orswell's instructions by stating, "Fine." Mr. Orswell told Complainant to repeat what he said, and not just to say, "Fine." Mr. Orswell kept telling Complainant, "Repeat what I said, that you won't talk to anybody. Repeat it. Repeat it."

60. Ms. Sullivan testified that Mr. Orswell was loud and yelled at Complainant. Ms. Sullivan told Complainant to tell Mr. Orswell what he wanted to hear so that he would stop yelling at her.

61. Complainant became upset, confused and was extremely distraught after this incident. She felt demeaned and belittled by Mr. Orswell's yelling.

62. Mr. Orswell told Complainant that she had exceeded her authority as a sales manager by going to Mr. McMahon who made a decision without having all the information. Mr. Orswell also told Complainant that, in the future, she was to let him handle these types of complaints.

63. Mr. Orswell admitted that he was loud during the discussion with Complainant but denied that he shouted at her.

64. The hand-shaking incident occurred approximately two hours before Mr. Orswell's verbal corrective regarding Complainant's handling of the tour operator's complaint.

65. Before Complainant left work on November 9, 1995, Complainant met with Mr. Glidden on three separate occasions to complain about Mr. Orswell's conduct while addressing the tour operator's complaint. The three meetings took place within a one-hour period between approximately 3:30-4:30 p.m.

66. During her first meeting, Complainant told Mr. Glidden that Mr. Orswell had spoken to her in a condescending manner about handling the tour group operator's complaint. Complainant also told Mr. Glidden that she was a "professional," she was not going to allow Mr. Orswell to treat her in this manner and that she was "extremely distraught." Complainant did not tell Mr.

Glidden during this meeting about Mr. Orswell's "physical manhandling" of her earlier that afternoon.

67. Complainant left Mr. Glidden's office and asked Ms. Sullivan to come with her into the women's bathroom. Complainant told Ms. Sullivan that she could not take it anymore and she was going to return to Mr. Glidden's office to resign. Ms. Sullivan told Complainant that that there was no purpose in her complaining to Mr. Glidden because she had already resigned.

68. Shortly after their first meeting, Complainant returned to Mr. Glidden's office. Complainant told Mr. Glidden that she was leaving Respondent Holiday Inn because she and Mr. Orswell had a personality conflict and she could no longer work with him. Complainant told Mr. Glidden that she wanted to be laid off.

69. During this meeting, Complainant told Mr. Glidden that Mr. Orswell had sexually harassed her but she did not give him any details. This was the first time Complainant raised a sexual harassment allegation with Mr. Glidden about Mr. Orswell other than the earlier incident in which he grabbed her breast. When Complainant returned to her work area, she became more upset and was unable to work. Mr. Glidden denied that Complainant made a sexual harassment complaint against Mr. Orswell during this meeting.

70. After their second meeting, Mr. Glidden called Mr. Orswell into his office and told him about Complainant's concerns about his treatment of her. Mr. Orswell denied that he talked to Complainant in a condescending manner

and told Mr. Glidden that he did not yell or speak to Complainant in a "negative way."

71. After a short period of time, Complainant returned to Mr. Glidden a third time and told him that she was still upset. Complainant also told him that she could not work while Mr. Orswell was present and she had to leave before the end of her workday. Mr. Glidden told Complainant that he had spoken to Mr. Orswell. He directed Complainant to tell Mr. Orswell that she was leaving.

72. Complainant immediately left Respondent Holiday Inn. When Complainant arrived at home, she was distraught and began to feel pain and stiffness in her neck, back and shoulder sockets. Later that evening, Complainant called Mr. Glidden at home and left a telephone message for him to call her.

73. Mr. Glidden received Complainant's message at approximately 10:00 p.m. and immediately called her. Complainant told him that Mr. Orswell had twisted her arm and pushed her against a filing cabinet before he had "verbally abused" her that afternoon. Mr. Glidden told Complainant that he did not understand why she did not tell him about the "handshaking" incident during their three meetings earlier that afternoon. Mr. Glidden also told Complainant that he planned to contact Mr. Orswell and Ms. Sullivan to verify what had happened.

74. Complainant became very upset when Mr. Glidden told her that he intended to contact Ms. Sullivan. Com-

plainant felt Mr. Glidden did not believe her despite the fact that she had worked with him for six years.

75. Mr. Glidden immediately called Ms. Sullivan who told him that Mr. Orswell twisted Complainant's arm behind her back and pushed her into a file cabinet. Mr. Glidden then called Mr. Orswell who was in Florida on a business trip but was unable to talk with him about the incident.

76. Mr. Glidden called Complainant back at about 10:30 p.m. and told her that he had spoken to Ms. Sullivan who confirmed Complainant's description of the arm-twisting incident. Mr. Glidden also told Complainant that he had not yet talked with Mr. Orswell about the incident.

77. During the week after the November 9, 1995 arm wrestling incident and before Mr. Glidden spoke with Mr. Orswell, he called Complainant a third time. During this telephone conversation, Complainant told Mr. Glidden that Mr. Orswell had made comments of a sexual nature to her. Mr. Glidden asked Complainant for more specificity but she did not elaborate on her allegations. Complainant told Mr. Glidden that she intended to consult an attorney and she did not want to discuss it with him.

78. Ms. Sullivan left her position at Respondent Holiday Inn on September 17, 1995. Prior to her leaving, Mr. Glidden asked Ms. Sullivan to stay because "her problem would be solved."

79. Mr. Glidden tried to reach Mr. Orswell several times. A couple of days later, Mr. Orswell told Mr. Orswell that Complainant had reported that she was hurt

during their arm-wrestling incident. Mr. Orswell acknowledged that they had a "vigorous" handshake during which he grabbed Complainant's arm but he did not recall twisting Complainant's arm behind her back or hurting her.

80. When Mr. Orswell returned from the trade show convention on November 20, 1995, he met with Mr. Glidden and again denied that he pushed Complainant against a file cabinet or twisted her arm. During the meeting, Mr. Glidden did not ask Mr. Orswell about Complainant's allegation that he had directed sexual comments to her.

81. Based on the statements by Complainant and Ms. Sullivan, Mr. Glidden believed that Mr. Orswell lied about the November 9, 1995 incident. He terminated Mr. Orswell's employment on November 20, 1995.

82. Ms. Sullivan returned to Respondent Holiday Inn shortly after Mr. Orswell was terminated and held her AA position until 1997.

83. By letter, dated November 22, 1995, Mr. Glidden informed Complainant that Respondent Holiday Inn had terminated Mr. Orswell's employment on November 20, 1995. Mr. Glidden also wrote that he looked forward to Complainant's return to work at Respondent Holiday Inn. (Respondent's Exhibit 4). Complainant did not respond to Mr. Glidden's letter.

84. Complainant did not return to work at Respondent Holiday Inn because of her November 9, 1995 back injury

and her belief that Mr. Glidden did not take her "seriously.

85. During the time period relevant to this complaint, Respondent Holiday Inn maintained an anti-harassment policy. It provided that Respondent Holiday Inn employees should contact Mr. Glidden to complain about alleged harassment by a co-worker or supervisor if they wished to speak to management personnel other than their direct manager or supervisor. It also provided that Respondent Holiday Inn would immediately investigate all harassment allegations. (Respondent's Exhibit 8A).

86. Respondent Holiday Inn included its sexual harassment policy in its employee handbook. (Respondent's Exhibit 8A). Complainant received Respondent Holiday Inn's sexual harassment policy in January 1992. (Respondent's Exhibits 5 and 8).

87. Mr. Orswell testified that he did not receive a sexual harassment policy while employed at Respondent Holiday Inn and he did not attend sexual harassment training sponsored by Respondent Holiday Inn.

#### Complainant's Back Injury Before and After November 9, 1995

88. At the age of 12, Complainant was diagnosed with thoracolumbar scoliosis—a curvature of her spine—accompanied by back pain. (Complainant's Exhibit 7). Complainant's treatment plan involved an exercise regimen. In 1982, Complainant injured her back in an automobile accident and was treated with by a chiropractor for her left upper back. In a written

statement, dated November 29, 1995, Complainant reported that her scoliosis was asymptomatic. (Respondent's Exhibit 2).

89. Prior to November 9, 1995, Complainant had no restrictions on her activities because of her scoliosis and did not take medication for her back injury. Complainant has sporadically exercised her entire life and participated in step aerobics at least four times a week.

90. About one year before November 9, 1995, Complainant sought treatment for back pain she experienced during her menstrual cycle. Complainant was unsure whether she received treatment from an orthopedist and did not recall his or her name.

91. On November 10, 1995, Complainant went to the emergency room of Quincy City Hospital and complained about a burning sensation going down her leg, neck lower back and arms. The hospital took x-rays and diagnosed Complainant with neck, back and shoulder strain. Complainant was released after receiving a neck collar and pain medication.

92. Quincy Hospital advised Complainant that she could return to work on November 12, 1995, with modified duty restrictions for five days. Complainant felt that she was incapable of returning to work on November 12, 1995 even with light duty restrictions. (Complainant's Exhibit 5).

93. Complainant did not recall telling Quincy Hospital on November 10, 1995 that she did not have previous neck or back injuries. (Complainant's Exhibit 5).

94. On November 14, 1995, Complainant returned to the Quincy Hospital emergency room because she experienced more pain. Quincy Hospital advised Complainant that she could immediately return to work with modified restrictions, including no repetitive stooping, twisting, or bending and changing positions every 15-20 minutes. It also referred Complainant for an evaluation and treatment at the New England Spine Center in Chestnut Hill, Massachusetts.

95. After conducting an evaluation on December 7, 1995, Dr. Carol Hartigan diagnosed Complainant with chronic neck pain and low back pain. Dr. Hartigan recommended that Complainant undergo comprehensive spine rehabilitation to avoid further deconditioning. Complainant attended a short course of occupational therapy but discontinued treatment at the New England Spine Center because it was too long a drive from her home. (Complainant's Exhibit 7).

96. Complainant began physical therapy in January 1996 and stopped in April 1996. (Respondent's Exhibit 3).

97. On February 2, 1996, a MRI of Complainant's lumbar spine confirmed two disc bulges. A MRI of her cervical spine revealed a disc herniation impinging on the spinal cord and a disc protusion without evidence of impingement. A second MRI was performed on April 4, 1996. (Respondent's Exhibit 3).

98. Complainant thereafter sought treatment from Michael DiTullio, an orthopedist, who was located in Quincy,

Massachusetts. In his notation, dated March 1, 1996, Dr. DiTullio reported that Complainant never had prior back pain. (Complainant's Exhibit 6). Complainant denied telling Dr. DiTullio on March 1, 1996 that she never had prior back pain. (Complainant's Exhibit 6).

99. Dr. DiTullio recommended a treatment plan of physical therapy that included application of heat and home exercises to strengthen her stomach and back. Complainant testified that the physical therapy was not successful.

100. Dr. DiTullio also recommended aquatic therapy or that Complainant work out at a gym. Complainant did not participate in aquatic therapy because she did not "care for the water" and did not believe it would benefit her. Complainant also discussed back surgery with Dr. DiTullio, but she declined.

101. On May 10, 1996, Complainant was evaluated at Boston Medical Evaluations. Dr. Robert Levine reported that Complainant denied any previous problems or low back or neck pain. Dr. Levine concluded that Complainant did not experience a loss of function because of the November 9, 1995 arm wrestling incident. Dr. Levine also concluded that Complainant was able to return to her regular work as a Sales Manager with no restrictions. (Respondent's Exhibit 3).

102. Complainant has taken Zoloft, an anti-depressant, for the past five years for her depression and symptoms related to her severe pre-menstrual syndrome. She had psychological therapy for two months prior to November 9,

1995. The reasons for Complainant's prescription of Zoloft and her associated therapy are unrelated to the instant discrimination complaint or the events that give rise to this complaint. Complainant did not discuss any sexual harassment allegations or other allegations described in this complaint during the medical appointments, visits, treatments, or discussion with medical providers that resulted in her prescription of Zoloft. (Joint Stipulation 1 and Complainant's Exhibit 7).

103. Complainant testified that Mr. Orswell's harassment made her very upset and feel like she did not want to go to work. She also testified that his conduct also made her depressed, physically sick and emotionally drained. Complainant testified that she becomes very emotional when she remembers Mr. Orswell's conduct and its effect upon her.

104. Prior to November 9, 1995, Complainant sought counseling for a number of personal issues including her father's death and her pending divorce. Complainant did not seek counseling at anytime after November 29, 1995.

105. Complainant has had diminished exercise activity and has gained 40 pounds since her November 9, 1995 injury. Complainant testified that she continues to have back problems especially if she sits for a long period. Complainant also had sleep disturbances related to her November 9, 1995 injury. Complainant testified that her weight gain occurred after November 9, 1995 and was not related to her father's death on March 17, 1995.

106. Ms. Sullivan testified that Complainant was very stressed and told her that she did not want to come to work during the period she was supervised by Mr. Orswell.

107. On or about November 10, 1995, Complainant filed a workers compensation claim with the Department of Industrial Accidents (DIA) for the injuries she sustained because of Mr. Orswell's assault. Respondent Holiday Inn prepared and transmitted its first report of injury on November 15, 1995. (Respondent's Exhibit 11).

108. Complainant received workers compensation benefits from November 10, 1995 until September 11, 1996. (Complainant's Exhibit 2). Complainant's workers compensation benefit was \$181.92 per week. (Respondent's Exhibit 7). On May 13, 1997, Complainant received a lump sum payment of \$8,500.00 in redemption of the liability for all remaining weekly payments. (Complainant's Exhibit 3).

109. When Complainant's workers compensation benefits ended in November 1996, she applied for and received unemployment insurance benefits from the Division of Employment and Training (DET).<sup>2</sup>

110. Complainant did not contact Respondent Holiday Inn or attempt to return to work at Respondent Holiday Inn when her workers compensation benefits ended on September 11, 1996.

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<sup>2</sup> Complainant testified that she was required to repay these unemployment insurance benefits.

### III. CONCLUSIONS OF LAW

#### A. Hostile Work Environment

General Laws, Chapter 151B, §4, paragraph 1, prohibits workplace discrimination, including sexual harassment<sup>3</sup> and gender based harassment. Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 677 (1993). General Laws, Chapter 151B, §4, paragraph 16A, also prohibits sexual harassment in employment. Doucimo v. S & S Corporation, 22 MDLR 82 (2000).<sup>4</sup>

To establish liability for a hostile work environment based on her sex (female), Complainant must show by a preponderance of evidence that: (1) she was subjected to gender based unwelcome verbal or physical conduct; (2) the unwelcome verbal or physical conduct was sufficiently severe or pervasive to alter her terms or conditions of employment at Respondent Holiday Inn and create an abusive working environment; (3) the harassment was carried out by a Respondent Holiday employee with a supervisory relationship to Complainant or Respondent Holiday Inn knew or should have known of the harassment and failed to take prompt remedial action. Kelley v. Plymouth County Sheriff's Department, et. al., 22 MDLR 208 (2000); Beldo v. University of Massachusetts, 20 MDLR 111 (1998). Under this standard,

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<sup>3</sup> 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, or sexually offensive work environment." Collegetown Division of Interco v. Massachusetts Commission Against Discrimination, 400 Mass. 156, 165 (1987).

<sup>4</sup> This case may be analyzed as a claim of hostile work environment based on Complainant's gender or a hostile work environment sexual harassment claim.

Complainant must show that her work environment was pervaded by gender-based harassment or abuse that posed a barrier to her full participation in the Respondent Holiday Inn workplace. College-Town, Division of Interco v. Massachusetts Commission of Discrimination, 400 Mass. 156, 162 (1987). If Complainant establishes by credible evidence that Mr. Orswell harassed her because of her gender-female, she can prove prohibited sex discrimination under G.L. c. 151B whether or not the unwelcome conduct directed at her was "of a sexual nature." See e.g., Brown v. Phoenix and Foxwood, 22 MDLR 160 (2000)(repeated derogatory comments regarding the complainant's gender constituted unwelcome or harassing conduct); Rowe v. American Paper Products, Inc., 22 MDLR 279 (2000)(sexually explicit conversations about pornography and "nudie bars" coupled with a supervisor slapping the complainant on the buttocks were sufficient to warrant a finding that the complainant's work place was permeated with gender harassment).

Workplace harassment is actionable if it is "so 'severe or pervasive' as to alter the conditions of [the victim's] employment and create an abusive working environment." Faragher v. Boca Raton, 524 U.S. 775, 786 (1998), quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986). The unwelcome conduct must be both objectively and subjectively offensive from the perspective of a reasonable person in the complainant's position. Muzzy v. Cahillane Motors, Inc., 434 Mass. 409 (2001); College-Town Division of Interco v. Massachusetts Commission Against Discrimination, 400 Mass. at 162; Ramsdell v. Western Bus Lines, Inc., 415 Mass. at 678. Complainant is not required, however, to show that the offensive conduct was sexually motivated. Melynchenko v. 84 Lumber Co., 424 Mass. 285, 286 (1997) (finding individual

liable under Chapter 151B for vulgar joking despite fact that his conduct was not sexually motivated). There is also no quantitative or numerosity requirement on the number of incidents necessary to constitute a harassment claim in the workplace. Gnerre v. Massachusetts Commission Against Discrimination, 402 Mass. 502, 507-508.

The determination of whether a particular work environment is hostile requires a factual inquiry into all the circumstances, including the frequency of discriminatory conduct, its severity and whether it was physically threatening or humiliating or merely an offensive utterance. See Faragher v. Boca Raton, 524 U.S. at 787-788. The Commission has consistently held that sex-based or sexually demeaning comments must be continuous and pervasive to constitute a hostile work environment. Kelley v. Plymouth County Sheriff's Department, et. al., supra. (a one-time use of use of sexually charged language in the complainant's presence did not establish a violation under G.L. c. 151B). Isolated or occasional comments or incidents, unless extremely serious, are not sufficient to alter the terms and conditions of employment. Candelieri and Massachusetts Commission Against Discrimination v. Vanson Leathers, Inc., 24 MDLR 228 (2002); Pio v. Kinney Shoe Corp., 19 MDLR 127, 131 (1997). See also Clark County School District v. Breeden, 532 U.S. 268, 271 (2001) ("simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment"); Prader v. Leading Edge Products, Inc., 39 Mass. App. Ct. 616, 619-20 (1996) (use of garden variety expletive cannot, standing alone, constitute harassment). A single episode of harassment may constitute actionable sex discrimination if its effect on an employee

is profound. Gnerre v. Massachusetts Commission Against Discrimination, supra. at 506-507 (1988); Morehouse v. Berkshire Gas Co., 989 F. Supp. 54, 62 (D.Mass. 1997).

I conclude that Complainant has established a claim of unlawful hostile work environment harassment based on Mr. Orswell's conduct and actions during 1994-1995. As discussed below, I find that Mr. Orswell targeted Complainant for unwelcome verbal and physical conduct based on her gender and that his conduct was sufficiently severe and pervasive to alter the conditions of Complainant's work environment at Respondent Holiday Inn.

First, Mr. Orswell subjected Complainant to an unwelcome physical touching when he grabbed or fondled her breast in or about Christmas 1994. While Mr. Orswell contends that his contact with Complainant's breast was brief and inadvertent, the evidence in the hearing record supports a finding that his touching was unwelcome and offensive as alleged by Complainant. There is no evidence that Complainant solicited or initiated Mr. Orswell's unwelcome actions--merely exchanging a hug is insufficient to establish that Complainant solicited Mr. Orswell's "grabbing." To the contrary, Complainant's actions along with her immediate complaint clearly establish that she regarded Mr. Orswell's conduct as undesirable and offensive. After Mr. Orswell's actions, Complainant backed away and told Mr. Orswell that he had "grabbed" her breast. Immediately after the incident, Ms. Sullivan told Mr. Glidden that Mr. Orswell had just "grabbed" Complainant's breast. Complainant also told Ms. Sullivan that she could not believe that Mr. Orswell had "grabbed" her breast.

Since Mr. Orswell was Complainant's direct supervisor, I find that his unwelcome, intentional touching of Complainant's breast is so offensive and outrageous that it is sufficient, standing alone, to create a hostile work environment for Complainant. Walker v. Ford Motor Co., 684 F.2d 1355, 1358 (11<sup>th</sup> Cir. 1982)(an isolated or single occurrence can constitute unlawful harassment if it is sufficiently severe). More so than in a case of offensive verbal advances or remarks, a single unwelcome physical advance by a supervisor can unreasonably alter the terms and conditions of a subordinate's work environment. See Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171 (1997)(the act of unwelcome physical touching of Complainant's breast is so offensive and outrageous that, standing alone, it would be sufficient to create a hostile work environment); Guth v. Fradellos d/b/a Belmont Center Restaurant, 18 MDLR 229 (1996)(a supervisor's touching of an employee's breast was particularly egregious).<sup>5</sup> Contrast Peltier v. City of Worcester and Missud, 22 MDLR 246 (2000)(a single instance of a co-worker grabbing the complainant's breast was an unwelcome, offensive touching was not severe or pervasive enough to create a hostile work environment).

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<sup>5</sup>The U.S. Equal Employment Opportunity Commission's (EEOC) standard under Title VII of the Civil Rights Act of 1964, as amended, is also consistent with the Commission's interpretation that that a supervisor's touching of an employee's intimate body part is sufficient to create a hostile work environment). See EEOC's Policy Guidance on Current Issues of Sexual Harassment, U.S. No. N-915-050, 95, 105 (March 9, 1990)("The Commission will presume that the unwelcome, intentional touching of [a complainant's] intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII . . . If an employee's supervisor sexually touches that employee, the Commission normally would find a violation. In such situations, it is the employer's burden to demonstrate that the unwelcome conduct was not sufficiently severe to create a hostile work environment."). See also EEOC's decisions: Williams v. Henderson, Postmaster General, U.S. Postal Service, No. 01A10988 (February 28, 2001) (grabbing and squeezing a breast is sufficiently severe to constitute harassment); Lans v. Apfel, Commissioner, Social Security Administration, No. 01980670 (August 28, 2000)(a supervisor's hitting of a subordinate's buttocks on one occasion constituted a hostile work environment).

Second, I find that Mr. Orswell physically assaulted Complainant during the handshaking incident on November 9, 1995. I do not find credible Mr. Orswell's testimony that he did not push Complainant against a file cabinet, twist her arm or hurt her during the handshaking incident. I also find that Mr. Orswell's testimony regarding this incident is unreasonable given the nature and extent of the injuries sustained by Complainant as shown by her testimony and medical documentation. While there is no evidence in the record to establish that Mr. Orswell's assault on November 9, 1995 was sexual in nature, I conclude that his actions show a clear intent to intimidate and dominate Complainant with physical force, which he succeeded in doing. Hanscom v. Boston Housing Authority, 23 MDLR 68 (2001).

I also conclude that Mr. Orswell's assault was clearly related to Complainant's gender and would not have occurred but for her gender. I am persuaded that Mr. Orswell would not have shoved and pinned a male employee in the manner that he handled Complainant on November 9, 1995. See e.g., Hanscom v. Boston Housing Authority, supra. (the complainant suffered physical injury to her back when she was shoved, lifted up and flung down by another employee). Like Mr. Orswell's grabbing of Complainant's breast, I find that his actions during the handshaking incident on November 9, 1995 were so offensive and outrageous that they were sufficient, standing alone, to create a hostile work environment for Complainant.

In addition to the "breast grabbing" and physical assault incidents discussed above, I conclude that Mr. Orswell subjected Complainant to a continuous or pervasive

pattern of offensive verbal and physical conduct in 1994-1995. As described below, these acts interfered with Complainant's ability to perform her job duties and constituted a hostile work environment when viewed in their totality.

I credit Complainant's testimony that, during 1994-1995, Mr. Orswell made weekly offensive comments about her body and physical appearance including one reference to her breasts as "ta, tas" and another reference to Complainant's use of her tongue as a prostitute.<sup>6</sup> I conclude that Mr. Orswell stared weekly at Complainant's breasts and repeatedly attempted to look up her dress, down her blouse and sit very close to her during supervisory meetings. I also conclude that Mr. Orswell "humped" or "rubbed against" the back of Ms. Sullivan's chair or the corner of her desk. See Svreck v. American Health Care, et. al., 22 MDLR 50 (2000) (frequent, substantiated sexual comments concerning the complainant's dress and breasts, inappropriate staring, rubbing and touching constituted sexual harassment). While Complainant did not recall whether Mr. Orswell's offensive conduct began in 1994 or 1995, I conclude that her testimony, as corroborated by Ms. Sullivan and Mr. Glidden, supports a finding that she was subjected to ongoing harassment based on her gender beginning in or about October or November 1994 and ending in November 1995.

I credit Ms. Sullivan and Complainant's testimony that Mr. Orswell constantly fondled or manipulated his "private parts" through his pants beginning in September or October

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<sup>6</sup> Since Complainant and Ms. Sullivan did not recall whether Mr. Orswell's reference to "ta, tas" and Complainant's use of her tongue as a prostitute occurred in 1994 and 1995, I will consider these incidents as background evidence of a hostile work environment. See generally Cuddy v. The Stop & Shop Supermarket Co., 434 Mass. 521, 531 (2001).

1994 and continuing through November 1995. I also credit their testimony that Mr. Orswell's response to their complaints about his behavior was to smirk, stop his behavior for a short period or time and resume his manipulations and fondling. Although Mr. Glidden testified that he counseled Mr. Orswell about his fondling or manipulations in or about May 1995, I find that his counseling was ineffective and failed to stop Mr. Orswell's offensive conduct. I also find that Mr. Glidden did not take any steps to monitor Mr. Orswell's actions and determine if his counseling was effective.<sup>7</sup>

In summary, I find that Mr. Orswell's verbal and physical conduct in 1994-1995 was unwelcome and sufficiently severe or pervasive that it altered Complainant's work environment at Respondent Holiday Inn and interfered with her job performance.<sup>8</sup> I also conclude that a reasonable woman in Complainant's position would find that the work environment at Respondent Holiday Inn was offensive and a hindrance to full participation in the workplace. Gill v. Task Construction, 24 MDLR 277 (2002); Couture v. Central Oil Company, 12 MDLR 1401, 1422 (1990). Since there is no dispute that Mr. Orswell was Complainant's supervisor during the time period relevant to this complaint, Respondent Holiday Inn is strictly liable for his acts of unlawful harassment committed against Complainant. Collegetown, supra. at 165, n.5 ("the Legislature intended that an

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<sup>7</sup>I do not credit Ms. Sullivan's testimony regarding Mr. Orswell's alleged use of his office computer on one occasion to show "cyber sex" to her. Ms. Sullivan did not recall when this alleged incident occurred nor did she testify that she told Complainant about it.

<sup>8</sup> While Mr. Orswell's personal habits may have been crude, inappropriate and boorish, I conclude that such conduct did not have a gender-based or sexual component and did not create a hostile work environment within the meaning of G.L. c. 151B. Perotta v. Rivkind, Baker & Braverman, et. al., 24 MDLR 30 (2002).

employer . . . be liable for discrimination committed by those on whom it confers authority without additional notice requirement"); Rowe v. American Paper Products, *supra*.

B. Timeliness of Complaint

On April 1, 1996, Complainant filed the instant complaint with the Commission alleging that Respondent Holiday Inn subjected her to a hostile work environment that culminated in her constructive discharge on or about November 9, 1995. Respondent Holiday Inn contends that her complaint is untimely because Complainant has not shown that a discriminatory act occurred on or after October 1, 1995, i.e., within the six-month limitations period.

During the period relevant to this complaint, Massachusetts General Laws, Chapter 151B, §5, required a complainant to file a charge of discrimination with the Commission within six months after the alleged discriminatory act(s).<sup>9</sup> School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7 (1996); Hollis Rounds v. Commonwealth of Massachusetts, Department of Correction, 19 MDLR 90 (1997)(sexual harassment allegations were time barred under G.L. c. 151B, §5). The Commission's Rules of Procedure authorized the filing of a discrimination complaint within six months after the alleged unlawful conduct. See 804 C.M.R. §1.10(2); Libby v. Commonwealth of Massachusetts, Department of Food and Agriculture, 22 MDLR 58 (2000)(complaint alleging sex

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<sup>9</sup> On August 7, 2002, Acting Governor Jane Swift signed Chapter 233 of the Acts of 2002 that amended G.L. c. 151B, §5, to increase the limitation period for filing a discrimination complaint at the Commission from six months to 300 days. The amendment applies to discrimination claims arising after its effective date on November 5, 2002. For all claims arising before November 5, 2002, the six-month limitation period still applies. See the Commission's *Sexual Harassment in the Workplace Guidelines*, dated October 2, 2002, pages 20-23.

discrimination was untimely because it was filed approximately one year after the alleged discriminatory layoff). The purpose of the six-month filing requirement is twofold: (1) provide the Commission with an opportunity to investigate and conciliate a discrimination claim; (2) give notice to an employer of potential liability. Cuddyer v. The Stop & Shop Supermarket Co., 434 Mass. 521, 531 (2001).

The six-month filing period is not jurisdictional. It is akin to a statute of limitations that is subject to waiver, estoppel, and equitable tolling. Sanderson v. Town of Wellfleet Fire Department, 16 MDLR 1341 (1994). The Commission can toll or extend the six-month limitation period when there are equitable considerations. Rock v. Westinghouse, 1 MDLR 1262 (1979). Commission regulations set forth two exceptions to the six-month statutory filing requirement. See 804 C.M.R. §1.10(2).

One exception arises where a complainant alleges facts "which indicate that the unlawful conduct complained of is of a continuing nature."<sup>10</sup> Rock v. Massachusetts Commission Against Discrimination, 384 Mass. 198, 205-08 (1981) (upholding "continuing violation" regulation as permitting the Commission to remedy ongoing discriminatory practices). When there is a continuing violation, a complaint is timely filed even though the alleged discriminatory act(s) commenced more than six months prior to the filing of a complaint. See Lynn Teacher's Union, Local 1037, AFL-CIO v. Massachusetts Commission Against Discrimination, 406 Mass.

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<sup>10</sup> The second exception is not applicable to the instant case. It applies when, "pursuant to an employment contract, an aggrieved person enters into grievance proceedings concerning the alleged discriminatory act(s) within six months of the conduct complained of and subsequently files a complaint within six months of the outcome of such proceeding(s)." 804 C.M.R. §1.10(2).

515, 522 (1990) (continuing violation doctrine applied to longstanding seniority system that gave continuing effect to an earlier discriminatory maternity policy). The continuing violation exception recognizes that some discrimination claims involve a series of related acts that must be viewed in their totality to adequately assess their discriminatory nature and impact. Cuddyer v. The Stop & Shop Supermarket Co., supra. at 531.

The purpose of the continuing violation doctrine is to enable the Commission to remedy ongoing discriminatory policies or practices. See e.g., Klaus v. Amherst Fire Department and Town of Amherst, 22 MDLR 164 (2000). The Commission has recognized two different types of continuing violations: systemic<sup>11</sup> and serial claims.<sup>12</sup> I am analyzing this claim as a serial continuing violation because Complainant alleged that Mr. Orswell harassed her through a series of incidents or acts that occurred before and after October 1, 1995 (the date six months prior to filing her complaint with the Commission). See Sabree v. United

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<sup>11</sup> In a systemic continuing violation, the complaint generally alleges that the employer has maintained a discriminatory employment policy or practice that adversely affects a protected class of employees. See Mack v. Great Atlantic & Pacific Tea Co., 871 F.2d 179, 183 (1<sup>st</sup> Cir. 1989). A discrimination charge involving a systemic violation is timely if it is filed while the employer's alleged discriminatory policy or practice remains in effect, or within six months after the employer's discriminatory policy and practice has ended. Lynn Teacher's Union, Local 1037 v. Massachusetts Commission Against Discrimination, supra.; Davis v. Town of Wilbraham Public Schools, et. al., 22 MDLR 1 (2000); Beldo v. University of Massachusetts, 20 MDLR 105, 111 (1998).

<sup>12</sup> A serial continuing violation occurs when the employer subjects an employee to a series or pattern of discrete, related discriminatory acts. See Mack v. The Great Atlantic & Pacific Tea Co., Inc., supra. These violations are "composed of a number of discriminatory acts emanating from the same discriminatory animus [with] each act constituting a separate wrong actionable" under Chapter 151B. Provencher v. CVS Pharmacy Division of Melville Corporation, et. al., 145 F.3d 5, 14 (1<sup>st</sup> Cir. 1998). The serial continuing violation also requires a complainant to show that at least one discriminatory act has occurred within the six-month limitations period. The timely discriminatory act serves as the violation that anchors the earlier untimely discriminatory acts, e.g., those discriminatory acts that took place prior to the six-month limitations period. See DeNovellis v. Shalala, 124 F.3d 298, 307 (1<sup>st</sup> Cir. 1997).

Brotherhood of Carpenters and Joiners, Local 1037 v. Massachusetts Commission Against Discrimination, 406 Mass. 515 (1990); Rock v. Massachusetts Commission Against Discrimination, *supra.*; Pilgrim v. Trustees of Tufts College, 118 F.3d 864, 869 (1<sup>st</sup> Cir. 1997).

After Complainant filed the instant discrimination complaint, the Supreme Judicial Court clarified the legal standard for determining when a complainant has established a timely hostile work environment claim under G.L. c. 151B. Cuddyer v. The Stop & Shop Supermarket Co., *supra.* Under the Cuddyer timeliness standard,<sup>13</sup> Complainant must show that Mr. Orswell's alleged harassing acts were part of an ongoing pattern of discrimination. She must also establish that there was a discrete violation within the six-month limitation period to "anchor" the earlier untimely discriminatory acts, e.g., those discriminatory acts that took place prior to the six-month limitation period. Raffurty v. Keyland Corporation & Kheary, 24 MDLR 64 (2002). Accordingly, Complainant must show, "within the six month limitation period, . . . at least one incident of [sexual] conduct which standing alone might not necessarily support her claim, but which substantially relates to earlier incidents of abuse, and substantially contributes to the continuation of a hostile work environment, such that the

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<sup>13</sup> The Commission has applied the Cuddyer standard to complaints that do not raise hostile work environment sexual harassment claims: Gonzales v. Salem State College, 24 MDLR 219 (2002)(discrimination based on national origin and ethnicity); Massachusetts Commission Against Discrimination & Maher v. Boston Housing Authority, 24 MDLR 3 (2002) (discrimination in housing based on sexual orientation); Andrews v. National Hair Care Center, Inc., 24 MDLR 115 (2002) (non-selection based on race, color, gender and age discrimination); Edouard & Massachusetts Commission Against Discrimination v. Kozubal, 24 MDLR 80 (2002)(a sexual harassment claim brought by a tenant against an owner/ lessor/agent under G.L. c. 151B, §4, para. 18). See also Morrison v. Northern Essex Community College, 56 Mass. App. Ct. 784 (2002)(Cuddyer timeliness standards apply to a hostile educational environment claim brought under G.L. c. 151C).

incident anchors all related incidents, thereby making the entirety of the claim for discriminatory conduct timely." Cuddyer v. The Stop & Shop Supermarket Co., supra. at 533;

Lynn Teacher's Union, Local 1037, AFL-CIO v. Massachusetts Commission Against Discrimination, supra. at 520-521. For the reasons set out below, I find that Complainant timely filed the instant complaint with the Commission.

Complainant filed the instant complaint on April 1, 1996 or within six months of her last day of work at Respondent Holiday Inn—the day of the handshaking incident during which Complainant sustained her neck and back injuries. As discussed above, Complainant provided sufficient evidence at the public hearing to establish that Mr. Orswell subjected her to ongoing unwelcome verbal and physical conduct of a sexual nature and offensive conduct that was based on her gender. Complainant alleged and proved by credible evidence that Mr. Orswell engaged in a series of discriminatory acts that constituted a hostile work environment during 1994-1995. Mr. Orswell's harassment included the following: weekly comments about Complainant's body and physical appearance including a reference to her breasts as "ta, tas" and using her tongue as a prostitute; constant fondling and manipulation of his "private parts;" staring at Complainant's breasts; looking up her dress and down her blouse; sitting too closely during supervisory meetings; grabbing her breast in December 1994; physically assaulting her on November 9, 1995. I therefore conclude that Complainant has established that Mr. Orswell's unlawful conduct constituted a hostile work environment during 1994-1995.

Complainant and Ms. Sullivan credibly testified that Mr. Orswell's offensive and harassing conduct began in or about October or November 1994 and continued until

November 9, 1995, Complainant's last day of work at Respondent Holiday Inn. Accordingly, I conclude that Complainant has shown by sufficient, credible evidence that some of Mr. Orswell's alleged acts of discrimination occurred within the six-month limitations period. Given the nature of Mr. Orswell's harassment and the time period over which they occurred, I find that Mr. Orswell's timely and untimely acts arise from a discriminatory animus based on Complainant's sex or gender. I therefore conclude that Mr. Orswell's timely discriminatory acts substantially relate to his earlier untimely acts and substantially contribute to the continuation of a hostile work environment for Complainant at Respondent Holiday Inn. Cuddyer v. The Stop & Shop Supermarket Co., supra. at 533.

Once Complainant establishes the existence of a continuing violation with a timely incident(s) of harassment, she may seek damages for harassment that occurred outside the limitations period. Cuddyer v. The Stop & Shop Supermarket Co., supra. at 541. Complainant is barred from pursuing a claim on the untimely harassment if the evidence in the record shows that she "knew or reasonably should have known, more than six months prior to her MCAD filing, that her work situation was pervasively hostile and unlikely to improve and, therefore, a reasonable person in her position, armed with her knowledge would have filed a seasonable complaint with the MCAD." This test focuses on whether Complainant knew or should have known about the "hopelessness" of her work environment at Respondent Holiday Inn, and not merely whether she did not and could not have reasonably recognized the incidents as unlawful harassment before the six-month limitations period commenced. See e.g., Handrahan et. al. v. Kaiser System, Inc., supra. If Complainant fails

to satisfy the "hopelessness" standard, she may use the time-barred incidents as background evidence of a hostile work environment but can only recover for events that occur within the limitations period. Cuddyer v. The Stop & Shop Supermarket Co., supra. at 541.

The determination of when Complainant believed her work situation was hopeless is a factual question. Sleeper v. New England Mutual Life Insurance Co., 24 MDLR 55 (2002). I conclude that Complainant knew after the incident in December 1994 during which Mr. Orswell grabbed or fondled her breast that her work environment was pervasively hostile<sup>14</sup> and was unlikely to improve. Complainant testified that she did not complain to Mr. Glidden about Mr. Orswell's repeated unwelcome conduct or behavior after this incident because she believed Mr. Glidden would not take appropriate remedial action to address her concerns. Complainant based her belief on Mr. Glidden's failure to effectively respond to her complaint about Mr. Orswell's "grabbing" of her breast and her perception that he did not take any action to resolve her concerns about Ms. Kazantis' conduct in 1993. Complainant also testified that she believed, by December 1994, that Mr. Glidden had not taken appropriate action to address at least one of Ms. Sullivan's complaints about Mr.

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<sup>14</sup> As discussed above, I find that Mr. Orswell grabbed or fondled Complainant's breast in December 1994 and that such unwelcome conduct created a hostile work environment for her. Once Mr. Glidden learned about Mr. Orswell's actions, he had an obligation to immediately conduct a "fair, thorough investigation" of Complainant's allegations and take prompt, effective remedial action, if appropriate. College-Town, Division of Interco v. Massachusetts Commission Against Discrimination, 400 Mass. 156, 167-168 (1987). At a minimum, Mr. Glidden was required to: (1) interviewed all witnesses who may have witnesses the offensive or discriminatory conduct, such as Ms. Sullivan; (2) take appropriate remedial action reasonably calculated to end the harassment or discrimination and impose discipline, if appropriate; (3) maintain a well-publicized and enforced anti-discrimination policy; (4) produce evidence that respondent Holiday Inn has provided adequate training to its managers and supervisors on how to identify and/or respond to harassment or discrimination complaints. Barbot v. Hapco Farms, 19 MDLR 133, 136-137 (1997). The evidence in the hearing record clearly establishes that Mr. Glidden and Respondent Holiday Inn failed to satisfy these fundamental requirements.

Orswell's alleged fondling or manipulation in the Sales Office that began sometime in the fall of 1994. Given the nature of Mr. Orswell's ongoing harassment before and after December 1994 and Mr. Glidden's failure to effectively respond to the December 1994 "breast grabbing" incident, I believe that a reasonable person in Complainant's situation would have concluded that it was unlikely, as of December 1994, that Mr. Glidden would have successfully resolved Mr. Orswell's ongoing harassment. I therefore conclude that a reasonable person in Complainant's situation would have timely filed a discrimination complaint with the Commission after Mr. Orswell's breast "grabbing" incident in December 1994.

Based on the totality of the evidence in the hearing record, I find that Complainant's allegations related to Mr. Orswell's discriminatory acts that occurred prior to October 1, 1995 are not time barred because they constitute a hostile work environment continuing violation. I conclude, however, that Complainant may recover only for incidents of harassment based on her sex or gender occurring in and after December 1994. I will consider, therefore, Mr. Orswell's discriminatory acts that occurred prior to December 1994 as background evidence of a hostile work environment at Respondent Holiday Inn during 1994-1995.

### C. Constructive Discharge

Complainant also alleges that she was constructively discharged from her corporate sales manager position at Respondent Holiday Inn on or about November 9, 1995. A constructive discharge occurs when the employer's conduct

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effectively forces an employee to resign. Accordingly, a constructive discharge is "legally regarded as a firing rather than a resignation." GTE Products Corp. v. Stewart, 421 Mass. 22, 35 (1995), citing Turner v. Anheuser-Busch, Inc., 7 Cal. 4<sup>th</sup> 1238, 1244-1245 (1994).

The test for whether Complainant was constructively discharged is objective and not subjective. GTE Products Corp., 421 Mass. at 35 (dissatisfaction with nature of assignments, inter alia, is insufficient to create a triable question of constructive discharge). To establish a prima facie case of constructive discharge, Complainant must show that her working conditions at Respondent Holiday Inn were so intolerable that a reasonable person in her position would have been forced to resign. Holt v. Minuteman Flames Minor Hockey Association, 22 MDLR 373 (2000); Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171 (1997); Said v. Northeast Security, 18 MDLR 255, 259 (1996); Rosado v. Santiago, 562 F.2d 114, 119 (1<sup>st</sup> Cir. 1977) ("the trier of fact must be satisfied that the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign").

Complainant must also show that she exhausted all reasonable alternatives to leaving her employment at Respondent Holiday Inn. Scionti v. Eurest Dining Services, 23 MDLR 234 (2001); Kletkota v. Carlin Combustion Technology, Inc., 21 MDLR 72 (1999); Estate of Douglas McKinley v. Boston Harbor Hotel, 14 MDLR 1226 (1992). In GTE Products Corp., the Supreme Judicial Court held that "part of an employee's obligation to reasonable is an obligation not to assume the worst, and

not to jump to conclusions too fast." 421 Mass. at 36. Similarly, courts have held under Title VII that "an employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged." See Tidwell v. Meyer's Bakeries, Inc., 93 F3d 490, 494-95 (8<sup>th</sup> Cir. 1996); West v. Marion Merrell Dow, Inc., 54 F3d 493, 498 (8<sup>th</sup> Cir. 1995).

A single or isolated act of discrimination will not usually support a constructive discharge claim even if it involves humiliating and disparate treatment or an act of retaliation. Estate of Douglas McKinley v. Boston Harbor Hotel, supra. at 1241; Kelley v. Plymouth County Sheriff's Department et. al., supra. To constitute a constructive discharge, the adverse working conditions must be unusually aggravated or amount to a "continuous pattern." Turner v. Anheuser-Busch, Inc., supra. at 1247.

I conclude that Mr. Orswell made Complainant's workplace so intolerable that a reasonable person in her position would have felt compelled to leave her employment at Respondent Holiday Inn. Complainant was the victim of Mr. Orswell's unwelcome verbal and physical conduct during 1994-1995 including his physical assault during their handshaking incident on November 9, 1995. I also conclude that Mr. Orswell's harassment interfered with Complainant's full participation in Respondent Holiday Inn's workplace. Holt v. Minuteman Flames Minor Hockey Association, supra. In addition, Mr. Orswell's harassment became intolerable causing Complainant mental and physical harm. Jordan v. Prime Laminating, Inc., 22 MDLR 151 (2000).

To prove her constructive discharge claim, Complainant must also establish that she exhausted every reasonable opportunity to continue working as a corporate sales manager at Respondent Holiday Inn. Alternatively, Complainant must show that such possibilities were untenable and that abandoning her corporate sales manager position was her only reasonable choice. See Estate of Douglas McKinley v. Boston Harbor Hotel, supra. at 141 (complainant failed to exhaust the possibility to continue working for the employer, including seeking an accommodation for his stress).

I conclude that Complainant has failed to show that she "exhausted" every reasonable opportunity to continue her employment at Respondent Holiday Inn. Complainant never informed Respondent Holiday Inn of her intention not to return to her corporate sales manager position before she filed the instant discrimination complaint on April 1, 1996. Complainant also made no effort to return to her position at Respondent Holiday Inn despite her knowledge that Mr. Glidden had terminated Mr. Orswell on November 20, 1995. In addition, Complainant did not explore any alternatives with Mr. Glidden or any Respondent Holiday Inn manager or supervisor prior to leaving her employment with Respondent Holiday Inn. I therefore conclude that Complainant did not take steps reasonably available to her to resolve her employment issues or conditions prior to her decision not to return to Respondent Holiday Inn. Andrews v. National Hair Care Center, Inc., 24 MDLR 115 (2002); Robinson v. Haffner's Service Stations, Inc., 23 MDLR 283 (2001).

Complainant asserts that she chose not to return to Respondent Holiday Inn because Mr. Glidden did not believe her or take her "seriously" regarding the handshake incident on November 9, 1995. Complainant testified that she was upset because Mr. Glidden called Ms. Sullivan and Mr. Orswell to corroborate her version of the handshake incident. I conclude that this is an insufficient justification for Complainant's failure to explore her reasonable opportunities to continue her employment at Respondent Holiday Inn.

This was not a situation in which Mr. Glidden had knowledge of her complaint and failed to address or take reasonable actions to ensure that the unwelcome conduct did not recur. See e.g., Comeau v. IDEA Lube, Inc. d/b/a/ Sooner Lube, 22 MDLR 5 (2000)(the supervisors failed to take any action to stop and prevent the offensive, vulgar and profane language by the complainant's co-workers); Choukas v. Ocean Kai Restaurant, supra. at 171 (1997)(the complainant had good reason to believe that the employer would not deal with her sexual harassment complaint based on her supervisor's treatment of the matter as a "joke"). Once Mr. Glidden received Complainant's complaint about the handshaking incident, he acted reasonably to determine what happened and take disciplinary action. Gill v. RGIS Inventory Specialists, Inc., 24 MDLR 208 (2002). Mr. Glidden promptly contacted Ms. Sullivan and Mr. Orswell to verify what happened. After Mr. Glidden discussed this incident with Mr. Orswell by telephone and in person immediately upon his return from a trade show convention, he terminated Mr. Orswell's employment on November 20, 1995. Mr. Glidden then informed Complainant on November 22, 1995 that he

had fired Mr. Orswell and looked forward to her return to work at Respondent Holiday Inn. Given Mr. Glidden's reasonable and prompt actions upon learning of the handshaking incident, I find that Complainant had an obligation to "hear [him] out and see what steps [he] had taken to" remedy her situation. Rowe v. American Paper Products, Inc., 22 MDLR 279 (2000).

I further conclude that Complainant was not sufficiently detailed about her sexual harassment allegations against Mr. Orswell during her communications with Mr. Glidden on and after November 9, 1995 such that Mr. Glidden was obligated to commence an inquiry or investigation. There is also no evidence in the record that Complainant or Ms. Sullivan complained or provided any detailed information to Mr. Glidden prior to November 9, 1995 about Mr. Orswell's alleged sexual harassment of Complainant other than the earlier breast-grabbing incident. Whatever Complainant's reasons for leaving her corporate sales manager position at Respondent Holiday Inn, I conclude that she failed to show that she was constructively discharged in or about November 9, 1995 in violation of G.L. c. 151B., §4, paragraph 4.

#### IV. REMEDIES:

Upon a finding of discrimination, the Commission is authorized to award damages resulting from Respondent Holiday Inn's unlawful discrimination, including Complainant proven lost wages, out-of-pocket expenses, and emotional distress. G.L. c. 151B, §5. See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997); Bournewood v. Massachusetts Commission Against Discrimination, 371 Mass. 303, 315-16 (1976). The party seeking recovery must prove

his or her damages by more than speculation or surmise. College-Town, Division of Interco, Inc., supra.

Since Complainant failed to prove her constructive discharge claim, she is not entitled to an award of lost wages. An award of monetary damages is appropriate, however, to compensate Complainant for the emotional distress she suffered as a victim of Mr. Orswell's harassment. See e.g., Baldelli v. Town of Southboro Police Dept., 17 MDLR 1541 (1995). A finding of discrimination, by itself, permits an inference of emotional distress as a normal adjunct of such discrimination. Labonte v. Hutchins & Wheeler, supra. at 824, quoting Buckley Nursing Home, Inc. v. Massachusetts Commission Against Discrimination, 20 Mass. App. Ct. 172, 182 (1985). Expert testimony is not necessary to prove emotional distress damages. College-Town, Division of Interco, supra. at 169; Franklin Publishing v. Massachusetts Commission Against Discrimination, 25 Mass. App. Ct. 947 (1988). Permissible considerations to measure and compensate for emotional distress include such factors as the nature, severity, and duration of Complainant's emotional distress. See Baldelli v. Town of Southboro Police Dept., 18 MDLR 167, 169 (1996).

I conclude that Complainant is entitled to damages for emotional distress resulting from Mr. Orswell's unlawful harassment. Complainant testified credibly regarding how Mr. Orswell's harassment, beginning in December 1994 and continuing until November 9, 1995, affected her mentally and physically. While Complainant did not seek counseling prior to or after November 1995 for Mr. Orswell's harassment, she credibly testified that it made her upset, depressed, physically sick, emotionally drained and caused her to

suffer from sleep disturbances. In addition to her back and neck injuries, Complainant testified that she had diminished exercise activity and gained 40 pounds.

Although Complainant did not take prescription medication or seek psychological counseling for symptoms related to Mr. Orswell's harassment, she is entitled to damages for the effect on her of his unlawful actions. While there may have been other stressors in Complainant's life that contributed to her emotional state during the relevant period,<sup>15</sup> they do not absolve Respondent Holiday Inn from its responsibility for Mr. Orswell's discriminatory conduct. See Hanscom v. Boston Housing Authority, supra.; Sverck v. American Health Care, et. al., supra. I am persuaded that Complainant sustained significant emotional distress attributable to Mr. Orswell's unlawful acts. Robinson v. Haffner's Service Stations, Inc., 23 MDLR 283 (2001); Lawless v. Northeast Battery & Alternator, Inc., 22 MDLR 138 (2000); Raffurty v. Keyland Corporation & Kheary, 24 MDLR 64 (2000). Based on the relative severity and duration of her emotional distress, I award Complainant \$50,000 to compensate her for the emotional harm she suffered from Mr. Orswell's harassment after December 1994.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby issue the following order:

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<sup>15</sup> These stressors include the death of Complainant's father, her divorce and disagreements with her ex-husband about child rearing issues.

1. Respondent Holiday Inn shall cease and desist from conduct in the workplace that creates a hostile work environment on any basis prohibited under G.L. c. 151B;
2. Respondent Holiday Inn shall pay Complainant the sum of \$50,000.00 in damages for emotional distress. I also order Respondent Holiday Inn to pay interest on the award of emotional distress damages at the statutory rate of 12% per annum from the date the complaint was filed until such date judgment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue. Respondent Holiday Inn shall pay this sum to Complainant within 60 days of its receipt of this decision.
3. The parties shall promptly notify the Commission's Clerk when Respondent Holiday Inn makes the ordered payment.

#### Training Provisions

4. Within 60 days of the Commission's final decision, Respondent Holiday Inn shall submit to the Commission's Director of Training a written policy for reporting, responding to and investigating complaints of discrimination and harassment. The Commission shall promptly notify Respondent Holiday Inn as to whether its policy is acceptable. If the Commission determines that Respondent Holiday Inn's policy is unacceptable, it will return the policy for revision, as appropriate. If, after 21 days for revision, Respondent Holiday Inn fails to submit an acceptable policy, the Commission

shall prescribe the details of a policy in a supplemental order.

5. Within 30 days of its receipt of the Commission's final action on Respondent Holiday Inn's written anti-discrimination and harassment policy, Respondent Holiday Inn shall schedule all employees, including its owners, supervisors and managers, to attend comprehensive training that addresses workplace discrimination and harassment.<sup>16</sup> The training shall include, but not be limited to, definitions of discrimination and harassment in the workplace, the supervisor's role in recognizing and preventing retaliation and other forms of harassment, the appropriate methods of conducting an investigation, responding to discrimination and/or harassment complaints, and Respondent Holiday Inn's liability under G.L. c. 151B and federal law for unlawful discrimination and harassment. This training must be at least 4 hours in length and must be completed within 90 days of Respondent Holiday Inn's receipt of the Commission's action on its written anti-discrimination and harassment policy.
  
6. Respondent Holiday Inn shall submit the training agenda to the Commission's Director of Training for approval at least 30 days prior to the proposed training session(s). The agenda shall provide that no more than 25 employees shall attend each training session held.<sup>17</sup>

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<sup>16</sup> The training order applies to the hotel facility located at 55 Ariadne Road, Framingham, Massachusetts.

<sup>17</sup> In reviewing the adequacy of Respondent Holiday Inn's training plan, the Director of Training shall consider Respondent Holiday Inn's recent training activity conducted in compliance with prior Commission orders.

7. At least three weeks prior to the training date(s), Respondent Holiday Inn shall inform the Commission's Director of Training, in writing, of the proposed training dates and locations so that the Commission has the option of sending a representative to attend and observe one or more of the training sessions as it is conducted.
8. Respondent Holiday Inn shall select a trainer who has completed the Commission's certified discrimination or harassment prevention training courses, or shall submit another proposed trainer's resume to the Commission's Director of Training for approval at least 30 days prior to the initial training session. Respondent Holiday Inn shall give a copy of this decision to the approved trainer as background information.
9. Within 30 days after each training session, Respondent Holiday Inn must submit documentation to the Commission's Director of Training of its compliance with this order. The documentation must be signed by the trainer and identify the training agenda, participants who completed the training session, the date and time of each training session, and a list of all employees as of the training date(s).
10. Once a year for three years after completion of the initial training session(s), Respondent Holiday Inn shall repeat the initial training session for all employees hired and employed since the date of the previous training session. Respondent Holiday Inn shall also conduct a refresher course (at least two

hours in duration) once each calendar year for all other employees, including managers and supervisors, for a total of three years.

11. In the event Respondent Holiday Inn is sold, the successor employer must complete these training requirements within the stated time frames if any of the following conditions apply:
  - a. A majority of Respondent Holiday Inn's managers employed as of the date of this decision continue to work for the successor employer as of the succession date;
  - b. A majority of Respondent Holiday Inn's governing board (such as the board of directors or trustees) as of the date of this settlement continue to serve on the successor employer's board as of the succession date;
  - c. The new owner is a relative of Respondent Holiday Inn's owner; and/or
  - d. Respondent Holiday Inn retains an interest in the successor entity.

This constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the full Commission within ten (10) days of receipt of this order and a Petition of Review with the full Commission within thirty (30) days of receipt of this order.

SO ORDERED this 26<sup>th</sup> day of February, 2003.

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Kenneth B. Grooms  
Hearing Officer