

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

JULIANNA McCORMICK AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 96-BEM-0584

MODERN CONTINENTAL
CONSTRUCTION CO.

Respondent

Appearances: John A. Morrissey, Esq., for Complainant McCormick
Richard D. Wayne, Esq., and Brian E. Lewis, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 23, 1998, Julianna McCormick (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that Modern Continental Construction (“Respondent”) unlawfully discriminated against her on the basis of sex and retaliated against her in violation of M.G.L. c. 151B.

Complainant asserts that while she worked for Respondent as a carpenter, she found in her jacket pocket a carved object in the shape of a penis. She also charges that she was subjected to retaliation after she reported the incident. The MCAD issued a probable cause finding and certified the case for public hearing on March 11, 2003.

The case was brought to public hearing on January 12-16, 2004. The Complainant testified on her own behalf as did her husband, Francis McCormick. David Piermarini and Desmond Trainor testified on behalf of Respondent. Complainant submitted four (4) exhibits and Respondent submitted twelve (12) exhibits.

To the extent the parties' proposed findings are not in accord with or irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or irrelevant to my findings, it is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant is a carpenter by trade. During the relevant time frame, she was a member of The New England Regional Council of Carpenters, Local 33 ("Union"). Prior to the events at issue, Complainant had previously worked for Respondent on various sites in the 1990's.
2. Respondent, Modern Continental Construction Company, is a general contractor located in Cambridge, Massachusetts. In 1997, Respondent was the general contractor on a MBTA project known as the North Station Super Station Project. The Project involved the construction of an

underground station and tunnel linking the Green Line with the Orange Line at North Station in Boston.

3. In August 1997, James Trainor, Respondent's superintendent for carpenters on the North Station Super Station Project, contacted Complainant in regard to working on the Project. Trainor had previously contacted the Carpenters' Union hall in order to request that Complainant be assigned to the North Station Project. The Union had told Trainor that Complainant was not able to work. Complainant believed that she was being black-balled by the Union because she had supported a losing candidate in a Union election. After Trainor's conversation with Complainant, Trainor again contacted the Union and requested that it assign Complainant to the North Station Super Station Project, which it did. Complainant began her employment on the North Station Super Station Project in August 1997. By all accounts, Complainant had a good relationship with James Trainor.
4. David Piermarini was Respondent's project manager for the North Station Super Station Project in 1997 and 1998.
5. James Trainor was responsible for deciding how many carpenters were needed on the North Station Super Station Project on a weekly basis. He made recommendations to Piermarini about the carpenters to be hired and laid off. The number of carpenters employed varied from day to day and from week to week. Piermarini normally would follow James Trainor's recommendations on staffing issues.

6. At all relevant times, Desi Trainor was a carpenter foreman employed by Respondent. He is the son of James Trainor. Complainant was a carpenter on Desi Trainor's crew while she worked on the North Station Super Station Project. A crew generally consists of three to four journeymen carpenters and a foreman.
7. As a foreman, Desi Trainor was paid \$1.00 per hour more than journeymen carpenters. Unlike journeymen carpenters, he was given a company truck for work and personal use, and he received vacation pay. Transcript, Volume II at 218-219. Desi Trainor received instructions from the carpenters' superintendent, James Trainor. Desi Trainor did not have the authority to hire or fire carpenters or to authorize overtime work. He was a member of the Carpenters' Union. Desi Trainor described himself as the contact between workers and management -- the person communicating directives from management to the workers. Transcript, Volume IV at 79. Trainor told members of his crew what work needed to be done on a given day. Transcript, Volume II at 82.
8. Desi Trainor testified that he, "directed [Complainant] and controlled her in terms of what she did." Transcript, Volume IV at 63. He described Complainant as above average in her work effort, very approachable and dependable. Transcript, Volume IV at 64; 69-70.
9. During the week of November 3-7, 1997, Desi Trainor was on vacation in Las Vegas. On Wednesday, November 5, 1997, Donnie Vichon was the acting foreman for Desi Trainor's crew of carpenters. At the end of the

shift on November 5, 1997, Complainant grabbed her sweatshirt and left the job site. The next morning on Thursday, November 6, 1997, Complainant discovered a carving in her sweatshirt pocket as she was dressing for work. She did not examine it closely at that time, but when Complainant arrived at the job site, she discovered that it was a carving made out of an industrial material called backer-rod and was shaped like a penis. After examining the object, Complainant was so upset that she left the job site and walked home to Charlestown.

10. After arriving home, Complainant showed the carving to her husband. Complainant and her husband went back to her job site around noon on November 6, 1997 and met with project manager David Piermarini. Complainant's husband showed the carving to Peirmarini and explained that his wife had found the object in her sweatshirt pocket. Peirmarini promised to investigate the incident. He sent Complainant home with pay.
11. Immediately after the meeting, Piermarini summoned carpenter superintendent James Trainor and union steward Maxi Brown. Piermarini instructed James Trainor and Maxi Brown to obtain information about the incident. Piermarini told Brown that if no one came forward with information, Piermarini would terminate the entire crew.
12. At 4:00 p.m. on November 6, 1997, James Trainor reported to Piermarini that John McIntyre, a carpenter on Desi Trainor's crew, admitted to placing the carving of the penis in Complainant's sweatshirt pocket. Piermarini called Complainant at home, informed her that he had learned

who placed the carving in her sweatshirt pocket, and asked her to come to a meeting at 10:00 a.m. the next day.

13. At a meeting on Friday, November 7, 1997, Piermarini told Complainant that McIntyre admitted to placing the carving in her sweatshirt pocket. At that time or in a subsequent meeting, Complainant was told by Peirmarini or Union steward Maxi Brown that the carved penis was meant for an apprentice. Transcript, Volume I at 81. According to Complainant, the apprentice always wore plaid. The sweatshirt that Complainant brought to work on November 5, 1997 was a gray sweatshirt with the name “Julie” written across the chest in black marker. Transcript, Volume I at 66. Complainant testified that she did not believe that the carved penis was meant for the apprentice. *Id.* at 82. I credit Complainant’s testimony and find that the carved penis was meant for Complainant.

14. Piermarini asked Complainant if she could still work with McIntyre. Complainant told Piermarini that she would not feel comfortable working with him. Transcript, Volume IV at 28; 30. Piermarini testified that he did not ask Complainant whether she felt she could work with McIntyre in order to decide if he should fire McIntyre, but “to get a feel for her opinion or her thoughts on the entire incident.” Transcript, Volume IV at 152. I do not find Piermarini’s testimony to be credible with respect to his alleged reason for asking Complainant whether she felt she could work with McIntyre.

15. After the meeting, Piermarini telephoned Ed Burns, Respondent’s Human

Resources Director, to discuss the incident. Piermarini decided to terminate McIntyre. Piermarini testified that he used the terms “layoff” and “termination” interchangeably. Respondent’s Exhibit 11.

16. McIntyre’s last day on the job site was Friday, November 7, 1997. He received his “layoff” check on Friday afternoon. Respondent’s Exhibit 12.

17. On Saturday, November 8, 1997, Piermarini called Complainant to inform her that he had terminated McIntyre. Piermarini asked Complainant if she could report to work on Monday, November 10, 1997. Respondent’s Exhibit 11.

18. On Sunday, November 9, 1997, John McIntyre called Desi Trainor at home to discuss his termination. McIntyre told Trainor that the termination had to do with putting something in Complainant’s jacket. Transcript, Volume 4 at 86. McIntyre asked Trainor if Trainor could get him a job somewhere else. Trainor said he “doubt[ed] it.” *Id.* at 87. Trainor testified that he was unwilling to help McIntyre get another job because he couldn’t “do anything for anyone that gets fired.” Transcript, Volume 5 at 16.

19. Every Monday morning, Respondent conducted a “tool box” or “safety meeting” with all its tradespersons to discuss and review pertinent topics and issues. For the meeting held on Monday, November 10, 1997, Piermarini instructed Ralph Marchand, Respondent’s project superintendent, to review the company’s anti-harassment and anti-discrimination policies and emphasize that behavior in violation of the

policies would not be tolerated.

20. After the Monday morning meeting, Piermarini learned that when McIntyre received his final paycheck on the previous Friday, he implicated Frank DiFronzo as a participant in the incident involving Complainant. DiFronzo was another carpenter on Desi Trainor's crew.
21. After the Monday morning meeting, Union steward Maxi Brown told Complainant to go to the carpenters' shack and "sit with Frankie [DiFronzo] and John Eaton and get everything settled." Transcript, Volume I at 85. At the shack, Eaton told her that the other carpenters wouldn't talk to her because she had reported the incident. DiFronzo admitted that he had carved the object, apologized, and explained that he was throwing it around with Eaton, McIntyre, and "Packy," and that McIntyre had placed the object in Complainant's pocket. *Id.* at 87-88. Union steward Maxi Brown told her that "the office" wanted her to determine "who could stay on the job and who had to be fired." Transcript, Volume II at 113-114. Complainant never told Piermarini that either John Eaton or an individual named "Packy" were involved in the incident.
22. Some time on Monday, November 10, 1997, Desi Trainor told Complainant that he had heard what happened while he had been on vacation and that he had talked to his wife about it. According to Complainant, Trainor encouraged her to, "tell the office . . . they were all involved . . . [because] if that's how they are going to treat [Complainant],

he would have no problem with them being let go.” Id. at 95.

Complainant testified that Desi Trainor informed her that management wanted her to make a decision about which individuals would be fired and which could stay. Transcript, Volume II at 152-153. Trainor denies saying this to Complainant, but I find it more likely than not to be true.

23. Complainant testified that shortly after her conversation with Desi Trainor, she went to Dave Piermarini’s office. Frank DiFronzo came in and apologized to her. According to Complainant, Piermarini asked her if she could work with John McIntyre and she responded that she couldn’t work with him on a crew but, “If I wasn’t near him then, yeah, that would be okay.” Id. at 97; 191; Respondent’s Exhibit 12. I find that this conversation took place as described by Complainant but that it more likely occurred on Friday, November 7, 1997 than on Monday, November 10, 1997.

24. During the Monday, November 10, 1997 meeting, Piermarini told Complainant that DiFronzo was being let go. Transcript, Volume II at 157. DiFronzo was laid off on Monday, November 10, 1997. Respondent’s Exhibit 12.

25. Complainant testified that she overheard Piermarini tell his secretary to call McIntyre to ask him if there was another site he wanted to go to. Transcript, Volume II at 98.

26. From November 10, 1997 forward, Complainant never complained to Piermarini or to James Trainor that she was the victim of harassment or

retaliation on the job site. Transcript, Volume II at 43, 45, 57.

27. In her charge of discrimination, Complainant alleges that on November 10, 1997, someone spit in her water bottle; that on November 21, 1997 she found a wooden wedge in her lunch bag with the word “cunt” written on it; and that on November 24, 1997 she discovered holes in her fleece pullover. Her husband testified credibly that he found the wooden wedge when he cleaned out her lunch bag, showed it to Complainant, and then threw it in the trash. Transcript, Volume II at 171.

28. Complainant testified that she never told anyone at work about the spit or the wooden wedge because she was “afraid to,” “embarrassed,” and because she believed that Respondent had handled her first report in an “incompetent” manner by relying on her to determine which individuals would be fired. Transcript, Volume I at 111 and 222; Volume II at 123. I credit Complainant’s testimony that she did not report these matters.

29. Complainant testified in a contradictory fashion about whether she reported the holes in her fleece jacket. She asserted at various points in her testimony that she didn’t remember whether she mentioned it to Desi Trainor and at another point that she did remember showing it to him. Transcript, Volume I at 222; II at 58; V at 118. Complainant testified that union steward Maxi Brown knew about the holes in her Polartec jacket because she found it in the mill and made comments about it. Transcript, Volume II at 58. I do not credit that portion of Complainant’s testimony asserting that she reported the holes in her fleece jacket.

30. For approximately a month after the incident with the carved penis, Complainant's co-workers, with the exception of John Eaton, stopped speaking to her. Transcript, Volume I at 106. She worked on various crews during this time including Charlie Cofield's crew and Donnie Vichon's crew. Transcript, Volume I at 213-314. Complainant described herself as an outcast socially with respect to her co-workers in the period around December 18, 1997 although she continued to get along with foremen Cofield and Vichon.
31. According to Desi Trainor, there seemed to be "a little tension" between Complainant and the rest of his crew following the incident with the backer-rod penis but it got better over time. He testified that his crew members were upset that Complainant had reported the backer-rod incident to management rather than to her steward. Transcript, Volume V at 90.
32. On or about November 19, 1997, while erecting staging with her crew, Complainant injured her back. At the time, Complainant was placing eight foot long metal beams on top of the staging. Transcript, Volume II at 128, 136. She did not report her injury to Desi Trainor until December 10, 1997 and, in the interim, continued to perform carpenter duties.
33. On occasions after November 19, 1997, Complainant's lunch container appeared to be deliberately crushed. Complaint of Discrimination; Transcript, Volume I at 132. She testified credibly that Desi Trainor asked her why she was carrying her lunch around with her and she answered that

every time she left it somewhere, it would get “screwed with.” Transcript, Volume I at 162. According to Trainor, Complainant never complained to him that someone had smashed her lunch on purpose. Transcript, Volume IV at 38. I find it more likely than not that Trainor was aware of Complainant’s concern that someone was tampering with her lunch.

34. Complainant testified that some time after she went back to work on November 10, 1997, a co-worker named Ben provided her with incorrect measurements, told her that she should not have brought her husband to the job site to complain about the carved penis in her pocket, and expressed the opinion that she should have stood up for herself. Transcript, Volume II at 127-128. Complainant never told Piermarini about the alleged incident with Ben nor did she include the incident in her charge of discrimination.
35. From November 6, 1997 to December 10, 1997, Complainant’s main job was preparing concrete pours in order to create the roof of the North Station Project. Her tasks included setting staging for the pours, erecting bulkheads to contain the pours, and stripping forms after the pour was complete and the concrete had hardened. Complainant testified that she was given projects that did not involve interaction with other crew members. Transcript, Volume I at 102. According to Desi Trainor, he either assigned Complainant to work with fellow crew members or with himself. Transcript, Volume V at 96. He denied that other carpenters refused to work with Complainant. Transcript, Volume IV at 45; 52. I do

not credit Desi Trainor's testimony about Complainant's interaction with other crew members.

36. Complainant described herself as being a nervous wreck during the Thanksgiving period in 1997. Transcript, Volume I at 112. She testified that everything she ate was going through her and that she had chronic diarrhea. She felt like she was on the verge of crying all the time and would cry in the shower so her children would not see her. She said that she was barely sleeping. She testified that she stopped talking to her husband and didn't want him near her. Complainant characterized herself as "shut down." Id. at 113
37. Complainant reported her back injury to Desi Trainor and to Thomas O'Brien, Respondent's safety officer, on December 10, 1997. She did so because her back seemed to be getting worse and she could no longer work. Id. at 117. The weekend before she reported the injury, Complainant was confined to bed or to a couch. Complainant experienced pain associated with bending and twisting.
38. O'Brien assisted her in filling out an Industrial Accident Board form. They listed the date of injury as December 5, 1997. O'Brien told her that they couldn't put down the real date of injury because she wouldn't be covered. Id. at 118-119. O'Brien took Complainant to Atlantic Health Clinic in Somerville. A physician at Atlantic Health examined Complainant and advised her to stay out of work for two days. On December 12, 1997, O'Brien sent Complainant for a follow-up visit at

Atlantic Health Clinic. The doctor who examined Complainant restricted her from long periods of standing, walking, climbing, bending or stooping and lifting weights greater than fifteen pounds.

39. O'Brien told Complainant to report to work in the carpenters' mill on or about December 15, 1997. Mill work is lighter duty than work in the field, but not "light duty." Transcript, Volume IV at 54-55. Carpenters in the mill cut lumber and plywood pieces to build the forms used by the carpenters on the job site whereas in the field, carpenters have to repeatedly bend, lift, and traverse uneven surfaces, including fields of rebar which are slippery and difficult to walk on. Transcript, Volume II at 71-17 and Volume V at 74. Complainant testified that during the period she was in the mill, due to her medical restrictions she couldn't return to the field and do the type of work that was normally done by her crew. Transcript, Volume II at 72. Complainant also testified that while she was in the mill, she was performing duties that were beyond her medical restrictions, but did them anyway because she was told to do so by her foreman. Transcript, Volume II at 122. Complainant continued to work in the mill until her layoff on January 9, 1998.
40. Complainant alleges that when she returned to work on December 15, 1997, her tool pouches were either hanging up in the mill or on top of her tool box but that every tool in the pouch was missing. Transcript, Volume I at 223-224; V at 125. She testified that she had left her tool pouches on top of her tool box in a "lock box" in the mill on December 5, 1997.

Transcript, Volume V at 122. Complainant testified that she reported to Desi Trainor that her tools were missing and asked him if he had seen her tools. Id. at 126.

41. Trainor testified that while Complainant was out of work due to her back injury, he had packed her tools in her toolbox and placed her toolbox in the back corner of the mill. Transcript, Volume V at 82, 84-85. He acknowledged taking her vice grips for his own personal use and returned them. Transcript, Volume V at 82-83. Complainant informed Trainor that her tape measure, hammer, utility knife, pry bar, and speed square were also missing. Id. at 86-87. Trainor claimed not to be surprised that the tools had disappeared, “because we borrow stuff from each other and sometimes you forget to bring it back.” Id. at 87. Once Complainant informed him her tools were missing, Trainor gave her an old measuring tape to use. He told his crew that if they had any of Complainant’s tools, they were to return them. Transcript, Volume IV at 40-41; Volume V at 87. Complainant testified that after she returned to work, the tools started to reappear on the work bench where she was working, but they were not all returned Transcript, Volume I at 224; Volume V at 127. I find that Complainant’s co-workers deliberately took and failed to return her tools.
42. On or around December 17, 1997, Complainant returned to Atlantic Health Clinic where the doctor told her she could return to full duty on December 22 or 23, 1997. Transcript, Volume I at 129-130 and 134; Complainant’s Exhibit 4. Complainant was also medically restricted

from bending and lifting of weights greater than 35-50 pounds.

Complainant's Exhibit 4. On the day of her Atlantic Health Clinic appointment, Complainant told Desi Trainor that her medical restrictions were lifted, but he told her to stay in the mill. Transcript, Volume V at 110-111.

43. Respondent did not return Complainant to full duty on or around December 22, 1997. Complainant continued to work in the mill. Complainant testified that while she was working in the mill, "different things were aggravating her back." Transcript, Volume V at 134. During the week of January 5, 1998, Complainant told Respondent's safety officer, Tom O'Brien and foreman Desi Trainor that her back was still bothering her and that she wanted to see a specialist. Id. at 134-135.
44. In January 1998, the North Station Super Station Project required fewer carpenters and laborers than it had previously. The carpenters' mill was dismantled because Respondent had completed assembling the roof on the Super Station project and the need for carpenters' forms had diminished. James Trainor made the decision to lay off Complainant because the mill was closing. Trainor also laid off John Eaton who worked in the mill with Complainant. Both Complainant and Eaton were laid off on or about January 9, 1998. From January 4, 1997 to February 1, 1998, Respondent laid off ten carpenters. Respondent's Exhibit 10.
45. At the time Complainant last worked for Respondent, she earned approximately \$25.00 per hour plus benefits. Her health benefits

continued for six months after her she was laid off. Transcript, Volume I at 140. While Complainant worked for Respondent, she also worked for a company called DHL from February 1997 to October 1997. Transcript, Volume I at 144. Her hours were Monday, Wednesday and every other Friday from 5:30 pm to 11:00 pm. Id. at 145. Complainant earned approximately \$8.00 per hour. She stopped working for DHL in order to work overtime for Respondent. Id. at 144.

46. Complainant testified that she saw the mill up and running again within a week after it was shut down. Transcript, Volume I at 68. She saw it being operated a short distance from where it originally was located. Id. at 169. Dave Piermarini testified that the mill was closed down about a month before it reopened. Transcript, Volume III at 202. I find that the mill was up and running within a month.
47. Complainant was not recalled when the mill re-opened. Project manager Dave Piermarini testified that he did not give any consideration to contacting Complainant after the mill re-opened. Transcript, Volume III at 205.
48. Complainant saw Dr. Fulton Kornack on January 22, 1998 because she continued to suffer back pain. Transcript, Volume II at 31-32; Respondent's Exhibit 6. Complainant had x-rays taken. She was diagnosed as having some minor degenerative disk disease and mechanical back pain syndrome. Id. According to Complainant, Dr. Kornack told her to take it easy for four to six weeks and did not write her

a prescription for physical therapy until April 6, 1998. Id. at 33; 39. The doctor's note indicates that she was put on a comprehensive program of physical therapy and anti-inflammatories at the time of her January 22, 1998 visit. Respondent's Exhibit 6.

49. Complainant testified that on January 23, 1998, she contacted the business agent of her union about finding work. She told the business agent that her back was still injured. Complainant testified that he instructed her to contact Respondent about light duty work. Complainant testified that she attempted to call Tom O'Brien. She was told by a secretary that James Trainor would get back to her about work, but he did not do so.

Transcript, Volume I at 138-139. I credit Complainant's testimony.

50. On or about February 9, 1998 to the first week of October 1998, Complainant was employed at a part-time job as an administrative assistant with an organization called "Move Mass 2000." Transcript, Volume I at 140; 145; Volume II at 37. Complainant worked approximately thirteen hours per week and earned \$10.00 per hour. She applied for unemployment benefits at the end of February 1998.

Transcript, Volume I at 140. She received unemployment benefits from March 1998 to June or July 1998. Id. at 142.

51. In February 1998, Complainant contacted the Mount Auburn Hospital Employee Assistance Program because she wasn't sleeping, she was crying excessively, and she had not had sexual relations with her husband since November 1997. Id. at 150. Complainant saw Jim Howland,

LICSW, on seven or eight occasions. Id. at 152. He referred Complainant to therapists associated with Andover Mental Health Associates, whom Complainant began treating with in April 1998, initially twice a week and later once a week Id. at 153-155.

52. Complainant's physical estrangement from her husband lasted almost a year. Transcript, Volume II at 173- 174. She described herself as upset, angry and always feeling hopeless. Complainant testified that as of the public hearing date, she was still having dreams of being told to get off the job site.

53. Complainant's husband, Francis McCormick, described her as happy prior to November 6, 1997. He testified that they had fun with their kids and engaged in physical intimacy two or three times per week. Transcript, Volume II at 163-164. According to Mr. McCormick, Complainant wasn't the same person after November 1997. Transcript, Volume II at 172. She was upset and "couldn't figure out why they laid her off," would cry all the time, was in a depression, and wouldn't do anything with her family. Id. at 172-173.

54. Complainant saw Dr. Kornack again on or about April 6, 1998. Transcript, Volume II at 35; Respondent's Exhibit 7. He drafted a letter stating that Complainant was to do no lifting greater than 20 pounds, and no repetitive lifting, bending or twisting activities. Respondent's Exhibit 7. Complainant testified that she obtained the letter from him for purposes of her Workers' Compensation claim. Id. at 38.

55. On April 9, 1998, Complainant filed a Worker's Compensation claim for her back injury. Complainant claimed "temporary, total incapacity" from December 10, 1997 to January 22, 1998 and partial incapacity from January 23, 1998 through at least April 9, 1998. Respondent's Exhibit 8. The Department of Industrial Accidents subsequently awarded Complainant partial incapacity compensation at the rate of \$416.40 per week from January 9, 1998 to June 24, 1998. Complainant's Exhibit 1; Respondent's Exhibit 9. The date of injury is listed as "November 19, 1997/ December 4, 1997." Complainant's Exhibit 1.
56. Immediately after Columbus Day 1998, Complainant began to work as a carpenter for "Save On-Walls" at a job in Charlestown doing renovations rather than heavy construction. *Id.* at 148. Complainant described herself as being in good shape physically at that time. *Id.* at 158. The parties stipulated that Complainant is not seeking back pay from the date she was hired at "Save On-Walls" in October 1998 forward.

III. CONCLUSIONS OF LAW

A. Gender-based hostile work environment

It is unlawful for "an employer ... because of the ... sex ... of any individual...to discriminate against such individual in compensation or in the terms, conditions or privileges of employment." M.G.L. c.151B, s.4 (1). Sex discrimination includes harassment in the workplace that is gender based but not necessarily sexual in nature. See Dinsmore & Ford v. Home Security, Inc. 19 MDLR 4 (1997); Baldelli v. Town of Southborough Police Department, 17 MDLR 1541 (1995) *citing* College-Town, Division of Interco Inc. v. MCAD, 400 Mass. 156 (1987)).

To establish liability for harassment based on gender, a complainant must prove that: (1) she is a member of a protected class; (2) she was the target of speech or conduct based on her membership in that class; (3) the speech or conduct was sufficiently severe or pervasive to alter her conditions of employment and create an abusive working environment; and (4) the harassment was carried out by an employee with a supervisory relationship to complainant, or respondent knew or should have known of the harassment and failed to take prompt remedial action. See Fluet v. Harvard University, 23 MDLR 145, 161 (2001); Lazure v. Transit Express, Inc. 22 MDLR 16, 18 (2000); MCAD Sexual Harassment in the Workplace Guidelines, at p.30, fn. 23 (October 2, 2002)

The evidence shows that Complainant, the only female carpenter on her crew and one of the few female carpenters who worked for Respondent, was a member of a protected class. On November 6, 1997, fellow crew members placed in her sweatshirt pocket a carving of a penis made out of an industrial material called backer-rod. Complainant was so upset that she left the job site and walked home to Charlestown. Complainant and her husband returned to her job site around noon on November 6, 1997 and met with David Piermarini, Respondent's project manager for the North Station Super Station Project. Complainant's husband showed the carving to Peirmarini and explained that his wife had found the object in her sweatshirt pocket. Peirmarini promised to investigate the incident. He sent Complainant home with pay. Complainant subsequently found a wooden wedge in her lunch bag with the word "cunt" written on it.

To constitute actionable harassment, the claimed conduct must be both objectively and subjectively offensive. See Messina v. Araserve, Inc., d/b/a ARA

Campus Dining Services at Massachusetts Institute of Technology, 906 F. Supp. 34, 36 (1995) *citing* Ramsdell v. Western Massachusetts Bus Lines, Inc. 415 Mass. 673, 678, 615 N.E.2d 192 (1993). The objective standard means that the evidence of gender harassment is to be considered from the "view of a reasonable person in the plaintiff's position." Muzzy v. Cahillane Motors, Inc., 434 Mass. 409 (2001) *quoting* Ramsdell v. Western Massachusetts Bus Lines, Inc. 415 Mass. 673, 678 (1993). The reasonable woman inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it is physically threatening or humiliating, whether it unreasonably interferes with the worker's performance and what psychological harm, if any, resulted. *See* Lazure v Transit Express, Inc., 22 MDLR 16, 18 (2000). The subjective standard is a personal one related to Complainant's own reaction to the harassing conduct. *See* Couture v. Central Oil Co., MDLR 1401, 1421 (1990) (characterizing subjective component to sexual harassment as . . . "in the eye of the beholder.").

Complainant was subjected to behavior that meets both the objective and subjective standards for a hostile work environment. From an objective standpoint, the placing of a carved penis in Complainant's pocket and a wooden wedge in her lunch bag with the word "cunt" written on it constitute sexual harassment. A reasonable woman in Complainant's position would have found such behavior offensive and an impediment to her full participation in the workplace. *See* Couture v. Central Oil Company, 12 MDLR 1401 (1990); Edmands v. Modern Continental/Obayashi, 22 MDLR 75 (2000) (upholding claim of gender harassment where female carpenter was locked in port-a-john, spied on, and subjected to sexually demeaning graffiti) *rev'd on other grounds sub nom* Modern

Continental/Obayashi v. MCAD, 445 Mass. 96 (2005). While the incident involving the carved penis and the wooden wedge with the word “cunt” on it were not part of an ongoing pattern of misconduct, they were sufficiently severe to render the environment sexually hostile. See Clark County School District v. Breeden, 532 U.S. 268 (2001) (recognizing that isolated incidents, if extremely serious, may amount to discriminatory changes in the terms and conditions of employment); Gnerre v. MCAD, 402 Mass. 502 (1988) (the more offensive the conduct, the fewer the incidents of harassment may be required to prevail).

From a subjective standpoint, there is convincing evidence that Complainant was deeply offended. Complainant testified in a sincere and credible manner about her reaction to the carved penis incident, including her need to leave her work site after determining the nature of the wooden object in her pocket and her inability to work with perpetrators McIntyre and DiFronzo after the incident. Complainant’s reaction illustrates that she did not consider the incident to be a joke but, rather, a serious affront to her dignity in the workplace. Contrast Candelieri v. Vanson Leathers, Inc. 24 MDLR 228 (2002) (alleged harassment found not to be subjectively offensive where complainant told dirty jokes on the job, inserted balloons under her shirt and wore blue jeans to work with holes in the crotch and buttocks). I conclude that Complainant has presented sufficient evidence to warrant a finding that the conduct of Complainant’s co-workers created a hostile work environment.

I also draw the conclusion that the conduct was targeted at Complainant because of her gender. The assertion by her crew members that the object was meant for another individual rather than Complainant was not convincing. Complainant noted that the

individual whom several co-workers claimed was the intended recipient of the wooden penis frequently wore plaid whereas she did not. Complainant's sweatshirt in which the carving was placed was not plaid and had Complainant's name on it. These circumstances support the conclusion that the carving was intended for Complainant as the only female carpenter on Desi Trainor's crew.

Since the harassment was not carried out by employees with a supervisory relationship to Complainant, Respondent is only liable for the harassing conduct if it knew or should have known of the harassment and failed to take prompt remedial action. See College Town, Division of Interco v. MCAD, 400 Mass 156, 163(1987); Rose v. Baystate Medical Center, Inc. et al, 985 F. Supp. 211, 218(D. Mass 1997). As far as the wooden wedge is concerned, Complainant admits that she never reported it to anyone. Thus, Respondent bears no responsibility for this matter.

The incident involving the backer-rod penis was reported to management and, thus, raises the question of whether Respondent took prompt remedial action. I conclude that management's response was adequate in this case. Compare Modern Continental/Obayashi v. MCAD, 445 Mass. 96 (2005) (Modern's response adequate where it identified one of the perpetrators of sexual harassment, obtained his apology, relocated his work assignment, and changed his shift). After project manager Dave Peirmarini learned that a carved penis had been placed in Complainant's pocket on Friday, November 6, 1997, he threatened to fire the whole crew unless those responsible came forward.¹ His threat was effective in getting Frank DiFronzo to reveal that he, as well as McIntyre, was involved in the incident. By Monday, November 10, 1997, the two

¹ Unlike the situation in Modern Continental/Obayashi v. MCAD, 445 Mass. 96 (2005), the crew members in this case were employees of Modern Continental Construction Company, not employees of Mohawk, an independent subcontractor.

known perpetrators were gone. One can quibble with the terms of the removal and whether the perpetrators were subsequently rehired by Respondent at a different location, but the fact remains that they were no longer on the job site after November 10, 1997. The pressure put on Complainant to decide whether she could continue to work with McIntyre, DiFronzo, and possibly others is troubling but does not change the outcome that both McIntyre and DiFronzo were both taken off the payroll immediately after disclosure of their involvement in the incident.

There is some evidence that fellow crew members John Eaton and “Packy” were involved in the carved penis incident as well, but Complainant never reported this information to project manager Piermarini. Complainant asserted that foreman Desi Trainor must have known about their involvement, but offered no support for this contention. Even if Complainant had reported Eaton and “Packy” to her foreman, the evidence of their involvement was minimal, consisting solely of DiFronzo’s contention that he threw the carved penis around with them before McIntyre placed it in Complainant’s pocket. This evidence is not a sufficient basis on which to charge Respondent with actual or constructive knowledge that anyone other than McIntyre and DiFronzo sexually harassed Complainant.

Complainant also alleges that McIntyre may have been rehired by Respondent to work a different job site, at some point after the incident. Even if such rehiring took place, the fact remains that both McIntyre and DiFronzo sustained lost income for some period of time, were taken off the Super Station job site, and were precluded from having any further interaction with Complainant. That a real separation from service took place is reinforced by the fact that McIntyre asked for Desi Trainor’s help in locating a job

following his removal from Trainor's crew. In sum, I conclude that Respondent took adequate remedial action to address Complainant's concerns about the penis incident. Thus, Respondent is not liable for the sexually harassing conduct of Complainant's fellow carpenters.

B. Retaliation

Complainant alleges retaliation against Respondent based on finding a wooden wedge in her lunch bag with the word "cunt" written on it, finding spit in her water bottle, having her lunch smashed, having her tools disappear, being treated as a social outcast at work, and being forced to work without a partner. Chapter 151B, sec.4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995).

To prove a prima facie case for retaliation, Complainant must demonstrate that she (1) engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondents subjected her to an adverse employment action; and (4) a causal connection existed between the protected activity, known by the retaliators, and the adverse employment action. *See* Morris v. Boston Edison Company, 924 F. Supp. 65, 68-69 (D. Mass. 1996); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000).

Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, non-discriminatory reason for its actions. See Weber v. Community Teamwork, Inc. 434 Mass. 761, 768-769 (2002); Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive, or state of mind. See Weber, 434 Mass. at 777; Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). 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. However, Complainant retains the ultimate burden of proving that Respondent’s adverse actions were the result of retaliatory animus. See id; Abramian, 432 Mass. at 117.

By reporting the discovery of the wooden penis to project manager Dave Piermarini on November 6, 1997, Complainant engaged in the protected activity of complaining about discriminatory treatment. See Augburg v. American Drug Stores, 21 MDLR 238, 242 (1999) (voicing of informal complaint protected under chapter 151B); Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997) (same). There were immediate repercussions. By Monday November 10, 1997, two of her fellow crew members had been terminated. This sequence of events establishes that Complainant engaged in protected activity and that Respondent was aware that she had engaged in protected activity.

The record also contains ample credible evidence of adverse action following Complainant’s involvement protected activity. Someone spit in her water bottle,

Complainant found a wooden wedge in her lunch bag with the word “cunt” written on it; and she discovered holes in her fleece pullover. Complainant found her lunch deliberately crushed on at least one occasion. Complainant’s co-workers stopped speaking to her which made her feel like an outcast socially. Between November 6, 1997 and December 10, 1997 she was, at times, given projects that involved working in isolation from fellow crew members. On December 15, 1997 Complainant returned to work from a medical leave to find all of her tools taken by her co-workers. On January 9, 1998, Complainant was laid off because the mill was closing. Although the mill was up and running a short time thereafter in a nearby location, Complainant was not recalled. While these circumstances can all be justified by explanations which are devoid of discriminatory animus, the pattern of activity and its proximity to Complainant’s protected conduct suggest that Complainant was being punished for reporting her sexual harassment to management. See Noviello v. City of Boston, 398 F.3d 76 (2005) (retaliatory hostile work environment can be an adverse employment action under chapter 151B sec. 4(4)); Clifton v Mass. Bay Transportation Authority, 62 Mass. App. Ct. 164 (2004) (recognizing a claim of retaliatory harassment based on a hostile work environment); *MCAD Sexual Harassment in the Workplace Guidelines IX.B* (2002). Accordingly, Complainant has established a prima facie case of unlawful retaliation.

Having found that a causal connection might exist between Complainant’s protected activity and the adverse employment actions described above, the burden shifts to Respondent to articulate and produce credible evidence to support legitimate, non-discriminatory reasons for its actions. With respect to spit in Complainant’s water bottle, Complainant’s discovery of a wooden wedge with the word “cunt” written on it, and her

slashed Polartec fleece jacket, Respondent maintains that these actions cannot be attributed to it because it had no involvement in, knowledge of, or responsibility for these matters. Complainant admitted at the public hearing that she never told any supervisors at work about the spit or the wooden wedge and that she could not recall if she told anyone about the holes in her fleece. She did not report these matters because she was fearful, embarrassed, and disgusted at the “incompetent” manner in which management had handled her report regarding the carved penis. Although Complainant asserted that union steward Maxi Brown knew about the holes in her Polartec fleece jacket, Brown was a union official, not a supervisor. There is no basis for imputing either actual or constructive knowledge of these matters to Respondent.

There is credible evidence, on the other hand, that foreman Desi Trainor knew Complainant was being treated as a social outcast in the period around December 18, 1998. He acknowledged that there seemed to be “a little tension” between Complainant and the rest of his crew following the incident with the backer-rod penis because Complainant had reported the incident to management rather than to her union steward. There is credible evidence, moreover, that Desi Trainor contributed to Complainant’s isolation by giving her work assignments that did not involve interaction with other crew members. Complainant told her therapist in February 1998 that she felt “at risk because no one was partnered with her.” Complainant’s Exhibit 3 (Mount Auburn EAP History and Progress Note dated 2/3/98). As Complainant’s foreman, Desi Trainor bears responsibility for her isolation. Moreover, Trainor admitted to taking Complainant’s vice grips while she was out on medical leave and to tolerating, if not condoning, the disappearance of her other tools. He attributed their disappearance to other carpenters

borrowing them, but the facts support Complainant's assertion that the tools were deliberately taken in retaliation for her report of harassment. Credible testimony offered by Complainant similarly establishes that Trainor was aware that one or more individuals on the job site had tampered with her lunch since Complainant told Trainor that every time she left her lunch somewhere, it would get "screwed with."

Desi Trainor's awareness that Complainant was being subjected to retaliation and his failure to prevent it are sufficient grounds for imputing liability to Respondent. An employee such as Trainor may be classified as a supervisor if that individual "is authorized to direct another employee's day-to-day activities." Williams v. Karl Storz Endovision, Inc., 24 MDLR 91 (2002), *citing* Fluet v. Harvard University, 23 MDLR 145, 163 (2001). Although Desi Trainor did not have the authority to hire or fire carpenters or to authorize overtime work, he was the person communicating directives from management to the workers. He admitted that he, "directed [Complainant] and controlled her in terms of what she did." This authority qualified Trainor as a supervisor in his capacity as a crew foreman. Trainor's knowledge of retaliatory actions against Complainant must therefore be laid at Respondent's doorstep. *See* Noviello v. City of Boston, 398 F.3d 76 (2005) (employer liability for co-worker harassment requires a showing that employer knew or should have known about the harassment yet failed to halt it). Since Respondent did not provide legitimate, non-discriminatory reasons for tolerating this atmosphere, it has failed to meet its burden at stage two. Consequently, I conclude that Respondent acted with retaliatory intent, motive, or state of mind in the months following Complainant's protected activity.

Complainant also asserts that her layoff was retaliatory but, unlike the harassment

discussed above, I conclude that her layoff was justified by legitimate, non-discriminatory reasons. The decision to lay off Complainant and other carpenters was made by James Trainor, the same individual who paved the way for Complainant's hiring and with whom Complainant had a good relationship. There is no evidence that James Trainor harbored discriminatory animus towards Complainant. He made the decision to lay off Complainant based on the fact that in January 1998, the North Station Super Station Project required fewer carpenters and laborers than it had previously. The carpenters' mill was dismantled. At the same or similar time he laid off Complainant, he also laid off carpenter John Eaton and at least eight other carpenters.

The issue of recall is another matter. The mill was rebuilt in a nearby location soon after it was shut down. Complainant was not recalled when the mill reopened on or around February 1998. Project manager Dave Piermarini acknowledged that he did not give any consideration to contacting Complainant after the mill reopened. Complainant asserts that she telephoned Respondent's safety officer Tom O'Brien about being rehired and was told by a secretary that James Trainor would return her call. He did not do so. The parties' collective bargaining agreement does not provide for recall rights.

The issue of recall is complicated by the fact that the record contains conflicting evidence as to whether Complainant was capable of performing the duties of a mill carpenter at the time Respondent re-staffed the mill. On the one hand, a physician from the Atlantic Health Clinic determined that Complainant was fit to return to full duty on December 22, 1997. Complainant asserts that she promptly communicated this information to Desi Trainor and asked him every day after that if she could go back out on the construction site. Transcript, Volume V at 110-112. On the other hand,

Complainant testified that on or around January 5, 1998, she complained to Desi Trainor and Tom O'Brien that her back injury was being aggravated while working in the mill and that she wanted to see a specialist. Dr. Kornack, examined Complainant on January 22, 1998 and noted that she was experiencing increased pain with any type of bending or twisting. Complainant admitted that he told her during the January 22, 1998 visit to take it easy for four to six weeks. Dr. Kornack re-examined her on April 6, 1998 and stated that she was to remain on light duty, was not to lift more than twenty pounds, and not to engage in repetitive bending, lifting, or twisting. Complainant filed a workers' compensation claim on April 9, 1998 asserting that she was totally incapacitated from December 10 through January 22, 1997 and partially incapacitated thereafter. Following her layoff, Complainant did not perform any carpentry work until October 1, 1998. Based on these physical limitations and the fact that the parties' collective bargaining agreement does not provide for recall rights, I conclude that Respondent has satisfied its burden to articulate and produce credible evidence to support a legitimate, non-discriminatory reason for its failure to recall Complainant.

Damages

Lost Wages

Upon a finding of unlawful discrimination, the Commission is authorized to award remedies to effectuate the purposes of G.L. c. 151B and to render the injured Complainant whole. Remedies include damages for lost wages and benefits and for emotional distress Complainant has suffered as a direct result of Respondent's discriminatory actions. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-

183 (1988).

Complainant is not entitled to damages for lost wages because Complainant's employment with Respondent terminated as a result of being laid off and the evidence does not support a conclusion that her layoff and failure to be recalled were retaliatory.

Emotional Distress Damages

Turning to the issue of emotional distress damages, Complainant's entitlement to an award of monetary damages does not need to be based on expert testimony; it can be based solely on the Complainant's testimony as to the cause of his distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004); College-Town, 400 Mass. at 169; Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation is not necessary to sustain an award for emotional distress. See Stonehill, 441 at 576. An award must rest on substantial evidence that is causally connected to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. Id.

Complainant testified credibly that she was a nervous wreck during the Thanksgiving period in 1997. Everything she ate was going through her and that she had chronic diarrhea. She felt like she was on the verge of crying all the time and would cry in the shower so her children would not see her. Complainant said that she was barely sleeping. She testified that she stopped talking to her husband and didn't want him near her. Her physical estrangement from her husband lasted almost a year. Complainant

described herself as upset, angry and always feeling hopeless. She characterized herself as “shut down.” Complainant testified that as of the public hearing date, she was still having dreams of being told to get off the job site.

Complainant’s husband, Francis McCormick, described her as happy prior to November 6, 1997. He testified that they had fun with their kids and engaged in physical intimacy two or three times per week. According to Mr. McCormick, Complainant wasn’t the same person after November 1997. She was upset and “couldn’t figure out why they laid her off,” would cry all the time, was in a depression, and wouldn’t do anything with her family.

In February 1998, Complainant contacted the Mount Auburn Hospital Employee Assistance Program (“EAP”) because she wasn’t sleeping, she was crying excessively and she had not had sexual relations with her husband since November 1997.

Complainant saw Jim Howland, LICSW, on seven or eight occasions. He referred Complainant to therapists associated with Andover Mental Health Associates, whom Complainant began treating with in April 1998, initially twice a week and later once a week. Based on the foregoing description of Complainant’s reaction to the events at issue, I conclude that Complainant suffered a substantial emotional injury. Complainant’s testimony was sincere and heartfelt.² Her description at the public hearing of what she

² I make this determination notwithstanding evidence that Complainant submitted a claim for benefits to the Department of Industrial Accidents in which she untruthfully asserted the date of her back injury to be 12/06/97 and untruthfully claimed total temporary incapacity from December 10, 1997 to January 22, 1998. Respondent’s Exhibit 8. These matters are troubling but are mitigated by the fact that Complainant claimed an injury date of December 5, 1997 at the direction of Respondent’s safety officer. Respondent’s project manager, Dave Peirmarini, testified that there was no reason for doubting Complainant’s assertion of injury because she was “a good employee for a long time.” Transcript, Volume 3 at 194. He dismissed the alteration of the date as not constituting a false report. Id. at 196. The correct date was included in the lump sum agreement issued by the Industrial Accident Board. Complainant’s Exhibit 1. Similarly, Complainant’s assertion of total temporary incapacity was modified to partial incapacity by the time the Industrial Accident Board issued an order of payment. Respondent’s Exhibit 9. I conclude that neither of

suffered as a result of Respondent's discriminatory actions was entirely consistent with the descriptions she gave to her therapists in 1998.

Respondent challenges Complainant's claim of emotional distress by noting that her answers on a 1998 psychological questionnaire reveal that during the 1998 time frame she experienced pleasure, was interested in other people, did not feel worthless, had energy, was no more irritable than usual, did not have a diminished appetite, and was no more tired than usual. Complainant's Exhibit 3 (Mt Auburn EAP questionnaire). While those feelings undeniably existed in 1998, others answers to the questionnaire indicate that during that period of time Complainant had lost all interest in sex, couldn't concentrate as well as usual, felt sad some of the time, was more discouraged about her future than she was previously, felt like she was being punished, cried more than she did previously, felt more restless than usual, had difficulty making decisions, and slept less than usual. In short, Complainant's energy level, appetite, and self-worth may have remained intact, but her ability to sleep, her ability to be intimate with her husband, her concentration, and her overall emotional state did not.

I conclude that Complainant is entitled to \$50,000.00 in emotional distress damages attributable to Respondent's retaliatory actions and/or failures to act to prevent retaliation.

IV. ORDER

Civil Penalty

M.G.L. c.151B, sec. 5 states, in part, "If, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful

these matters is sufficient to undermine the veracity of Complainant's testimony.

practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent: (a) in any amount not to exceed \$10,000 if the respondent has not been adjudged to have committed any prior discriminatory practice; (b) in an amount not to exceed \$25,000 if the respondent has been adjudged to have committed one other discriminatory practice during the 5 year period ending on the date of the filing of the complaint. . . .”

In 2000 this Commission determined that Respondent Modern Continental³ did not take adequate remedial steps in response to the sexual harassment of a female construction worker during the period from late 1993 to 1994. See Edmands v. Modern Continental/Obayashi, 22 MDLR, 75 (2000). That case was reversed by the Supreme Judicial Court in 2005 *sub nom* Modern Continental/Obayashi v MCAD, 445 Mass. 96 (2005). Thus, I shall analyze Respondent’s conduct under part (a) of M.G.L. c.151B, sec. 5 rather than under part (b). I find that Respondent’s conduct towards Complainant was so egregious as to merit a civil penalty under M.G.L. c.151B, sec. 5 (a) in the amount of \$10,000.00.

Injunctive relief

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under M.G.L. ch. 151B, sec. 5, Respondent is ordered to immediately cease and desist from further acts of discrimination, including conduct which tolerates or facilitates retaliatory conduct towards victims of discrimination.

³In the 2000 case, respondent consisted of a joint venture between Modern Continental Company and Obayashi, a construction company based in Japan.

Monetary Relief

Respondent shall pay Complainant, within sixty (60) days of receipt of this decision:

1. The sum of \$ 50,000.00 in damages for emotional distress. The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made. If Respondent fails to comply with the terms of this Order within the time period allotted, Complainant should notify the Clerk of the Commission.

Training

1. In 2000, the Commission directed Respondent to establish a written policy setting forth the fundamental steps it would take to investigate complaints of discrimination and harassment. See Edmands v. Modern Continental/Obayashi, 22 MDLR, 75 (2000) rev'd sub nom Modern Continental/Obayashi v. MCAD, 445 Mass. 96 (2005). The events at issue in this case preceded said policy and therefore serve as evidence of its necessity, notwithstanding the reversal of Edmands v Modern Continental/Obayashi by the Supreme Judicial Court. These events also demonstrate the need for Respondent to address remedial measures to be taken in cases of discrimination and harassment. Respondent is therefore directed to provide the Commission with a description of how said policy has been implemented by Respondent and with a written proposal for: a) expanding the policy to include remedial measures in cases where discrimination and harassment have been found to exist and b) preventing retaliation against employees filing discrimination complaints. Respondent shall submit this information within 60 days of the final decision of the Commission.

2. Respondent was also directed in 2000 to develop a plan to train each of its employees in Massachusetts concerning the legal requirements of nondiscrimination in the workplace and to conduct training once a year for three years. See Edmands v. Modern Continental/Obayashi, 22 MDLR, 75 (2000) rev'd sub nom Modern Continental/Obayashi v. MCAD, 445 Mass. 96 (2005) Said order is hereby extended for an additional three years commencing in 2006. The training program shall address the proscription against retaliatory conduct along with the prevention, investigation, and reporting of discrimination in the workplace. Respondent shall submit to the Commission within 60 days of the final decision an addendum to its training program addressing any of the aforementioned matters that are not part of the current training plan.

This decision represents the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may seek review by the full Commission by filing a notice seeking review within ten (10) days of receipt of this decision, and a petition for review within thirty (30) days of receipt of this decision.

So ordered this 13th day of December, 2005.

Betty E. Waxman, Hearing Officer

