

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & JOANNE DOUGLAS,
Complainants

v.

DOCKET NO. 06-SEM-01748

ELECTRO-TERM, INC., &
ESTATE OF WARREN SMITH¹,
Respondents

Appearances:

Robert L. Dambrov, Esquire for Joanne Douglas
Timothy J. Ryan, Esquire for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 14, 2006 Joanne Douglas filed a complaint with this Commission charging Respondents with discrimination on the basis of race and color in violation of M.G.L., c. 151B § 4(4), (4A) and (5). Specifically, Complainant charges Respondents with constructive discharge based on her race and color (African-American). The Investigating Commissioner issued a Probable Cause finding. After attempts to conciliate the matter failed, the case was certified for public hearing. A public hearing was held before me on April 7, 2008. After careful consideration of the post-hearing submissions of the parties and the entire record in this matter, I make the following findings of fact, conclusions of law and order.

¹ Smith died in February 2008; his estate has been substituted for him as a party Respondent

II. FINDINGS OF FACT

1. Complainant, Joanne Douglas, is an African- American woman who resides in Springfield, Massachusetts. On or about June 2, 2005 Complainant was hired to work at Respondent Electro-Term, Inc. as an administrative assistant to Warren Smith. At the time of her employment, Complainant lived with her daughters, ages 22 and 18, her son, age 13, and her two-year-old grandchild.

2. At the time of Complainant's employment, Smith was the owner, President, Treasurer, Secretary, and sole Director of Electro-Term, a manufacturer and distributor of solder-less electrical terminals and accessories. The company employs over 15 employees.

3. On January 11, 2008 Smith gifted the company to its employees pursuant to an Employee Stock Ownership Plan (ESOP). Smith died on February 21, 2008, prior to the hearing in this matter. Walt Rustic is now the company's president.

4. Dinette Bucci has worked for Electro-Term for 13 years, and has been the company's Human Resources manager for eight years. Prior to her hire, Complainant was interviewed by Bucci and then Smith, who offered her the position. Complainant performed the roles of administrative assistant, personal secretary, and company secretary for Respondents. Her job duties included answering Smith's phone, typing, filing and making business travel arrangements for Smith.

5. In approximately November 2005, upon returning from a business trip, Smith admonished Complainant for failing to book him in a non-smoking room. When Complainant attempted to respond, Smith yelled, "Shut up," threw down papers that he had been holding and stormed out of the room. Later that day Smith called Complainant

into his office along with Bucci to further discuss her booking the wrong room. During this meeting Complainant became upset and began crying. Smith told Complainant, “Cut out the girlie thing.” Complainant left the meeting to compose herself and later told Bucci that Smith’s statements made her very uncomfortable. I credit this testimony as it was not disputed.

6. On another occasion when Smith discovered that a large copy machine had jammed, he immediately went to Complainant and yelled, “What the heck is going on? Why didn’t you do something about this?” Complainant responded that she had not used the machine, was not responsible for the jam, and asked him what he wanted her to do about it. Smith responded that she could go home and sleep for all he cared. Upset, Complainant said, “Fine with me. That’s what I’ll do.” She left the building, believing she had quit her job. The following day, Bucci called Complainant and asked her to come back to work and told her they would have a discussion with Smith. Complainant returned later that day and Smith apologized to Complainant for his comments the previous day.

7. On another occasion Smith expressed dissatisfaction with a spreadsheet that Complainant was working on. Complainant told Smith she did not understand what he wanted. Smith responded, “I don’t understand why you don’t understand. Where were you raised?” Complainant testified she believed this comment was racist and implied that she was raised in a ghetto. Complainant did not complain to anyone about this comment because she continued to feel intimidated by Smith. I credit her testimony.

8. Around early March, 2006 Electro-Term was arranging a company-wide party for its employees to celebrate obtaining a government contract. One of Complainant’s

duties was to supply organic salad dressing for the event. Complainant had been out sick for two days preceding the event and the day before, a co-worker called Complainant and offered to pick up the salad dressing.

9. On Thursday, March 9, 2006, Complainant was called into a meeting with Smith and Bucci. Smith told her she should have delegated the duty of purchasing the salad dressing by, asking someone else to do it, rather than waiting for someone to offer. Complainant agreed, apologized and said she wanted to do a better job. Complainant testified that Smith told her he wanted her to take more initiative, but did not believe it was in her character to change. He then said her character was to be an “obedient servant.” Complainant was taken aback and offended by this comment, but insisted that she could do her job and could change. Smith responded, “You can’t change. That’s not that in your character. What if I asked you to be white [or act white] could you do that?” Complainant responded that no, she could not act white. Smith then asked, “Why not? Michael Jackson did it.” Complainant testified that she was in shock over Smith’s comments, and believed them to be racist. She equated the term “obedient servant” with slavery. I credit her testimony, which was not disputed by Respondents. Smith then gave her the assignment of studying her character flaws in order to fix them. Complainant did not object to Smith’s remarks because she was in shock, and so stunned that she did not know what to do. I credit her testimony.

10. Complainant testified that she found Smith intimidating, and was not comfortable complaining to him directly, given his harsh manner of speaking to her and the fact that he was her boss and President of the company. I credit this testimony.

11. Immediately after the meeting, Complainant went to Bucci's office, where Bucci gave her some pamphlets and told her that she would have eight hours of paid time to complete an assignment on "Thoroughness." The assignment included defining the characteristic, interviewing people with that characteristic, and providing a written response. Complainant then left the office building with the assignment and went home, planning to return with the completed assignment the following day.

12. Complainant testified that once at home she had trouble deciding whether to complete the assignment or resign from her position. She felt that in order to provide financial support for her family and remain in her job, she would have to tolerate Smith's offensive comments. On Friday, March 10, 2006 Complainant asked Bucci for more time to complete the assignment and said she wouldn't be in that day. Over the weekend, after struggling with the issue, and discussing the matter with her mother, she decided that Smith's comments were unacceptable and that she could not continue to work for him. I credit Complainant's testimony that she could no longer tolerate working in such an abusive environment.

13. On Monday, March 13, 2006, Complainant called Bucci and told her that she would not be returning to Electro-Term. I credit Complainant's testimony

14. Bucci testified that the company's disciplinary practice was to provide "character correction" rather than warnings, in accordance with a program called "Character First." Complainant was given a written assignment, which was considered "step two" in the company's disciplinary process.

15. On March 23, 2006 Complainant met with Bucci at Electro-Term in order to complete an "exit interview" form. Given the contentious working relationship between

Complainant and Smith, Bucci made no attempt to persuade Complainant to return to Electro-Term. On the exit interview form Complainant wrote, as her main reason for leaving, “Uncomfortable working environment (sic) with Warren Smith, i.e. yelling and improper (sic) statements made.” In response to a question asking for suggested improvements for the next employee the Complainant wrote, “Warren should probably take some political correction classes to learn how to communicate (sic) with employees.” (Exh. C-3). No discussion occurred between Bucci and Complainant during this meeting. Complainant testified that the improper statements she referred to on the form included referring to her as an “obedient servant,” and asking if she could “act white,” like Michael Jackson. Complainant further testified that by suggesting political correctness classes she was referring to Smith’s need to learn that some statements are not appropriate. I credit this testimony.

16. Lydia Weldon worked for Respondents as a receptionist from February 2004 to June 2007. She voluntarily left her position in order to accept employment elsewhere. Weldon stated that Smith was very particular about how things were done, and became upset if they weren’t done his way.

17. Weldon testified that she witnessed Complainant leave Smith’s office on March 9, 2006 upset and in tears. Weldon recalled that she subsequently spoke to Complainant briefly on the phone. During this conversation Complainant told Weldon that Smith had remarked to her that Michael Jackson had turned white and couldn’t she turn white like him. Weldon testified that Smith did not permit employees to speak Spanish among themselves and on occasion had directed her to separate employees who were speaking Spanish and instruct them to speak English. Weldon has not seen

Complainant since her termination. I credit Weldon's testimony, which substantiated Complainant's testimony.

18. Complainant testified that for a period of about two months following her employment with Electro-Term she took to her bed and did not want to get up, stopped taking phone calls, began sleeping and crying habitually, became short-tempered with her children, and generally stayed in her house. She started gaining weight after she left Electro-Term and has gained 45 to 50 pounds to date.

19. Complainant testified that after leaving the job, she was "a mess" and that the matter "took a lot out of her." She was unable to do the usual things she did with her children, such as take trips to Six Flags. She stopped going out to clubs and to the mall with her friends as she had done in the past. She frequently remained in her room crying and wondering what she was going to do. As a result of the loss of income, she was forced to apply for food stamps.

20. Complainant testified that her mother, Florence Douglas, was eventually able to motivate her to resume actively caring for her children and to seek work through a temporary agency, Career Group. I credit her testimony which was corroborated by her mother Florence Douglas and her daughter, Tiesa Ferguson.

21. Complainant testified that it took her a year to fully recover from the abusive work environment created by Smith at Electro-Term, and although she has moved on with her life in other ways, she still wonders whether employers are harboring racist thoughts. I credit her testimony about the lingering effects of Smith's abuse.

22. Complainant was out of work for about 9 weeks, before finding temporary work for 16 days, was subsequently unemployed for another month and then obtained

permanent employment with Balise Motor Sales where she has worked in various capacities to the date of the public hearing.

23. At the time Complainant's employment at Electro-Term ended, she was working 40 hours per week at an hourly rate of \$13.00. Thus had she remained at Electro-Term for the remainder of 2006, her annual salary would have been \$27,040.00 (\$13/hr x 40 hrs/wk x 52 wks). In 2006, Complainant received gross pay of \$1,152.50 from Career Group Staffing Services, Inc. and \$14,661.00 from Balise Motor Sales for a total of \$15,813.50. I conclude that Complainant lost wages resulting from her termination in the amount of \$11,257.00. Complainant was found eligible for unemployment compensation, but the amount of compensation she received is unknown.

24. In 2007, Complainant earned \$27,391.90 from her employment at Balise Motor Sales, more than she would have made at Electro-Term. (Exh. C-1)

III. CONCLUSIONS OF LAW

A. Racial Harassment

Complainant claims that Respondents violated M.G.L. c.151B, sec.4, by discriminating against her in the terms, conditions, or privileges of employment by virtue Smith's creation of a racially hostile work environment. In order to establish a claim of harassment based on her race, Complainant must establish that she is a member of a protected class; that she was the target of speech or conduct based on her membership in that class; that the speech or conduct was sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive working environment; and that the harassment was carried out by an employee with a supervisory relationship to

Complainant or that Respondents knew or should have known of the harassment and failed to take prompt remedial action. Beldo v. Univ. of Mass. Boston, 20 MDLR 105, 111 (1998), citing Richards v. Bull H.N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994); College-Town, Division of Interco v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987); Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511-1515 (11th Cir. 1989); Walker v. Ford Motor Co., 684 F.2d 1355, 1358-1359 (11th Cir. 1982); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) Complainant has met her burden of proof on each element of her claims. She is a member of a protected class by virtue of her race and color, African-American. Complainant testified credibly to several incidents of offensive comments by, and interactions with, her employer, Warren Smith. Complainant testified that on one occasion, while deriding her for perceived poor performance, Smith remarked to her, "Where were you born?" Complainant took this comment to imply that she was born in a ghetto. Smith subsequently questioned Complainant's character, when complaining about her lack of thoroughness, and told her she had the character of an "obedient servant" which Complainant took as an offensive reference to slavery. He then asked her whether she could act white like Michael Jackson. I find that these comments were abusive and racially offensive and that Complainant was the target of speech based on her membership in a protected class.

Respondents do not dispute that these incidents occurred, but argue that they do not rise to the level of racial harassment. The elements of racial harassment are severity, pervasiveness and interference with the employee's ability to do her job. I find that Complainant has proven that Smith's conduct satisfies these elements. Smith's comments

were sufficiently severe and pervasive to alter Complainant's conditions of employment and create an abusive working environment.

Complainant had a tumultuous working relationship with Smith, who by all accounts was a difficult man to work for. However, Smith's comments were egregious and offensive, and his insinuation that her character was flawed in conjunction with asking her if she could "act white," demonstrates that his comments were racially motivated. Since he was the President of the company, the company is strictly liable for his conduct.

In determining whether speech or conduct creates a racially hostile work environment for an employee, the fact finder must consider 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).

I conclude that in this case, Smith's comments were sufficiently egregious to constitute racial harassment. The Supreme Judicial Court has declined to impose a numerosity test in determining what constitutes harassment and has stated that the more offensive the comments the fewer incidents of harassment may be required to demonstrate the objective reasonableness of the claim. Id. at 508. I conclude that the circumstances of this case, wherein the company president, in the presence of the his human relations manager, berated Complainant in a most racially insensitive manner, were particularly demeaning and embarrassing to Complainant and that any reasonable

person in her situation would have been deeply offended. Thus I conclude that Respondents created an unlawful racially hostile work environment in violation of M.G.L.c. 151B.

B. Constructive Discharge

Complainant alleges that Respondents' racially hostile work environment caused her to be constructively discharged. A constructive discharge occurs when an "employer's conduct effectively forces an employee to resign." GTE Products Corporation v. Stewart, 421 Mass. 22, 33-34 (1995). A constructive discharge can occur when the employer "materially breaches [an] employee's contract of employment in some manner short of termination" or makes "working conditions so intolerable that the employee feels compelled to quit." Constructive discharge occurs where, "based on an objective assessment of the conditions under which the employee has asserted [s]he was expected to work, it could be found that they were so difficult as to be intolerable." *Id.* at 34. In order to prevail on her constructive discharge claim, Complainant must establish that Respondent made her working conditions so intolerable that a reasonable person in her position would have felt compelled to resign. McKinley v. Boston Harbor Hotel 14 MDLR 1226, 1240 (1992). An isolated act of an employer will usually be insufficient unless the adverse working environment is unusually aggravated or amounts to a continuous pattern. The standard for constructive discharge "is, and should be, a strict one," and requires that an employee must demonstrate that "the threat of physical or psychic harm was so great as to preclude ever returning to work." She must also show that she exhausted all possibilities to continue working and that resignation proved to be the final and only alternative.

Upon leaving the Electro-Term building on March 9, 2006 Complainant was extremely upset, offended, and unsure whether she could bear to continue working for Warren Smith. Over the weekend she debated whether she could accept Respondent's comments and continue working at Electro-Term, ultimately deciding that she could not tolerate his racially offensive attitude and statements. I conclude that Complainant reasonably found her working conditions to be intolerable. In reaching this conclusion I take into consideration that Smith's statements on March 9, 2006 were the culmination of a series of hostile confrontations initiated by Smith toward Complainant. While not all of these interactions involved explicit racial language, there was certainly an inference of racial animus, and the final incident on March 9, when Smith conveyed to Complainant his belief that her short-comings were inherent to her race, was sufficiently severe that no reasonable person in Complainant's position could have continued to work in such a hostile environment. This racially motivated character assessment by Smith is sufficient to sustain a claim of constructive discharge.

Moreover, I conclude that Complainant exhausted her available remedies. Given that Smith was her direct supervisor as well as the company's president, there was no other alternative remedy available to Complainant other than to discontinue contact with Smith by resigning, particularly since Smith's remarks were made in the presence of, and with the tacit approval of, the company's human resources manager.

Thus, I conclude that Complainant's objective working environment was so intolerable so as to compel her to leave her employment and I further conclude that Respondents are liable for unlawfully terminating Complainant's employment in violation of M.G.L.c. 151B.

C. Individual Liability

The Commission has held that individuals may be liable under M.G.L.c.151B §4(4A) if they “interfere with a Complainant’s right to be free from discrimination in the workplace.” In order to prove interference with a protected right, Complainant must show that Smith had the authority or the duty to act on behalf of the employer; his action or failure to act implicated rights under the statute; and there is evidence articulated by the complainant that the action or failure to act was in deliberate disregard of the complainant’s rights, allowing the inference to be drawn that there was intent to discriminate or interfere with complainant’s exercise of rights. Woodason v. Town of Norton School Committee, 25 MDLR 62, 63 (2003).

The evidence in this record establishes the requisite intent to discriminate required in order to find Smith individually liable for unlawful discrimination on the basis of race and color. Smith was Complainant’s direct supervisor and was sole owner of Electro-Term. He was the primary decision-maker with respect to establishing the terms and conditions of Complainant’s employment. He engaged in discussions with Complainant regarding her perceived character flaws that were based on racial stereotyping; to wit, asking her if she could act white, inquiring where she was raised, and whether she could act like Michael Jackson. The evidence firmly established Smith’s intention to discriminate on the basis of race and to interfere with Complainant’s rights under c. 151B§4(4A). I conclude that Mr. Smith is individually liable for unlawful discrimination in this matter.

I therefore conclude that Respondents engaged in unlawful discrimination on the basis of race and color in violation of M.G.L.c.151B §4 and I find them jointly and severally liable for unlawful discrimination.

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 and emotional distress suffered as a direct and probable consequence of Respondents' unlawful actions. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

A. Lost Wages

At that time Complainant's employment at Electro-Term ended, she was working 40 hours per week at an hourly rate of \$13.00. Thus had she remained at Electro-Term for the remainder of 2006, her annual salary would have been \$27,040.00 (\$13/hr x 40 hrs/wk x 52 wks). In 2006, Complainant received gross pay of \$1,152.50 from Career Group Staffing Services, Inc and \$14,661.00 from Balise Motor Sales for a total of \$15,813.50. I conclude that Complainant is entitled to compensation for lost wages in the amount of \$11,257.00 and that her right to recover lost wages ceased in 2007, when her gross pay from her current employer exceeded the wages she would have received at Electro-Term.

B. Emotional Distress

The Commission is authorized to award damages for emotional distress damages resulting from unlawful discrimination. Stonehill College v. Massachusetts Comm'n Against Discrimination 441 Mass. 549 (2004); Bournewood Hosp., Inc. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 303(1976); Buckley Nursing Home, Inc. v. Massachusetts Comm'n Against Discrimination, 20 Mass. App. Court 172(1985).

Emotional distress damages should be fair and reasonable, and proportionate to the distress suffered. Stonehill, supra, at 576. Some of the factors to be considered are; the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has suffered and reasonably expects to suffer and whether the complainant has attempted to mitigate the harm. Id. The Complainant must show a sufficient causal connection between the Respondent's unlawful act and the Complainant's emotional distress. Id.

I conclude that Complainant suffered emotional distress as a result of Respondent's unlawful discrimination against her. When Smith first asked her to act white, she was in shock, surprised and did not know what to do.

Complainant testified that for a period of about two months following her employment with Electro-Term she took to her bed and did not want to get up, stopped taking phone calls, began sleeping and crying habitually, became short-tempered with her children, and generally stayed in her house, wondering what she was going to do. She started gaining weight after she left Electro-Term and has gained 45 to 50 pounds to date. Complainant testified that she was "a mess" and that the matter "took a lot out of her."

She was unable to do the usual things with her children, such as trips to Six Flags. She did not go out to clubs or to the mall with her friends as she had done in the past. In addition she was forced to apply for food stamps.

Complainant testified that her mother, Florence Douglas, was eventually able to motivate her to resume actively caring for her children and to seek work through a temporary agency, which she parlayed into a permanent position. Her testimony was corroborated by her mother Florence Douglas and her daughter, Tiesa Ferguson.

Complainant testified that it took her a year to fully recover from the events with Smith at Electro-Term, and although she has moved on with her life in other ways, she is still wonders whether employers are harboring racist thoughts.

I conclude that Complainant's emotional distress was causally connected to Respondent's discriminatory conduct and lasted for a period of months after her discharge. I conclude that Complainant is entitled to an award for emotional distress in the amount of \$75,000.00.

V. ORDER

Respondents are hereby jointly and severally Ordered to:

(1) Immediately cease and desist from discriminating on the basis of race and color;

(2) Pay to Complainant Joanne Douglas the sum of \$11,257.00 for lost wages within 60 days of receipt of this decision with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made.

(3) Pay to the Complainant Joanne Douglas the sum of \$75,000.00 in damages for emotional distress within 60 days of receipt of this decision, with interest thereon from the date the complaint was filed until such time as payment is made.

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 10th day of September, 2008.

JUDITH E. KAPLAN,
Hearing Officer