

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and DELOURIS COOK,
Complainants

v.

DOCKET NO. 02-BEM-02867

JAMES MISKEL,
Respondent

Appearances:

Lynn Milinazzo-Gaudet, Esquire Commission Counsel

Julie A. Baker, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 30, 2002, Complainant Delouris Cook filed a complaint with this Commission charging the Commonwealth of Massachusetts House of Representatives and James Miskel with discrimination in employment on the basis of gender/sexual harassment. Complainant alleged that she was sexually assaulted by Miskel and subjected to a sexually hostile work environment and that the Massachusetts House of Representatives denied her a reasonable accommodation for the disability that resulted from the assault. She also alleged that she was subjected to retaliatory termination. The complaint was subsequently amended to add Representative Christine Canavan as a party-Respondent. The Investigating Commissioner found probable cause with respect to the claim against Miskel and issued a lack of probable cause finding on the claims against the House of Representatives and Representative Canavan. Thus the sole issue before the

Commission is whether Miskel subjected Complainant to a sexually hostile work environment and is liable for any damages resulting there from. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on November 5, 2008. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant, Delouris Mae Cook, resides in Taunton, Massachusetts. From March 1999 until May 31, 2002, Complainant was employed by the Massachusetts House of Representatives as an Administrative Assistant to Representative Christine Canavan. Her job duties involved keeping Representative Canavan's calendar, tracking her meetings and hearings, ensuring Canavan was prepared for events, answering Canavan's mail and helping to resolve constituent issues. Complainant described her work environment as pleasant and challenging and she was particularly fond of helping constituents resolve their problems.

2. James Miskel (hereinafter "Respondent") is a resident of Dorchester, Massachusetts. At all times relevant to this matter, Respondent was employed by the Massachusetts House of Representatives as a Court Officer.

3. Complainant testified that on March 6, 2002, Respondent sexually assaulted her in the elevator at the Massachusetts State House. According to Complainant, Respondent pulled her hair, forcing her head back, restrained her arms, rubbed his hand

down her back over her buttocks and forced his hand up under her skirt grabbing her vaginal area. I credit her testimony.¹

4. Following the assault, Complainant returned to her office on March 7 and 8, 2002, but was stunned, shaken up, fearful, and worried about the incident that had occurred with Respondent in the elevator. She reported the incident first to her friend Jose Vincenty and then to Representative Canavan. She then reported the incident to the Massachusetts State Police and filed a criminal complaint against Respondent.

5. Following an internal review by the House of Representatives, Respondent's employment was terminated on March 13, 2002.

6. Complainant testified that following the sexual assault she began commuting to work with Canavan because she could not cope with the crowds on the MBTA and could not walk into the State House alone. She could no longer concentrate, was unable to focus and could not answer even a simple question. Complainant testified that she no longer cared to engage in the work related tasks that she had previously enjoyed. She stopped taking calls from constituents and going to hearings for Canavan. She felt she was "deconstructing" and felt bad about herself because of her inability to function as she had before the assault. She had no appetite, was nauseous and lost weight.

I credit her testimony about the effects of the assault on her emotional and physical well-being and that she was no longer able to do her job.

¹ On January 9, 2003, a criminal complaint was issued against Miskel based on this incident and on July 22, 2003, Miskel was convicted of indecent assault and battery and assault and battery and was sentenced to one year probation. Prior to the public hearing, I ruled that under the principles of collateral estoppel, Miskel's criminal conviction barred Miskel from contesting whether the assault occurred and was unwelcome and that he was precluded from testifying about these issues. I ruled however, that Complainant must still prove that the incident created a hostile work environment for her.

7. On March 15, 2002, Complainant reported to work for the last time. She testified that she knew that things had changed irreparably and she was no longer capable of adequately performing her job. She was overwhelmed by the thought that she had to pass the elevator where the attack occurred each day. She knew that her life would never be the same and she would never be able to function in the way she had when she was hired. I credit her testimony.

8. On April 4, 2002, Complainant applied for worker's compensation benefits. Her claim was allowed the following day, retroactive to March 18, 2002. She began receiving weekly benefits of \$372.01, which ceased on July 3, 2002.

9. Between March and May of 2002, Complainant was in communication with Representative Canavan. During this time, Complainant told Canavan that she would be willing to continue to perform her previous job functions, as long as she no longer had to come into the State House. She offered suggestions such as working from home or conducting meetings for Canavan in her legislative district. Complainant testified that during this time she was treated for post traumatic stress disorder and anxiety. An independent medical examiner determined that Complainant was able to return to work as of May 31, 2002. However, Complainant did not return to her job at the State House, and her employment was terminated on May 31, 2002.

10. Complainant testified that the sexual assault was the reason she was no longer able to perform the functions of her job, and that but for the attack, she never would have left her job. I credit her testimony.

11. Complainant did not work at all from March 16, 2002 to January 2003. From January 2003 to July 2004, Complainant was employed part-time at Pathways to

Healing, a job she obtained through a friend who was the owner of Pathways. At this position she answered the telephone, scheduled appointments and attended holistic healing classes held on the premises. Complainant testified credibly that in January 2003 she was not emotionally ready to go back to work full-time and Pathways provided a low-pressure, healing environment. She earned approximately \$50.00 per week in that position. She left that position because she was ready to re-enter the workforce full-time at a more traditional job and because the organization could no longer afford to pay her salary. In 2003, Complainant received unemployment compensation in the amount of \$10,752.00.

12. Complainant was next employed at Chadwick's in Middleboro on September 20, 2004. She left that job after a 10-day training period because of the pressure to make sales and because she was "not really a salesperson." She earned a total of \$454.00.

13. From October 14, 2004 to February 20, 2006, Complainant was employed full-time at Community Systems, Inc. in Sandwich and also worked occasionally as a primary care assistant for CPMI.

14. Complainant pursued a claim for further worker's compensation benefits arising out of the assault, and on October 4, 2006 agreed to a lump sum settlement of \$35,000.00 with a net benefit to her of \$24,750.00 for "payment of permanent, partial impairment" based on Complainant's life expectancy of 38.7 more years at \$12.29 per week. (Ex. C-5)

15. In 2002, Complainant earned \$12,097.00 in wages and received \$9,216.00 in unemployment compensation for a total of \$21,313.00. Thus her lost wages for 2002 were \$10,927.00 (\$32,240.00-\$21,313.00)

16. In 2003, Complainant received unemployment compensation of \$10,752.00 and wages in the amount of \$2,600.00 (\$50.00 per week x 52 weeks) for a total income of \$13,352.00. Thus her lost wages for 2003 were \$18, 888.00 (\$32,240.00-\$13,352.00)

17. From January 2004 until she began working full time on September 20, 2004 at Chadwick's. Complainant earned \$1,300.00 (\$50 per week x 26 weeks). During this time she would have received wages of \$23,250.00 had she continued working for Respondent. Thus her lost wages for 2004 totaled \$21, 950.00 (\$23,250.00-\$1,300.00). Complainant's total damages for income she lost as a direct result of Respondent Miskel's unlawful action is \$51,765.00 (\$10,927.00 + \$18,888.00 + \$21,950.00)²

III. CONCLUSIONS OF LAW

Complainant's claim against Respondent Miskel is against him individually, and does not arise out of a complaint against her employer, as he was not her employer, supervisor or manager and the complaint against her employer was dismissed after investigation. Pursuant to Massachusetts General Law Chapter 151B, §4(4A), it is unlawful "[f]or any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter." The right to work in an environment free from unlawful sexual harassment is "unquestionably among the rights encompassed by the [151B]." Thomas O'Connor Constructors, Inc. v. MCAD, 72 Mass.App.Ct. 549, 557 (2008). See, Fluet v. Harvard University, 23 MDLR 145, 165-166 (2001); Berardi v. Medical Weight Loss Center, Inc., 23 MDLR 5, 11-12 (2001); Erewa v. Reiss, 20 MDLR 36, 40 (1998). Moreover, the Commission has long

² Workers' compensation benefits paid to Complainant were not deducted from Complainant's damages because, unlike with unemployment compensation benefits, it was impossible in this case to determine how worker's compensation benefits were calculated.

recognized and imposed individual liability under G.L. c. 151B. Rushford v. Bravo's Pizzeria and Restaurant, et al., 23 MDLR 171, 174 (2001) citing Beaupre v. Cliff Smith & Associates, 50 Mass. App. Ct. 480, 491 (2000).

In determining if individual liability attaches, in this matter, the Commission must first determine if Respondent's conduct rises to the level of sexual harassment proscribed by M.G.L. c. 151B, §4. "Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when ...such advances requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment." G.L. c. 151B, § 1(18); College-Town Division of Interco v. MCAD, 400 Mass. 156, 165 (1987). See Massachusetts Commission Against Discrimination, Sexual Harassment in the Workplace Guidelines (2002) at II(C). In determining whether speech or conduct creates a hostile work environment, the standard is whether a reasonable person in the complainant's position would interpret the behavior "as offensive and an interference with full participation in the workplace." Baldelli v. Town of Southborough Police Dept., 17 MDLR 1541, 1547 (1995); Harris v. International Paper Co., 765 F.Supp. at 1512-16 and notes 11 and 12; See Gnerre v. Massachusetts Commission Against Discrimination, 402 Mass. 502, 507 (1988)(sexual harassment in housing). As the Supreme Judicial Court made clear in Gnerre, and a long line of other cases, there is no "numerosity test" in determining what constitutes harassment; the more offensive the conduct the fewer incidents of harassment may be required to demonstrate the objective reasonableness of the claim. Id. at 507

In this case Respondent's sexual assault of Complainant in the workplace was clearly conduct of a sexual nature. Complainant testified that Respondent grabbed her by the arms, kissed her, rubbed his hand down her back and buttocks, and forced his hand up under her skirt, and grabbed her vaginal area with his hand. Complainant made it very clear that this sexual conduct was an assault and was not welcome. I conclude that Respondent's conduct was sufficiently egregious to create an intimidating, hostile, humiliating and sexually offensive work environment for Complainant thereafter, and that this one instance was sufficiently severe to interfere with Complainant's work performance and alter the conditions of her employment such that she could no longer perform her job.

Complainant also established that the conduct was hostile, intimidating and/or offensive in a way that affected her performance or the conditions of her employment. Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 678-679 (1993). She testified that prior to the attack she found her job challenging and fun and she loved working in a position in which she could help people.

Complainant testified that immediately following the attack she returned to her office in a state of shock, stunned, shaken and afraid. Thereafter she began to commute to and from work with Representative Canavan because she could not cope with walking into the State House alone. It was clear she felt threatened and intimidated by Respondent's assault. She could no longer focus, concentrate or answer a simple question. Complainant was no longer able to engage in the job tasks she most enjoyed, such as talking with constituents and attending hearings for Canavan. She testified that things had changed irreparably and that she was no longer capable of performing the

tasks required of her job. She was overwhelmed by the thought that she would have to walk past the elevator where the attack occurred. After leaving work on March 15, 2002, Complainant was unable to ever report for work again at the State House and believed she would never be able to function at the premises where the assault occurred.

I conclude that Complainant was the victim of egregious and unwelcome sexual behavior in the workplace, a sexual assault, perpetrated by Respondent. The conduct was subjectively and objectively offensive and sufficiently severe as to alter the conditions of Complainant's employment, creating an intimidating, hostile, and offensive work environment in violation of G.L. c. 151B. Applying the terms of G.L. c. 151B, § 4(4A) to the case at hand, Complainant has established that Respondent's sexual assault created a sexually hostile work environment in which Complainant was frightened and intimidated and interfered with her right to be free of sexual harassment in the workplace.

IV. REMEDY

Pursuant to M.G.L.c.151B § 5, the Commission is authorized to grant remedies to make the Complainant whole. This includes an award of damages to Complainant for lost wages, emotional distress and other compensatory damages suffered as a direct and probable consequence of unlawful sexual harassment by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournemouth Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997). Complainant has waived any claims for emotional distress damages in this matter.

Complainant argues that her termination on May 31, 2002 was a direct result of the emotional harm caused by Respondent's sexual harassment. She contends that the

trauma of the sexual assault irreparably changed her work environment and left her unable to perform her job and that Respondent should compensate her for the loss of income she suffered from the time period March 16, 2002 through February 20, 2006. Although Respondent was not Complainant's employer, I concur with Complainant that her loss of income was a direct result of Respondent's unlawful conduct and that he is liable to her for the loss of income which was a direct consequence of his actions. Because Complainant was unable to work for a period of time as a result of Respondent's discriminatory conduct, she is entitled to compensatory damages equal to the income she lost. However, I do not agree that the period of compensation for lost income extends to 2006. I conclude that the period for which lost income should be calculated begins on March 16, 2002 and ends on September 20, 2004 when Complainant began working at Chadwick's, a position she left voluntarily left for reasons unrelated to the actions of Respondent.

When Complainant was terminated from her position at the House of Representatives, she was earning a salary of \$32,240.00 per year. In 2002, she earned \$12,097.00 in wages and received \$9,216.00 in unemployment compensation for a total of \$21,313.00. Thus her lost wages for 2002 were \$10,927.00 ($\$32,240.00 - \$21,313.00$)

In 2003, Complainant received unemployment compensation of \$10,752.00 and wages in the amount of \$2,600.00 ($\50.00 per week x 52 weeks) for a total income of \$13,352.00. Thus her lost wages for 2003 were \$18,888.00 ($\$32,240.00 - \$13,352.00$)

From January 2004 until she began working on September 20, 2004 Complainant earned \$1,300.00 ($\50 per week x 26 weeks). During this time she would have received wages of \$23,250.00. Thus her lost wages for 2004 totaled \$21,950.00 ($\$23,250.00 -$

\$1,300.00). Complainant's loss of income totals \$51,765.00, an amount for which I conclude Respondent is liable. (\$10,927.00 + \$18,888.00 + \$21,950.00).

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, § 5, it is hereby ordered that:

1. Respondent pay to Complainant the sum of \$51,765.00 for compensatory damages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this order.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this the 23rd day of November, 2009.

JUDITH E. KAPLAN,
Hearing Officer