

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION)	
AGAINST DISCRIMINATION and)	
GLENN E. DUKES)	
Complainant)	
)	
v.)	Docket No. 98-BEM-4792
)	
)	
NWI INVESTIGATIVE GROUP, INC.)	
et. al.)	
Respondents)	

Appearances:

Elisabeth M. LeBrun, Esq., for Complainant
John P. Roache, Esq., for Respondents NWI Investigative
Group, Inc., William Donnelly, Joseph Errico and Richard
Hurley

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On December 31, 1997, Complainant Glenn E. Dukes filed a complaint with the Massachusetts Commission Against Discrimination (hereafter: the Commission). The complaint charged Respondent NWI Investigative Group, Inc. (hereafter: Respondent NWI), William Donnelly, Joseph Errico and Richard Hurley with discrimination based on his sexual orientation or perceived sexual orientation in violation of General Laws, Chapter 151B, §4, paragraph 1. Complainant alleged that the

Respondents discriminated against him when they subjected him to a hostile work environment from July 1997 through October 1997 and terminated his employment on October 30, 1997.

Attempts to conciliate this matter were unsuccessful. On June 28, 2001, Investigating Commissioner Dorca I. Gomez certified this case for a public hearing.

I held a public hearing in this case on February 26 and 27 and May 7, 2002. On October 3, 2002, Respondents filed their proposed findings of fact and rulings of law with the Commission. Complainant filed his proposed findings of fact and rulings of law on October 7, 2002.

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

II. FINDINGS OF FACT

1. Complainant Glenn E. Dukes is a gay male who currently lives in East Boston, Massachusetts.

2. From 1989 to 1993, Complainant served as a specialist in the Military Police Corps, United States Army. In 1996-1997, Complainant received an associate degree in law enforcement from Massasoit Community College and a paralegal certificate from Northeastern University. During this period, Complainant also worked as a loss prevention supervisor for Osco Drug Stores. (Complainant's Exhibit No. 1).

3. Respondent NWI conducts investigations and surveillances for insurance industry clients on employees who have received workers' compensation benefits and in liability cases such as "slip and fall" claims. Respondent NWI has a company-wide private investigator license issued by the Massachusetts State Police that covers its' field investigators.¹

4. In 1997, Respondent NWI's headquarters was located at 500 West Cummings Park, Suite 4000, Woburn, Massachusetts. During the relevant time period, the Woburn administrative offices were open from 7:00 a.m. to 7:00 p.m. Respondent NWI also maintained additional offices in New York, New Hampshire and Florida.

5. In 1997, Respondent NWI had approximately 25 employees, including 7-10 employees who worked in its Woburn office. During the period relevant to this complaint, Respondent NWI employed 10 field investigators who conducted investigations and

¹Respondent NWI is also licensed as a private investigation firm in 35 states and operates in eight additional states that do not require a license.

surveillances in Massachusetts. At all times relevant to this discrimination charge, Respondent NWI was an employer within the meaning of G.L. c. 151B, §1, paragraph 5.

6. William J. Donnelly is Respondent NWI's Vice-President. Mr. Donnelly worked part-time at Respondent NWI for approximately 21 years and has been a full-time employee since January 1, 2001. During the time period relevant to the instant complaint, Mr. Donnelly was Respondent NWI's Vice President of Operations and managed the Operations Division that included field investigators, field supervisors and a video technician.

7. Prior to working part-time at Respondent NWI, Mr. Donnelly served as a police officer in the Raynham Police Department from 1974-1978. Mr. Donnelly worked as an inspector, investigator, lieutenant and chief of staff in the Massachusetts Registry Police Department from 1978 through 1993. From 1993 until his retirement on December 31, 2000, Mr. Donnelly worked on Mondays through Fridays, 7:00 a.m. to 3:30 p.m., for the Massachusetts State Police Headquarters in Framingham, Massachusetts. During this period, Mr. Donnelly worked at Respondent NWI on Mondays through Fridays between 3:30 p.m. and 6:00 p.m.

8. During the period relevant to this complaint, Joseph Errico was Respondent NWI's Operations Manager and reported directly to Donnelly. In 1997, Mr. Errico directly supervised Marjorie Sylvia Foley and Richard Hurley, regional supervisors, and Theresa Long, a video technician.

9. In October 1995, Marjorie Sylvia Foley began to work at

Respondent NWI as a field investigator.² In February or March 1996, Respondent NWI promoted Ms. Foley to a regional field supervisor position. In her position, Ms. Foley was responsible for investigation activities in metro Boston-a 30- to 40-mile radius surrounding Boston and central Massachusetts. Ms. Foley left Respondent NWI in May 1998 to work for the Commonwealth of Massachusetts as an industrial accidents investigator. On March 7, 2002, Ms. Foley returned to work for Respondent NWI as a field supervisor.

10. In 1997, Ms. Foley directly supervised 10-15 field investigators, including Complainant. As part of Ms. Foley's duties, she assigned and reviewed cases with investigators, assisted them with their investigations and surveillances and provided case updates to clients. Ms. Foley also reviewed resumes, called applicants to set up interviews, occasionally conducted interviews and explained key job responsibilities and duties to new field investigators. In Ms. Foley's absence, Complainant occasionally discussed his investigations or surveillances with Mr. Hurley.

11. Theresa N. Long worked as a video technician at Respondent NWI from February 1997 until August 2001. Ms. Long worked Mondays through Fridays, 10:00 a.m. to 7:00 p.m, and occasionally on weekends. Ms. Long's job duties included distributing and collecting surveillance equipment, copying and editing videotapes made by field investigators and returning them to supervisors. Ms. Long also conducted background checks on claimants and prepared dossiers for use by field investigators.

²Throughout the public hearing, some witnesses referred to Foley by her maiden name "Sylvia."

Complainant's Job Duties and Responsibilities

12. In July 1997, Mr. Errico interviewed and hired Complainant as a field investigator at a pay rate of \$9.00 per hour plus travel expenses related to his investigations.³ Complainant generally worked 40 surveillance hours per week on weekends, Mondays, Thursdays and Fridays. Complainant routinely handled cases in the Greater Boston area including Hyde Park, Roslindale and Mattapan. (Complainant's Exhibit Nos. 2 and 3).

13. On July 16, 1997, Complainant signed an employment agreement with Respondent NWI. The agreement described, among other things, Complainant's duties as an investigator, hours of work, compensation and terms of employment. The agreement also included a covenant not to compete and Respondent NWI's confidentiality requirements. (Complainant's Exhibit No. 4).⁴

14. Shortly after Complainant began working at Respondent NWI, Errico gave him a copy of Respondent NWI's policy manual entitled, "Excellence Through Performance," dated January 1996. (Complainant's Exhibit No. 3). Complainant testified that he read and understood Respondent NWI's employee policy. (Respondent's Exhibit No. 1).

15. Respondent NWI's policy required field investigators to "provide verbal status reports as [they] progress toward accomplishment of case assignments." Respondent NWI instructed its investigators to "frequently communicate with [their] supervisor during the development of [their] investigation at

³Mr. Errico did not testify at the public hearing in this case.

⁴Complainant's Exhibit No. 4 is dated July 16, 1996. The parties agreed that the correct date is July 16, 1997.

least once daily." (Complainant's Exhibit No. 3, page 9). Respondent NWI also required its field investigators to report, at the end of each workday, the hours they worked by calling the investigators' telephone line. (Complainant's Exhibit No. 3, page 7).

16. Complainant testified that he went to Respondent NWI's Woburn office twice a day to: (1) pick up surveillance cameras, film and batteries, (2) turn in his hand-written reports of investigations that were due within two hours after completion of an investigation, (3) pick up new cases and dossiers (3-5 pages in length, including an assignment sheet) and (4) pick up his paycheck. Complainant also testified that he sometimes completed an investigation report based on his notes while in the Woburn Office. Complainant estimated that he spent approximately 8 hours each week performing activities in the Woburn office. Respondent NWI did not compensate its field investigators, including Complainant, for the time they spent in its Woburn office.

17. Complainant testified that he generally came into the Woburn office between 10:00 a.m. and 12:00 noon on his workdays. He testified that he saw Mr. Donnelly in the office about 60% of the times he came into the Woburn office during the mornings. Complainant testified that he also came into the Woburn office after his second surveillance in the afternoon and early evening between 4:00 p.m. and 7:00 p.m. On these occasions, Complainant testified that he saw Mr. Donnelly approximately 60% of these instances. Complainant testified that he never spoke with Mr. Donnelly other than to say "hi."

18. Mr. Donnelly did not recall seeing, meeting or speaking to

Complainant in the Woburn office from July 1997 through October 1997. I credit Mr. Donnelly's testimony.

19. Ms. Foley testified that Respondent NWI instructed field investigators to update their supervisors once in the morning and once in the afternoon if they had two investigations. Ms. Foley testified that the field investigators were not required to come into the Woburn office solely to report on the status of a case. She also testified that field investigators came into the Woburn office two or three times a week to turn in completed cases or videotapes but that they were not supposed to remain in the office for any period of time. Ms. Foley testified that field investigators generally took one or two days to complete an investigation.

20. Ms. Foley denied that Complainant came into the Woburn office twice on Mondays, Thursdays and Fridays. She testified that she saw Complainant, at most, three times a week. Ms. Foley also testified that Complainant spent approximately one hour in the office when he wrote investigative reports and 5-10 minutes on those occasions that he picked up videotapes, reviewed cases and reviewed his schedule. I credit her testimony.

21. Ms. Long testified that, upon request of an operations supervisor, she assembled a full set of equipment for a new field investigator and recorded their serial numbers. The equipment included a camera, one videotape for each assignment, battery and charger and a pager. The field investigator signed a document acknowledging receipt of equipment. Because she issued a battery charger, Ms. Long testified that there was no need for a field investigator to come into the Woburn office daily to replace a battery. If an investigator needed

videotapes for an ongoing case, Ms. Long issued videotapes at the request of an operations supervisor and gave them directly to the supervisor or investigator.

22. Ms. Foley testified that Respondent NWI's general policy, in 1997, was that investigators were not allowed to write their reports inside the Woburn office. The field investigators were instructed to write them in the field to ensure as much accuracy as possible and to minimize the impact on operations in the Woburn office. Ms. Foley recalled that Complainant wrote a report in the Woburn office on no more than three occasions.

23. Ms. Foley also testified that, in 1997, Respondent NWI's policy required metro-Boston field investigators to submit their investigative reports by 5:00 p.m. or the end of the business day. Ms. Foley testified that Respondent NWI's practice allowed field investigators to turn in their investigations after they completed their morning cases on the following day.

24. Mr. Donnelly testified that Respondent NWI's policy did not require field investigators to hand deliver their investigative reports. Field investigators could submit their investigative reports by regular and overnight mail, if necessary, and by facsimile transmission. Mr. Donnelly also testified that some field investigators delivered their reports and videotapes to his personal residence in Raynham, Massachusetts or to Respondent NWI's offices in Woburn, Springfield, New Hampshire and Florida. Ms. Long testified that there was a "drop box" at Mailboxes, Inc., located in an adjacent building, that field investigators used when the Woburn office was closed.

25. Respondent NWI's written policy required its field

investigators to notify local police departments before they began their investigations or surveillances. Respondent NWI's policy also required field investigators to immediately call their supervisors if they had "any difficulty" with surveillance. (Complainant's Exhibit No. 3, page 4). The purpose of Respondent NWI's notification policy was to enable a supervisor to identify a field investigator as a Respondent NWI employee to a local police department. Mr. Donnelly testified that Respondent NWI supervisors then determined whether it was necessary for field investigators to check in on future cases with specific police departments.

26. Prior to beginning his employment at Respondent NWI, Complainant participated in a one- or two-week on-the-job training program during which he "rode around" with an experienced field investigator to observe his investigations. As part of this training program, Complainant learned how to conduct field investigations in accordance with Respondent NWI's protocols, operate video equipment used for surveillances and write reports based on his hand-written case notes. Complainant testified that his Respondent NWI "trainer" told him that field investigators had to notify the local police department before initiating a surveillance or investigation, depending on the police department's policy. Complainant testified that his Respondent NWI trainer did not instruct him as to which police departments required advance notification.

27. Complainant testified that his supervisors never told him to write reports in the Woburn office nor was he warned or disciplined for writing reports in the Woburn office. Complainant testified that he observed other field investigators write reports in the Woburn office without being disciplined or

warned. Complainant also testified that he saw field investigators come into the Woburn office to submit investigative reports, pick up new cases and get equipment in the video room when Ms. Long was not present.

Hostile Work Environment

28. Complainant testified that he never told anyone at Respondent NWI that he was "gay" nor did he discuss his sexual preference with Messrs. Donnelly or Errico.

29. Complainant testified that Ms. Foley asked him once whether he had a girlfriend and he replied that he "did not date girls." Complainant testified that Ms. Foley did not respond to his statement. Ms. Foley denied that she asked Complainant whether he had a girlfriend or dated women. I credit Ms. Foley's testimony.

30. Ms. Foley and Ms. Long testified that they did not know about Complainant's sexual preference while he worked at Respondent NWI. Ms. Long also testified that she did not hear any discussion or comments about Complainant's sexual orientation while he was employed at Respondent NWI.

31. On September 9-10, 1997, Complainant attended an in-house training seminar in the Woburn office along with several new field investigators, including Derek Downs and Matthew Sullivan. The training agenda included, among other things, a review of investigation procedures and requirements, report writing, surveillance equipment and set-up and conducting a mobile

surveillance.⁵ (Complainant's Exhibit No. 6).

32. During the training session, Complainant reviewed participant materials and responded to questions about how to conduct a field investigation using video surveillance. Complainant testified that Mr. Errico asked Complainant how he would conduct an investigation in a "gay bar." Complainant testified that his response was evasive and that he "really did not answer" the question. Complainant felt that Mr. Errico's question was offensive, inappropriate and not relevant to the discussion about investigation approaches. Complainant also testified that Mr. Errico did not ask this question of other training participants and that made him feel uncomfortable.

33. Mr. Donnelly testified that it was Respondent NWI's policy to match field investigators with the environment in which they would be conducting an investigation.

34. Complainant testified that Mr. Donnelly used the epithet, "faggot," two or three times sometime in August 1997--about six weeks after he began his employment at Respondent NWI. Complainant testified that Mr. Donnelly did not speak to nor refer to him in this manner and he did not recall the context in which Mr. Donnelly used the epithets.

35. Complainant testified that he was offended by Mr. Donnelly's use of the term, "faggot," but did not report it to anyone in Respondent NWI because Mr. Donnelly was a vice-president.

⁵Mr. Donnelly testified that he did not conduct the session reviewing Respondent NWI's employee handbook during the training session because he was ill. Mr. Donnelly also testified that he did not know whether other Respondent NWI trainers reviewed the handbook with the new field investigators.

36. Mr. Donnelly denied that he used the term "faggot" at any time in the Respondent NWI's workplace. Ms. Long testified that she did not hear Mr. Donnelly or any other employee use the term, "faggot," in Respondent NWI's Woburn office. I credit Mr. Donnelly's and Ms. Long's testimony.

37. During Complainant's employment at Respondent NWI, there was a large mural of photographs and caricatures in the video room on the wall to the left of the entrance door. When the door to the video room was open, it covered a majority of the mural pictures. Ms. Long described the video room as 6 feet by eight or 10 feet. The video room included Ms. Long's desk and chair, a large file cabinet next to the back wall that held photographs from the video surveillances, a large shelving unit that held the video cameras and VCRs and a door that led to another room in which the video equipment was stored. (Complainant's Exhibit No. 12). Ms. Long testified that she spent 50% of her workday in the video room, during the morning hours prior to lunch. After lunch, Ms. Long used a desk directly behind Mr. Errico's desk.

38. Ms. Long testified that Mr. Donnelly and the operations supervisors also had access to the video room but it was not open to field investigators. Ms. Long testified that some field investigators but not Complainant came into the video room at her invitation. If Ms. Long was unavailable, the field investigator had to go to an operations supervisor to obtain equipment or tapes. Ms. Foley testified that Respondent NWI's policy was that field investigators were not allowed in the video room for safety and theft control reasons.

39. Mr. Donnelley testified that he and Ms. Long had a key to

the video room and possibly Mr. Errico. Mr. Donnelly testified that the only employees authorized to enter the video room were Ms. Long and the operations supervisors.

40. Complainant testified that Ms. Foley and Mr. Hurley sometimes told him to go to the video room to get blank tapes, new batteries and/or a replacement camcorder. Complainant estimated that he went into the video room six or seven times a week.

41. Beginning in 1993, Respondent NWI supervisors and managers placed various pictures on the video room mural. Some of the pictures were originally taken during Respondent NWI investigations. (Complainant's Exhibit Nos. 7-11). Ms. Long and Ms. Foley testified that they placed a couple of pictures on the wall.

42. The mural included the following pictures: (1) an obese woman in a bathing suit and a man sitting on a child's bike with a sign attached to the picture that reads, "REWARD! Has anyone seen this small retarded boy?. . ." Both of these pictures had a Respondent NWI supervisor's head superimposed on it; (2) a woman bending at her waist at a 45% angle with a sign attached that reads, "Gram Clam;" (3) two pictures and caricatures that showed a nude man climbing over a fence and a man sitting on a toilet; (4) two pictures that showed the heads of Messrs. Donnelly and Hurley superimposed on the bodies of women in bikini bathing suits. The captions on these pictures included the following: (a) "Billy, black is definitely your color. Oh stop Rich, you're too nice;" (b) "No Hugh, I just couldn't. Oooh! You make my mouth water." (Complainant's Exhibit Nos. 7, 8, 10 and 11). The mural also included pictures of Ms. Foley dressed as a clown while others showed a Santa Claus during the

holiday party at Respondent NWI. (Complainant's Exhibit Nos. 8, 10 and 11).

43. Complainant believed it was inappropriate to display photographs that were taken as part of Respondent NWI's investigations. Complainant testified that the pictures showing the nude man climbing over a fence and the man sitting on a toilet were offensive to him. Complainant also testified that the photographs depicting Messrs. Donnelly and Hurley along with their written comments were offensive because they showed gay or effeminate men in a manner that "feeds into stereotypes."

44. Complainant never told anyone at Respondent NWI that these photographs and caricatures offended him.

45. Mr. Donnelly and Ms. Long testified that no one ever complained about the pictures on the wall. Ms. Long and Ms. Foley testified that the pictures were not offensive to them.

46. Complainant testified that Mr. Hurley called him, "Dr. Quinn, Medicine Woman" on several occasions--almost every time Complainant talked with Mr. Hurley, in person or on the telephone. Complainant testified that he was offended and insulted by Mr. Hurley's comments because it implied that he was "feminine." Complainant testified that he did not respond to Mr. Hurley when he called him, Dr. Quinn." Complainant testified that he did not tell anyone in Respondent NWI because Hurley was a supervisor.

47. Mr. Donnelley testified that he never heard Mr. Hurley refer to Complainant as "Dr. Quinn." Ms. Foley testified that she never heard anyone at Respondent NWI refer to Complainant as

"Dr. Quinn." Ms. Foley also testified that she heard Mr. Hurley ask various employees, including Complainant, whether they watched Dr. Quinn reruns on Saturday night like Donnelly—implying that Mr. Donnelly was old. Ms. Foley testified that Complainant never complained to her about Mr. Hurley referring to him as "Dr. Quinn."

48. In 1995-1996, Mr. Donnelly testified that he posted a sexual harassment policy in Respondent NWI's "conspicuous place in the workplace." (Complainant's Exhibit No. 16). Respondent NWI's policy does not explicitly prohibit harassment based on sexual orientation. Complainant testified that he never saw a policy prohibiting sexual and/or sexual orientation harassment during his employment at Respondent NWI.

Termination

49. In August 1997, Complainant conducted video surveillances in 50% of his insurance investigations. On September 10, 1997, Respondent NWI issued a written warning to Complainant for failing to meet its standard that he obtain video surveillances in 60% of his insurance investigations. Complainant testified that he failed to meet Respondent NWI's monthly standard because of a malfunction in his video camera that he replaced during September 1997. (Complainant's Exhibit 5).

50. Mr. Donnelly testified that Respondent NWI's policy in 1997 was that field investigators were required to notify their supervisors whenever a police department asked them to come into a police station for questioning. The field supervisors then informed Mr. Donnelly who then called the police departments. Mr. Donnelly testified that he made approximately 10-12

telephone calls to police departments and that, on one occasion, a police officer continued to require a field investigator to come into the police department.

51. On or about October 15, 1997, Respondent NWI assigned Complainant to a case involving a claimant who lived in Roslindale. Complainant "checked in" with the Roslindale police precinct and then set up his surveillance. At approximately 9:33 a.m., Complainant observed the claimant leave her residence and travel by car to a methadone clinic in Hyde Park, Massachusetts. Complainant continued his surveillance of the claimant and waited 15-20 minutes while she was in the methadone clinic. The claimant then traveled to an automobile repair shop and left her car (approximately 9:58 a.m.) At 10:02 a.m., the claimant left the automobile shop, approached Complainant at 10:12 a.m. and asked him for a ride. At 11:00 a.m., Complainant discontinued his surveillance and left the area. Complainant testified that he checked in with the Roslindale police precinct each of the three days he conducted the claimant's surveillance but did not notify the Hyde Park police station because Complainant was mobile.

52. At some point on October 16, 1997, a Boston police detective in the Hyde Park police precinct called Complainant at his home. Complainant testified that the police detective asked him to come to District Station E-18 in Hyde Park but would not tell him what he wanted to discuss. Complainant then met with two Boston police detectives in District Station E-18 along with two Drug Enforcement Agency (DEA) officers who asked him questions about the claimant and whether he was conducting a narcotics investigation. Complainant testified that he told them that he was conducting an investigation for Respondent NWI but refused

to disclose any details based on Respondent NWI's confidentiality policy. They also told Complainant that the claimant told them that he had represented himself as a DEA agent and told her that he wanted to buy a "kilo." Complainant denied making these representations. The meeting lasted 10 minutes and ended with the police detectives indicating that they intended to file a criminal complaint against the claimant for making a false statement. Complainant did not notify anyone at Respondent NWI before he went to the Hyde Park police station.

53. Complainant believed he did not have to inform Respondent NWI because he did not conduct a surveillance in Hyde Park and the police detectives did not tell him, in advance, about the subject matter of the meeting. Complainant called Ms. Foley as soon as he left the meeting and told her what had transpired during the meeting with the police detectives and DEA officers.

54. In 1997, Respondent NWI's policy prohibited field investigators from posing as a law enforcement officer of any kind or as any state, local or federal government employee. (Complainant's Exhibit No. 3, page 6). Respondent NWI's policy also required field investigators to carry their Respondent NWI identification on their persons while conducting company business. (Complainant's Exhibit No. 3, page 5).

55. Later on October 16, 1997, Ms. Foley told Mr. Donnelly about Complainant's meeting with the Boston police department and the DEA officers. Mr. Donnelly immediately instructed Ms. Foley to obtain a supplemental report from Complainant regarding this incident. Mr. Donnelly also instructed Ms. Foley to talk to Complainant and warn him that he was not to go to any police

department unless he first contacted Respondent NWI.

56. Ms. Foley testified that she told Complainant, on October 16, 1997, that he had to notify Respondent NWI prior to going to a police station to discuss a Respondent NWI investigation or surveillance. Ms. Foley also told Complainant that he should tell the requesting police officers to call Respondent NWI if they had questions about his investigation or surveillance. (Respondent's Exhibit No. 6). I credit Mr. Foley's testimony regarding her oral directives to Complainant on October 16, 1997.

57. At Ms. Foley's request, Complainant prepared a summary report about the incident on October 15-16, 1997, and gave it to her. (Respondent's Exhibit No. 2).

58. On October 23, 1997, Respondent NWI assigned Complainant to conduct an investigation in Plymouth, Massachusetts. Complainant testified that he did not notify the Plymouth police department prior to initiating his surveillance because he had difficulty locating the station and he had to commence his surveillance before a certain time. When he arrived on-site, Complainant conducted a video surveillance of the claimant with her children outside her home. Complainant's surveillance only lasted a few minutes and he proceeded to his next investigation. I do not credit Complainant's testimony regarding his reason for not informing the Plymouth police department before commencing his surveillance.

59. Complainant testified that a Plymouth police officer called him sometime on October 24, 1997, left a message on his answering machine and asked him to call. Complainant testified

that he called the police officer who questioned him about his physical appearance. Complainant testified that the police officer asked him to come to the Plymouth police station but did not give him any reasons for the request.

60. Later on October 24, 1997, Complainant went to the Plymouth police station. During the meeting, a Plymouth police officer told Complainant that the Plymouth police department had received several calls about an unidentified man who videotaped children near a preschool. Complainant produced a Respondent NWI identification card and confirmed that he had conducted an investigation in Plymouth on October 23, 1997.

61. Immediately after his meeting with the Plymouth police officers, Complainant called Ms. Foley and told her what had happened. Ms. Foley testified that Complainant told her that he did not notify the Plymouth Police Department before he began his surveillance because he forgot his Respondent NWI identification. I credit Ms. Foley's testimony.

62. At the time of the investigation, Complainant lived in Cohasset and his sister lived in Sandwich. Complainant testified that he did not believe the Plymouth police officer's telephone call related to his work at Respondent NWI; specifically his Plymouth surveillance on the prior day. Complainant testified that he thought the telephone call might have related to his sister who was involved in a "nasty" divorce during which his sister and her spouse had called the police to complain about each other. I do not credit Complainant's testimony regarding his failure to inform Respondent NWI about the telephone call from the Plymouth police department.

63. Complainant did not inform anyone at Respondent NWI that a Plymouth police officer had contacted him and asked him to come into the police station. Complainant testified that he did not believe the police officer's telephone call was related to his Respondent NWI activities but that it most likely related to his sister's domestic issues.

64. Mr. Donnelly testified that the Plymouth Police Department called him on the same day of Complainant's meeting to confirm that Complainant was a Respondent NWI employee.

65. On October 29, 1997, Mr. Donnelly instructed Mr. Errico and Ms. Foley to terminate Complainant for failing to follow Respondent NWI's procedures; specifically, going to the Plymouth police department without first notifying a Respondent NWI supervisor. Mr. Donnelly testified that he had not met Complainant and did not know about his sexual orientation prior to making his termination decision. I credit Mr. Donnelly's testimony.

66. On October 30, 1997, Mr. Errico met with Complainant and terminated him for failing to follow Respondent NWI's procedures. (Respondent's Exhibit No. 7). Complainant signed a written notice acknowledging his termination and did not attach any objections to his termination on the notice nor raise any objections with Ms. Foley. (Complainant's Exhibit No. 14).

67. Complainant did not work at Respondent NWI at any time after October 30, 1997.

68. At Mr. Donnelly's request, Foley prepared a summary memorandum on November 3, 1997 regarding the Boston and Plymouth

Police Department incidents involving Complainant on November 3, 1997. (Respondent's Exhibit No. 6).

69. Respondent NWI did not give Complainant a written warning when he: (1) wrote investigative reports in the Woburn office; (2) failed to check in with the Boston Police Department during his Roslindale investigation on or about October 15, 1997; (3) failed to call a Respondent NWI manager or supervisor before going to a Boston police station on October 16, 1997.

70. Complainant testified that he knew of several field investigators who had problems with their field investigations while employed at Respondent NWI, including their failure to inform police departments prior to conducting their investigations. Complainant testified that Matthew Sullivan, a field investigator, told him that he failed to "check in" with a police department on two occasions and that once he was surrounded by police cars while conducting an investigation because he failed to "check in." Complainant testified that, to his knowledge, Respondent NWI took no action against Mr. Sullivan because of his failure to "check in" with a police department. (Complainant's Exhibit No. 13).

71. Mr. Donnelly denied any knowledge of the incidents involving Mr. Sullivan prior to his decision to terminate Complainant.

72. Mr. Donnelly and Ms. Foley testified that Respondent NWI employed two "openly" gay men as field investigators during the period relevant to this complaint. Ms. Long testified that another Respondent NWI employee told her at the office holiday party that he was "gay." Ms. Long and Ms. Foley testified that she did not observe any Respondent NWI employee "make fun of,

ridicule, criticize or embarrass" these employees who voluntarily left Respondent NWI. Ms. Foley also testified that she did not discuss Complainant's sexual orientation with his training investigator. Ms. Long testified that she did not believe that Complainant was gay and that no one at Respondent NWI told her that Complainant was gay.

73. After his termination, Complainant testified that he was angry, frustrated and felt "sick to his stomach." Complainant also testified that he felt that he was judged unfairly as a person and was not given a fair opportunity for his work to be evaluated based on his actual job performance. Complainant also testified that he had never been fired before and that it was a hard "thing to go through."

74. Complainant testified that he did not seek any counseling or therapy after his termination.

75. Complainant received unemployment insurance benefits but he did not recall his weekly benefit check amount. Complainant testified that he began working for TJ Maxx as a store detective about four months after his termination from Respondent NWI and his last hourly pay rate was \$12.97 an hour. Complainant did not recall his starting pay rate at TJ Maxx. Complainant testified that he worked for TJ Maxx until the fall of 1999. Complainant testified that he worked at the Royal Sonesta during 2000 on the security staff.

III. CONCLUSIONS OF LAW

General Laws Chapter 151B, §4, paragraph one, prohibits discrimination in employment based on an employee's sexual

orientation. Unlawful discrimination based on sexual orientation includes adverse employment actions and harassment of employees because of their sexual orientation. Moore v. Boston Fire Department, 22 MDLR 294 (2000); Barbot v. Hapco Farms, Inc., 19 MDLR 133 (1997). The Commission has defined sexual orientation harassment as conduct in the workplace "which creates an intimidating, hostile, humiliating, or sexually offensive work environment." Dodson v. Sandpoint, L.L.C., 20 MDLR 67 (1998); Magane v. Corcoran Management Co., 18 MDLR 103, 104 (1996).

A. Hostile Work Environment

The standard for analyzing a hostile work environment claim based on sexual orientation is analogous to a hostile work environment sexual harassment claim. Klekota v. Carlin Combustion Technology, Inc., 21 MDLR 72 (1999); Curry & Hayes v. Alessio, 21 MDLR 247 (1999). To state a claim of hostile work environment based on his sexual orientation, Complainant must show that: (1) he is a member of a protected class based on his sexual orientation; (2) he was subjected to unwelcome verbal or physical conduct based on his sexual orientation; (3) the unwelcome conduct was subjectively and objectively offensive; (4) the unwelcome conduct was sufficiently severe or pervasive that it altered the conditions of Complainant's employment and created an abusive work environment; (5) the harassment was carried out by a Respondent NWI employee with a supervisory relationship to Complainant or Respondent NWI 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). Complainant must also show that his work environment was pervaded by harassment or abuse based on his sexual orientation that posed a barrier to his full participation in Respondent NWI's workplace. College-Town Division of Interco v. Massachusetts Commission Against Discrimination, 400 Mass. 156, 162 (1987); Meritor Savings Bank v. Vinson, 477 U.S. 57 (1987).

A hostile work environment occurs when the unwelcome or offensive conduct is so pervasive that it creates a barrier to Complainant's full and untrammelled participation in the Respondent NWI's workplace. See Ramsdell v. Western Mass. Bus Lines, Inc. 415 Mass. 673, 678 (1993); College-Town, Division of Interco v. Massachusetts Commission of Discrimination, 400 Mass. 156, 162 (1987); Klekota, supra; Waite v. Associated Heating Oil, 17 MDLR 1412 (1995). The determination of whether a work environment is hostile requires a factual inquiry into all of the circumstances, including the frequency of the unwelcome conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with a complainant's job performance. Faragher v. City of Boca Raton, 524 U.S. 775, 787-788 (1998); Massachusetts Against Discrimination & Rodriguez v. Nationwide Warehouse & Storage, et. al., 25 MDLR 233 (2003). The appropriate standard to be applied in hostile work environment cases is that of a reasonable person from the protected group of which Complainant is a member. Andrade v. Stop & Shop Supermarket, Inc., 23 MDLR 213 (2001).

Complainant has met the first element of his prima facie case based on his undisputed testimony that he is a gay male.

Complainant has failed, however, to prove the remaining elements of his prima facie case of unlawful harassment based on his sexual orientation. First, there is no credible evidence in the hearing record that Respondent NWI employees, including Mr. Donnelly, Ms. Foley and Mr. Long, knew or had reason to know about Complainant's sexual orientation during his three-month period of employment at Respondent NWI. Complainant did not put Respondent Flatley on notice regarding his sexual orientation since he testified that he never told anyone at Respondent NWI that he was gay and did not discuss his sexual preference with Messrs. Errico or Donnelly during his employment at Respondent NWI. In addition, Respondent NWI's witnesses testified credibly that they never discussed or overheard comments about Complainant's sexual orientation. I conclude that their testimony that they did not know about Complainant's sexual orientation is credible given Complainant's brief employment history at Respondent NWI, his limited interaction with Respondent NWI employees other than Ms. Foley, his direct supervisor, and the fact that Complainant was not openly gay. Compare and contrast Dumas v. Town of Dudley, 21 MDLR 217 (1999)(the town's denial was unreasonable where the evidence showed that the complainant's sexual orientation was common knowledge throughout the town, he had lived his entire life in the town and had worked there as a police officer for 15 years).

Second, Complainant attempted to portray his work environment at Respondent NWI as rife with homophobic behavior. Complainant testified that Respondent NWI's supervisors subjected him to the following conduct that he found offensive: (1) In July 1997, Mr. Errico questioned him about how he would conduct an investigation in a "gay" bar; (2) Mr. Donnelly used the term, "faggot" on two occasions in August 1997; (3)

Respondent NWI employees maintained a display of homophobic pictures on a mural in the video room; (4) on several occasions, Mr. Hurley referred to Complainant as "Dr. Quinn, Medicine Woman," a fictional television character whom Complainant asserted was a "masculine female." Complainant has not persuaded me that these acts, individually or together, rose to the level of harassment so severe or pervasive as to constitute an abusive or hostile work environment for him at Respondent NWI. Dodson v. Sandpoint, L.L.C., supra.

I do not credit Complainant's testimony that he heard Mr. Donnelly use the term, "faggot," twice in August 1997 while he worked in Respondent NWI's Woburn office. Complainant's testimony is not credible and unsupported by any evidence in the hearing record. I find that even if Donnelly used such epithets on two occasions, they are insufficient in this case to support a finding of a hostile work environment directed toward Complainant. See e.g., Dodson v. Sandpoint, L.L.C., supra. (a coworker's one-time reference to Complainant as a "faggot" was not so severe or pervasive as to constitute a hostile work environment); Klekota v. Carlin Combustion Technology, Inc., supra. (a coworker's isolated reference to the complainant's sexual orientation made during an heated exchange of insults did not rise to the level of unlawful workplace harassment); Barbot v. Hapco Farms, Inc., 19 MDLR 133 (1997)(complainant's coworkers repeatedly called him, "faggot," and criticized his work performance based on derogatory stereotypes concerning his homosexuality). While "faggot" is certainly an offensive and derogatory term, Complainant testified that Mr. Donnelly did not direct such term toward him and that he did not know or hear the factual context in which Mr. Donnelly allegedly used the term. See e.g., Fijal v. Kentucky Fried Chicken/JTN Food Service,

Inc., 20 MDLR 45 (1998)(the owner called the complainant "faggot" and subjected him to actions that established the owner's disapproval of complainant's status as a gay employee).

I also do not credit Complainant's testimony that Mr. Hurley repeatedly called him, "Dr. Quinn." Complainant's testimony goes against the weight and credibility of other witnesses who testified that they never overheard Mr. Hurley refer to Complainant in this manner. Even if Mr. Hurley called Complainant, "Dr. Quinn," on more than one occasion from July 1997 through October 1997, I find that such references are ambiguous, at best, regarding sexual orientation and are insufficient to establish a hostile work environment based on Complainant's sexual orientation. Jones v. Iron Mountain Records, 19 MDLR 138 (1997).

Finally, contrary to Complainant's contention, I do not find that the photographs on the video room wall were "sexually explicit homophobic" pictures. While some pictures are certainly boorish and arguably inappropriate for a workplace, I am not persuaded that they show or depict gay men in a stereotypic manner as contended by Complainant. In addition, none of the witnesses testified that the pictures of Messrs. Donnelly and Hurley were directed at or related to any gay employee of Respondent NWI. I also conclude that they were not specifically directed at Complainant since they were apparently affixed to the video room wall prior to the commencement of his employment at Respondent NWI. I specifically find that the pictures related to Donnelly and Hurley were sophomoric and ill-conceived attempts to bring humor into Respondent NWI's

workplace at their expense—not Complainant’s or any other gay employee at Respondent NWI.⁶

Based on the above findings, I conclude that Complainant has not proved that his work environment was “so pervaded by harassment or abuse with the resulting intimidation, humiliation and stigmatization,” that it made his employment at Respondent NWI less desirable to a reasonable person in his position. See Cuddyer v. The Stop & Shop Supermarket Co., 434 Mass. 521, 532 (2001); Muzzy v. Cahillane Motors, Inc., 434 Mass. 409 (2001). I conclude that the conduct and pictures cited by Complainant are not sufficient to create an objectively hostile or abusive work environment based on his sexual orientation. See e.g., Clark County School District v. Breeden, 532 U.S. 268 (2001) (“simple teasing, off-hand comments, and isolated incidents unless extremely serious will not amount to discriminatory changes in terms and conditions of employment”); Horzesky v. R&M Construction Co., 15 MDLR 1171 (1993)(casual comments or accidental or sporadic conversations are in sufficient to constitute a pervasive, hostile work environment). Accordingly, I conclude that Complainant has not established a prima facie case of a hostile work environment based on his sexual orientation.

⁶Complainant did not allege nor do I find that the mural pictures and the alleged references to “Dr. Quinn” are evidence of gender-based discrimination based on Respondents’ belief that Complainant did not fit the sexual stereotype of a man. See e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 250-252 (1989)(recognized sex stereotyping as evidence of sex discrimination); Hamm v. Wegauwega Milk Products, Inc., 332 F.2d 1058,1062 (7thCir. 2003).

B. Termination

In the absence of direct evidence of an unlawful motive based on Complainant's sexual orientation, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976). See also Abramian v. President & Fellows of Harvard College, *supra.* at 116; Wynn & Wynn v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-666 (2000).

To establish a prima facie case of sexual orientation discrimination based on his termination from employment at Respondent NWI, Complainant must establish by credible evidence that (1) he was a member of a protected class based on his sexual orientation; (2) he was performing his field investigator duties adequately or capably; (3) Respondent NWI subjected him to an adverse employment action; (4) he was terminated while similarly situated employees not of his protected class remained on the job or he was terminated under circumstances that give rise to a reasonable inference of unlawful discrimination based on his sexual orientation. Abramian v. President & Fellows of Harvard College, *supra.*; Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., 25 MDLR 103 (2003); Massachusetts Commission Against Discrimination & D'Agostino v. Salvation Army, 25 MDLR 176 (2003); Adesso v. Reliable Bus Lines, Inc., 24 MDLR 28 (2002); Dodson v. Sandpoint, L.L.C., *supra.*

Once Complainant establishes a prima facie case of unlawful discrimination based on his sexual orientation, the burden

shifts to Respondents to articulate a legitimate, non-discriminatory reason(s) for his termination. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2001); Abramian, supra. at 116-118. If Respondents meet their burden of production, Complainant must then show by a preponderance of the evidence in the record that the proffered reason(s) was not the real reason for his termination and that Respondents acted with a discriminatory intent, motive or state of mind based on Complainant's sexual orientation. Lipchitz v. Raytheon Company, 434 Mass. 493, 501-502 (2001); Blare v. Husky, 419 Mass. 437, 443 (1995). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass. at 504. Accordingly, Complainant retains the ultimate burden of proving that Respondent NWI's actions were the result of a discriminatory animus based on his sexual orientation. Id.; Abramian, 432 Mass. at 117; Manning v. Massachusetts Public Interest Research Group, Inc., 24 MDLR 309 (2002).

The undisputed evidence in the record shows that Complainant has met two elements of his prima facie case of discrimination based on his sexual orientation. As a gay male, Complainant is a member of a protected class based on his sexual orientation. Complainant has also proved that Respondent NWI subjected him to an adverse employment action when it terminated him from employment on October 30, 1997.

I conclude, however, that Complainant has not shown by credible evidence that he was performing his field investigator job duties in an acceptable or adequate manner when Respondent NWI terminated him on October 30, 1997. There

is sufficient unrebutted evidence in the record to establish that Complainant failed to meet Respondent NWI's reasonable performance expectations and standards in 1997, culminating in his termination on October 30, 1997. Blare v. Huskey, 419 Mass. 437 (1995). I credit Donnelly's testimony that he terminated Complainant because of his failure to comply with Foley's oral directive that Complainant notify Respondent NWI before going to a police department for questioning concerning a surveillance or investigation. See Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., supra.

I do not find credible Complainant's purported explanation for failing to notify Respondent NWI when contacted by the Plymouth Police Department in October 1997; specifically, that Complainant believed the Plymouth police department wanted to talk to him about his sister's domestic violence complaints and not his surveillance in Plymouth on the prior day. In the context of Ms. Foley's directive on October 17, 1997 and the surveillance Complainant conducted in Plymouth on October 24, 1997, I find that Complainant's proffered explanation for not contacting Respondent NWI before going to the Plymouth police station is unreasonable and is not credible. Based on the totality of evidence in the hearing record, I find that Complainant did not call Ms. Foley or another Respondent NWI supervisor before meeting with the Plymouth police officers to conceal the fact that he did not notify the Plymouth police department before commencing his surveillance on October 24, 1997.

I also conclude that Complainant has not met the final element of his prima facie case because he has not proven by

credible evidence that he was terminated under circumstances that give rise to a reasonable inference of unlawful discrimination based on his sexual orientation. Abramian v. President & Fellows of Harvard College, supra.; Massachusetts Commission Against Discrimination & Gallagher v. Laz Parking, Ltd., supra. I find that there is no credible evidence in the hearing record to prove that Mr. Donnelly knew or had reason to know about Complainant's sexual orientation before he made his termination decision. Complainant testified that his weekly contact or interaction with Mr. Donnelly during his employment at Respondent NWI was very limited and consisted solely of exchanging brief greetings. In addition, Complainant offered no credible evidence that Ms. Foley, Mr. Errico or any other Respondent NWI employee discussed his sexual orientation with Mr. Donnelly prior to his termination.⁷

To prove disparate treatment based on his termination, Complainant must identify other Respondent NWI employees who were similarly situated "in terms of performance, qualifications and conduct, without such differentiating or mitigating circumstances that would distinguish their situations." Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122 (1997). See also Smith v. Stratus Computers, Inc., 40 F.3d 11, 17 (1st Cir. 1994), cert. denied, 514 U.S. 1108 (1995), quoting Mitchell v. Toledo Hospital, 964 F.2d 577, 583

⁷ Even if I were to find that Mr. Donnelly referred to "faggot" on two occasions in August 1997, which I do not, such statements are insufficient in this case to result in "an inescapable, or at least highly probable, inference" that he was motivated by Complainant's sexual orientation. Wynn & Wynn, 431 Mass. at 667, citing Johansen v. NCR Comten., Inc., 30 Mass. App.Ct. 294, 298-300 (1991). Rather, I find that they constitute "statements made by [a] decision maker unrelated to the decisional process itself [which] do not suffice to satisfy the [complainant's] threshold burden." Wynn & Wynn, 431 Mass. at 667, citing Price Waterhouse v. Hopkins, 490 U.S. 228, , 277 (O'Connor, J., concurring). See also Massachusetts Commission Against Discrimination & Belopolsky v. Massachusetts Bay Transportation Authority, 25 MDLR 181 (2003).

(1st Cir. 1992). Accordingly, Complainant must prove that heterosexual coworkers were treated differently in that Respondent NWI did not hold them to the same notification requirement upon contact by a police department. Smith College v. Massachusetts Commission Against Discrimination, 376 Mass. 221, 228 (1978); Graves v. Haartz-Mason, Inc., 23 MDLR 13 (2001).

Complainant identified Matthew Sullivan as a similarly situated heterosexual employee who failed to "check in" with a police department prior to commencing his surveillance but was not subjected to any disciplinary action by Respondent NWI supervisors. (Complainant's Exhibit No. 13). While Mr. Sullivan was a similarly situated employee to Complainant in that they were both field investigators, I find that Respondent NWI treated Complainant no differently than Mr. Sullivan regarding their failure to contact police departments prior to initiating a surveillance--neither were subjected to any disciplinary action for this infraction of Respondent NWI's policy. Allen v. MBTA, 24 MDLR 313 (2002); Graves v. Haartz-Mason, Inc., supra.

Complainant's proffered evidence of Mr. Sullivan's treatment is not relevant or persuasive because I find that Respondent NWI terminated Complainant after he failed to comply with Ms. Foley's directive regarding prior notification when contacted by a police department. There is no evidence that Respondent NWI terminated Complainant because he failed to notify the Plymouth police department before initiating his investigation on October 23, 1997. Complainant also did not produce any evidence to prove that, during the relevant time period, Respondent NWI failed to terminate a heterosexual

field investigator who did not notify a Respondent NWI manager or supervisor before going to a police department for questioning about a surveillance or investigation.

Massachusetts Commission Against Discrimination & Flaherty v. Perini/Kiewit/Casa Joint Venture, 25 MDLR 278 (August 27, 2003)(no discrimination where Complainant was offered a transfer after her infraction like other similarly situated male employees).

In summary, Complainant has failed to prove a prima facie case of unlawful termination based on his sexual orientation. Massachusetts Commission Against Discrimination & Landry v. Dana Farber Cancer Institute, Inc., 24 MDLR 214 (2002). Based on the totality of evidence in the hearing record, I find that Respondent terminated Complainant based on his unsatisfactory work performance in 1997 and not because of his sexual orientation. In addition, even if the facts could support a prima facie case, Respondent NWI has articulated legitimate, non-discriminatory reasons for Complainant's termination—his failure to comply with Ms. Foley's directive on notification after contact by a police department. Complainant has also failed to produce credible evidence from which an inference could be made that Respondent NWI violated G.L. Chapter 151B, §4(1).⁸

⁸Given my findings and conclusions, I do not have to address whether Mr. Donnelly, Mr. Errico and Mr. Hurley are individually liable for the alleged discrimination. See Beaupre v. Cliff Smith & Associates, 50 Mass. App. Ct. 480, (2000); Woodason v. Norton School Committee, et. al, 25 MDLR 64 (Full Commission decision).

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby order that the complaint in this matter be dismissed. This decision 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 16th day of December 2003.

KENNETH B. GROOMS
Hearing Officer