

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
LEANNE SULLIVAN
Complainant

v.

DOCKET NO. 97-BEM-4511

JIMBOS SOUTH
Respondent

Appearances: Lynn Whitney, Esq. for Complainant
James V. Marano, Jr., Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

The Complainant, Leanne Sullivan, filed a charge with the Massachusetts Commission Against Discrimination on December 9, 1997, against her former employer, Respondent, Jimbos South. Complainant alleged that she had been sexually harassed by a co-worker while working as a waitress at Respondent, had complained to management and was terminated from her employment in retaliation for complaining of sexual harassment. Complainant further alleged that she suffered lost wages and benefits and emotional and physical distress as a result of Respondent's actions.

The Commission found probable cause to credit the allegations of the Complainant and the parties were allowed to conduct discovery. The Complainant propounded discovery in June of 2001. Respondent failed to respond to Discovery requests and as a

result was sanctioned by the Investigating Commissioner in September of 2003. The sanctions resulted in Respondent being defaulted and denied the opportunity to present evidence and witnesses in its defense. A Motion to remove the default was denied by the Investigating Commissioner for not being timely filed and for failure to show good cause for refusing to comply with the Commission's discovery Order. Respondent was allowed to appear at the public hearing and cross-examine Complainant's witnesses.

Conciliation efforts were unsuccessful and the matter was certified to public hearing. A hearing was conducted before the undersigned hearing officer on February 7 & 8, 2005. Subsequent to the hearing, both parties filed post-hearing briefs. Having reviewed the entire record in this matter and the submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant began working as a waitress at Respondent, Jimbos South, a restaurant in Braintree, Massachusetts in the summer of 1992 when she was 18 years old.

Complainant's mother was a full-time employee at Respondent and continued to be employed by Respondent subsequent to the events at issue in this case.

2. Respondent is an employer within the meaning of G.L. c. 151B. Respondent was owned by the Doulos family, purported to be the owners of Jimmy's Harborside Restaurant and Jimbos Restaurant in Boston. Complainant was interviewed by Irene Doulos and hired shortly thereafter. Complainant worked under Ron Caliri, who she identified as the General Manager of the restaurant and Irene (Rene) and Kim Doulos, who were the daughters of the owner. Complainant testified that the managers she worked under were Ron Caliri, Lori Russo, Rose Kelly and Carl Lovell, who became the

manager at some point in her tenure. Complainant testified that Ron Caliri and Lori Russo were brother and sister. Complainant frequently socialized with her co-workers outside of work.

3. Fred Miller was hired as a line cook after Complainant began working at Jimbos. Complainant testified that she became friendly with him when he began joining her and others for drinks after work. Complainant became involved in a sexual relationship with Miller that lasted for several weeks and was broken off by her. She stated that their dating relationship dissolved rather quickly once she determined that it was not going to be a good relationship.

4. Prior to her breakup with Miller, Complainant had worked at Respondent from 1992 to 1997 without incident or receiving any discipline. She testified that beginning in the summer of 1997, when she ended her relationship with Miller, up until her termination in November of 1997, she was sexually harassed by Miller who she claims created a hostile work environment for her.

5. Complainant claimed that Miller's harassment of her began about a month after their break-up in June or July of 1997, when she began dating someone else, and he accused her of not even "waiting a month before jumping in bed with someone else." She claimed that he made this statement to her in the kitchen of Respondent and that she was caught off guard and felt embarrassed by the comment, which no one else overheard.

6. Complainant claimed that thereafter, Miller began referring to her in the most derogatory terms, calling her a "slut, cheap whore, quick fuck, and cunt." Complainant stated that Miller made such comments on multiple occasions for a number of weeks, when no else was present to hear them, but gradually started saying nasty things to her in

front of other co-workers. She recalled that Miller made sexually offensive comments to her in the presence of her co-worker, Michelle Parker, and Complainant's mother, others on the wait staff and the line cooks, and that this embarrassed her and caused her to feel "that awful pit" in her stomach. She stated on one occasion she almost "puked in a basket." I credit Complainant's testimony that this conduct occurred and that it distressed and embarrassed her. Complainant wept openly when she recalled these comments being made in front of her mother.

7. Feeling that she had to discuss Miller's behavior with management, Complainant did speak to a manager, which one she could not recall, who promised to look into it and get back to her, but she heard nothing back. Complainant testified that Miller's comments became more frequent and were made in the presence of other waitresses named Kristen and Kathy, Linda Dwight, a waiter named Joe McQuaid, and Complainant's mother. The other waitresses and her mother would ask her what was going on or why this was happening. On one occasion her mother even pulled Miller aside to ask him why he was behaving toward Complainant in such an inappropriate manner. Complainant admitted on cross-examination that after awhile things got heated and she argued with Miller and on occasion raised her voice with him. I find that Miller's behavior angered her and though she claims not to remember swearing at him or calling him names in response to his inappropriate behavior, I believe it is likely that this occurred. Complainant admitted yelling at Miller over an incident that occurred between him and her sister at a night club in Boston where he asked Complainant's sister if she were as "good a f—k as her sister, and said, "your sister's such a whore." He also made physical advances to her on the dance floor. Complainant's sister called her from the club to tell her about Miller's

behavior. Complainant testified that she was devastated and angry by what happened between Miller and her sister and she approached Miller afterwards telling him his behavior to both her and her sister was degrading. Contrary to Respondent's insinuation, she was not jealous about Miller dancing with her sister. I credit Complainant's explanation for why she yelled at Miller on this occasion.

8. Complainant stated she continued to be embarrassed and humiliated by Miller's derogatory sexual comments saying they made her "feel nauseous" and "not good about herself." She also claimed that her thought processes were thrown off and she lacked the concentration needed to be a good waitress. She would bring incomplete orders or forget to bring drinks and this impacted her tips. She also suspected that Miller was holding up her orders as he told her sister this.

9. Complainant testified that in addition to derogatory sexual comments, Miller would make sexual gestures to her including moving his pelvis in a suggestive manner, running his tongue over his lips in a suggestive fashion and doing "dirty dancing" moves while on the line. She admitted that the situation with Miller escalated when she began dating someone else who would come to the restaurant. On cross-examination she testified that her new boyfriend and Miller were involved in a minor confrontation in the parking lot of the Respondent in October of 1997, and though she admitted telling her new boyfriend that Miller was harassing her, she denied that she brought him in to threaten Miller. She testified that a manager, Lori Russo, came out to the parking lot to ask her what was going on and she responded, "I don't want to know what's going on." While Respondent questioned her about receiving a written reprimand for this incident, Complainant vehemently denied that she ever received any reprimand regarding this incident and I

credit her testimony. Respondent also attempted to insinuate that Complainant had had disputes with other employees requiring management's intervention prior to her problems with Miller. Complainant denied this on cross-examination contrary to her previous deposition testimony, but later testified that she'd had some minor disputes over issues about table assignments and waitresses who hoarded tables. I do not believe that her credibility was strained over this issue and I believe her testimony about the incidents with Miller and that she did not invite his conduct.

10. Complainant claimed that because the situation with Miller was not getting better she complained a second time to Lori Russo, but did not hear that Russo did anything about her complaint. She also claimed to have talked to managers Rose Kelly and Carl Lovell about the situation. She told Lovell that Miller would sing hard core rap songs with the terms "slut" and "whore" and replace her name in the song and then just claim to be singing. These managers never got back to Complainant to tell her what, if anything, they had done to address her complaints. On cross-examination Complainant's memory was refreshed by her deposition testimony that Lori Russo did tell her that Miller denied making any harassing comments to Complainant. However, she recalled that she approached Russo to ask if Russo had taken any action, and stood by her statement that Russo did not get back to her. She had no recollection of Lovell telling her that Miller denied her allegations.

11. Complainant said that she finally complained to Ron Caliri, the General Manager, about the ongoing harassment by Miller and let him know that she had previously complained to other managers. She did recall a meeting with Caliri and Russo where Caliri asked her a number of questions about Miller's conduct and asked her for the

names of co-workers who had witnessed such conduct. She had no idea if Caliri spoke to these employees or what they might have told him and she had no memory of Caliri coming back to her to state that Miller denied her allegations. Respondent insinuated that Complainant first complained to Caliri when she was reprimanded for the incident in the parking lot with her boyfriend, but Complainant claimed to have approached Caliri prior to that incident. According to Complainant, Caliri said he would have to talk to Miller to figure out what was going on and that he'd get back to her, but a week later when she asked him if he'd spoken to Miller, he had not.

12. Complainant stated she actually went to Caliri with the Sexual Harassment poster from Respondent's bulletin board and stated: "this is what I'm complaining about," but that Caliri seemed to suggest he was too busy to be bothered with her complaint and did not have time to deal with it. She stated that she was present when her mother approached Caliri to ask him why he hadn't done anything about her daughter's complaint and that Caliri was very evasive. According to Complainant, Caliri was friends with Miller, was a mentor to him, and was not sympathetic to complaints about Miller.

13. When Caliri did not get back to her, Complainant felt that she was at a dead end since he was the General Manager, so she proceeded, on two occasions, to call the elder Mr. Doulos, Respondent's owner, at Jimmy's Harborside Restaurant in Boston. According to Complainant, she made these phone calls months after the harassment began and Mr. Doulos did not return her phone calls.

14. However, after Complainant made these phone calls, Ron Caliri called her at her home to ask her why she "went above his head" and called Mr. Doulos. He also stated to

Complainant in this phone call that he would help Miller counter-sue her if she did not drop this. I credit Complainant's testimony that she phoned Mr. Doulos and that Caliri was angry at her for doing so and threatened her to stop complaining.

15. Respondent insinuated through questioning of Complainant that she had been reprimanded on a number of occasions for arguing with management, arguing with Miller and generally causing uncomfortable situations in the restaurant. Complainant admitted that she had raised her voice to management on a few occasions but stated she was angry frustrated and hurt because the harassment went on for so long. Complainant denied being told to stop fighting with Miller in October and November of 1997 and denied asking anyone to fire Miller. She also denied that she was ever formally reprimanded for raising a ruckus or arguing with management and had no memory of receiving verbal reprimands for raising her voice or using vulgarities. There was no evidence allowed in the record to suggest otherwise. Complainant admitted to witnessing what she called a "bogus write-up" of Miller which was done by Caliri but which Miller refused to sign. She stated that contrary to what was noted in that "write-up," she was never "written-up" for harassing Fred. Complainant categorically denied ever seeing a reprimand signed by Russo that she was disrespecting management. Respondent's purported reprimand was not admitted into evidence, and I credit her testimony that she never witnessed any written reprimands. While she denied receiving verbal reprimands related to Miller, she stated that, at one point, Caliri attempted to take away her shift in order to separate her and Miller. While it is apparent that management thought she and Miller were both to blame for their contretemps, Complainant stressed that she had worked for Respondent

for five years without major incident until the problem arose with Miller. I credit this testimony.

16. Complainant testified that on one occasion Caliri stated to her that “women should not be in the workforce; they should be home barefoot and pregnant.” On the night in November of 1997 when Complainant was terminated, she and some others, including her mother, her sister, and a waitress named Kristen were in the front room discussing her claims of harassment. Caliri was also present and he looked at Complainant’s mother and said: “all you girls here are nothing but dirty rotten pigs.” Complainant stated that she was appalled by this comment and her mother began to cry. Lori Russo then suggested that Complainant and her mother take the second half of the shift off stating that the other waitresses would cover their sections for the rest of the night. Complainant and her mother retrieved their jackets and pocketbooks and went home. Complainant stated that she felt sick to her stomach and appalled by Caliri’s comment and that her mother was shaken up by the incident. This confirmed for her that Caliri did not want to hear any more complaints about harassment. I credit Complainant’s version of this incident, however I also believe, as Respondent suggests, that she became angry with Caliri and argued with him. I draw the inference that Russo suggested she and her mother take the rest of the night off to avoid an escalating confrontation with Caliri in the restaurant.

17. Complainant stated that when she arrived at her home in Holbrook, there was a telephone message on her answering machine from Kim Doulos stating that her services at Jimbos were no longer needed and admonishing her for leaving the restaurant in the middle of a shift. Complainant called the restaurant and asked to speak to Kim Doulos.

Doulos told Complainant that she had just talked to Caliri and was appalled that Complainant would leave in the middle of a shift. Complainant protested that Lori Russo had given her and her mother the rest of the night off and Doulos responded that according to Caliri, they had taken it upon themselves to just leave in the middle of their shifts. Complainant stated this was not true and asked if her mother was also fired and Doulos said no. When Complainant again mentioned the sexual harassment Doulos said: "I don't want to hear anything about it."

18. Complainant testified that she wrote a letter to Kim Doulos on November 26, 1997 when the events in question were fresh in her mind and sent it certified mail on that day. (Ex. C-2). The letter was admitted into evidence over Respondent's objection because the date on the letter is January 26, 1998. In the letter she recounted the time-line of Miller's harassment and the events leading up to her termination.

19. Complainant claimed that within a week after sending this letter, she received a phone call from Rene Doulos stating she had read Complainant's letter. Doulos proceeded to apologize to Complainant stating she had no idea what had been going on, and offered Complainant a job at Jimbos Restaurant in Boston, which Complainant declined. The reasons she declined the offer were because she was very upset about the circumstances culminating in her termination and because she lived in Holbrook at the time and Boston was not a convenient place for her to commute to.

20. Thereafter, Complainant filed a Complaint of discrimination with the MCAD. She claimed that the continuing harassment and her termination after complaining to management, left her mentally, physically and emotionally stressed. She stated that she had anxiety attacks which exacerbated her pre-existing chronic asthma and that she used

her inhaler much more frequently which gave her the shakes. She claimed that she suffered from nervousness and anxiety that caused her to be unfocused. Some symptoms of this were that she could never leave her house with worrying about whether she had shut off appliances and sometimes she would forget where she was driving to.

Complainant stated that this anxiety and inability to focus carried over into her other jobs.

21. Complainant stated that she saw her primary care physician who referred her to a therapist who met with her approximately 3 weeks after her November 21, 1997 termination. While Complainant believed she saw this therapist once a week for awhile to address her work issues of the last several months, the therapist's records indicate that they had only one visit in December of 1997. Complainant could not explain this discrepancy and could not remember how many times she saw the therapist, but remembered it was more than one time. When Respondent suggested that Complainant's medical records indicate she had seen the therapist on a more consistent basis two years later in 1999, she appeared confused about time frames.

22. In her 1997 session with the therapist Complainant remembered discussing losing her job, the difficulty of starting over with loss of self-esteem, and feelings of embarrassment and personal self-worthlessness. Complainant also discussed problems with her then current boyfriend and stated she sometimes has a "short fuse" and "hates people." She believes that she was prescribed an anti-depressant but could not recall if it was Prozac or Zoloft and she didn't take it for very long because she could not afford to pay for the prescriptions. Complainant knew that her health insurance would be terminated when she lost her job, but she received no notice or documents from Respondent regarding her health insurance. Complainant stated that she still feels the

effects of her experience at Respondent but has felt better as time has past. She stated she would get nervous every time she started a new job and have anxiety attacks wondering if she'd have a similar experience. I find that Complainant suffered emotional distress as a result of the sexual harassment she endured at Respondent and her subsequent termination.

23. On cross-examination Complainant admitted that she had seen a therapist in the context of her parent's divorce as early as November, 1990, when she was 17 and more than a year before commencing work at Jimbos. She was prescribed both Prozac and Klonopin. Complainant did not recall being treated for headaches and prescribed Fioranol resulting from a break-up with a boyfriend in 1990, but did not dispute her doctor's records. She testified that she has had asthma flare-ups her entire life and that they are often exacerbated by stress. Her doctor's notes indicated that 1992 was a particularly stressful time for her as she tried to support her mother who was going through a divorce and her own break-up with a boyfriend. However, Complainant was not seeing a therapist or taking medication for most of the time she worked at Respondent and did not do so until after she was terminated. Complainant saw a therapist again in 1999 and 2000 for issues relating to a break-up with her boyfriend, a serious problem with alcohol, anger and depression. She also discussed issues related to her father, from whom she is estranged, and had complaints of repeated difficult relationships with men. Complainant did not discuss sexual harassment or her problems at Jimbos with her therapist in 1999, two years after the events that precipitated her termination. She returned to work at Jimbos in 1999 for a brief period when Russo asked her mother if she would be interested in picking up a few lunch shifts. She did so knowing that Miller was

still employed there but said she did it because Russo asked her mother and to make some extra money. She was not friendly to Miller who complained she was not the same person and told her he was hurt by her behavior. She responded, "I'm not here to socialize." She was let go a second time by Caliri who told her that Miller could not deal with her being in the restaurant.

24. Complainant sought other employment after her termination from Jimbos in 1997 and within a month or so of her termination she began work as a cocktail waitress at Memory Lane, a lounge in Braintree. During the time she was out of work she met most of her expenses including a car payment and car insurance by charging to her credit cards or borrowing money. Complainant worked Friday nights and some Saturday nights at Memory Lane earning \$2.63 per hour plus tips. She could not recall the amount of her tips but believed them to be less than at Jimbos because the lounge did not serve meals. She worked at that job for a month or two.

25. In the winter of 1998 sometime after the holidays, Complainant began working at Joe's American Bar and Grill in Hanover and worked 2-3 lunch time shifts a week. This was a part time job with no benefits and she remembered her tips being \$10 to \$20 less per shift, because they were lunch shifts. She estimated that her average combined salary from these two jobs was \$240 to \$330 per week and that this included tips. She worked these two jobs until she began working at Lindsey's Restaurant in Wareham in May or June of 1998. The job at Lindsey's was full time with 6 to 8 shifts per week, but she received no benefits. She could not recall the amount of tips she made at Lindseys, where she worked until the end of November, 1998, but estimated the range was from \$220 to \$450 per week. Complainant had received a degree in respiratory therapy in

1996 and she began working as a respiratory therapist in November of 1998 at a hospital and part-time at a nursing home facility. By the end of 1998 or early 1999 she was receiving health insurance again. Complainant estimated that her wages plus tips at Jimbos ranged from \$400 to \$800 per week and that this varied because there were good and bad weeks. Complainant's W2 forms for the years 1996 and 1997 at Jimbos indicate that she earned \$16,768.84 and \$16,025.64 respectively. This would indicate that Complainant earned an average wage of less than \$400 per week, but she does not know how Jimbos factored in her tips to her reported income.

III. CONCLUSIONS OF LAW

Sexual Harassment

Massachusetts General Laws c. 151B §4 (16A) makes it an unlawful practice for an employer personally or through its agents, to sexually harass any employee. Sexual harassment includes "sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when ... (b) such advances requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. G.L. c. 151B § 1(18). In order to constitute sexual harassment that is actionable under the statute, the conduct complained of must be sufficiently severe and pervasive to alter the conditions of one's employment. College-Town Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1986).

To prevail on a claim of hostile work environment, Complainant must demonstrate that: (1) she was subjected to conduct of a sexual nature; (2) such conduct

was unwelcome; (3) such conduct had the purpose or effect of creating an intimidating, hostile, humiliating or sexually offensive work environment; and (4) the conduct unreasonably interfered with Complainant's work performance or altered the terms and conditions of her employment. See MCAD Sexual Harassment in the Workplace Guidelines, 24 MDLR (2002).

In this case, Miller's verbal and physical conduct toward Complainant was sexually offensive, degrading and humiliating. Miller's sexually explicit and degrading insults and his sexually suggestive comments and gestures toward Complainant were overtly sexual in nature. Such behavior persisted over a period of several months, creating a humiliating and sexually hostile work environment for Complainant and interfering with her ability to do her job. In order for conduct to be considered pervasive, Complainant must demonstrate that she was subjected to a "steady barrage of opprobrious [sexual] comment or abusive treatment." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 214 (2000) [quoting Carlton v. Worcester School Dept., 14 MDLR 1143, 1147 (1992)] Given Complainant's credible testimony regarding the frequency and severity of Miller's conduct, I conclude that it was severe and pervasive and resulted in the creation of a sexually hostile, humiliating and offensive work environment for her. Complainant indicated that Miller's sexually offensive behavior and comments frequently caused her to lose her concentration and affected her ability to be an effective waitress. I am persuaded that his conduct altered her working conditions and interfered with her ability to perform her job.

The fact that Complainant and Miller had dated and engaged in a consensual sexual relationship prior to his harassing conduct does not alter the fact that his

subsequent conduct was unwelcome. Complainant testified credibly that she did not invite Miller's harassing conduct and was at first taken aback and then humiliated, upset, and angered by it. Complainant's angry responses to Miller, her mother's protestations to him, and her complaints to management, all indicated that Miller's behavior was unwelcome. By its attempts to assail Complainant's character with questions regarding the number of the men she dated and the nature of the relationships, Respondent did not succeed in demonstrating that she provoked or invited Miller's conduct. The inquiry into Complainant's dating habits had no bearing on the fact that Miller's offensive and abusive conduct towards her was unwelcome and created a sexually hostile work environment.

Since Miller was not a manager or a supervisor of Complainant, the Respondent is liable for his acts of sexual harassment if it knew or should have known of the harassment and failed to take reasonable steps to ensure that it ceased. College-Town, supra. 400 Mass. at 163. Complainant testified credibly that she complained to a number of managers about Miller's inappropriate conduct and that none of these managers informed her of any measures taken to remedy the situation. When she followed up with one manager she was told that Miller denied the conduct.

Based on Complainant's assertions and the escalation of the situation between her and Miller, I conclude that Respondent's managers were on notice of Miller's harassing conduct and did not take adequate steps to ensure that his unlawful behavior ceased. Furthermore it is apparent that Respondent's managers blamed Complainant for inflaming the situation with Miller, when she responded angrily to him. I do not doubt that altercations between Complainant and Miller occurred, and that Complainant was not

shy about voicing her displeasure at Miller. It is understandable that Respondent sought to avoid such disruptions in the restaurant, but it appears that Miller escaped these incidents unscathed notwithstanding his provocative and offense behavior.

Given all of the above, I conclude that Complainant has proved a claim of hostile work environment sexual harassment for which Respondent is liable.

Retaliation

Complainant alleges that she was terminated from her employment in retaliation for her having complained repeatedly about Miller's harassment of her. There is sufficient evidence to suggest that this in fact was the case. General Laws c. 151B §4 (4) prohibits discrimination against individuals who have opposed any practices forbidden under c. 151B. To prove a prima case of retaliation Complainant must demonstrate that she (1) engaged in a protected activity; (2) Respondent was aware that she engaged in protected activity; (3) Respondent subjected her to an adverse employment action; and (4) a causal connection existed between the protected activity and the adverse employment action. Morris v. Boston Edison Company, 924 F. Supp. 65, 68-69, Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000).

Complainant engaged in protected activity when she complained to Respondent's managers about Miller's sexual harassment. Complainant testified credibly that she registered complaints with managers Ron Caliri, Lori Russo, Rose Kelly, and Carl Lovell. When she received no adequate response from them, she actually placed phone calls and left messages with Mr. Doulos, the owner, at his Boston restaurant. Complainant testified that after she made these phone calls, Caliri admonished her for going over his head and threatened to help Miller counter-sue her. I find that Caliri was

angry with Complainant for complaining about Miller, for going over his head and refusing to drop the issue and that he threatened her. The fact that he was friends with Miller and mentored him lends further credence to Complainant's allegation that this occurred. Miller's threats clearly constituted retaliation for Complainant's having engaged in protected activity within the meaning of c. 151B. Furthermore, I find that his dishonesty surrounding Complainant's termination discussed below, was also retaliatory.

Complainant alleges further that on the night she was terminated she was discussing Miller's harassment with her mother when Caliri made an abusive comment about women. The record does not reflect what exactly provoked Caliri's comment, but the end result was that an altercation ensued and Russo suggested Complainant and her mother take the rest of the night off, promising their shifts would be covered. When Complainant arrived home there was a message on her phone from Kim Doulos terminating her employment for leaving in the middle of her shift. I find that Caliri lied to Doulos about the circumstances surrounding Complainant's leaving that night and when Complainant attempted to explain this to Doulos, her protestations fell on deaf ears. Even if one were to conclude that Doulos acted in good faith, based upon what she believed was accurate information from Caliri, once Complainant mentioned allegations of sexual harassment, Doulos had a duty to examine the truth of Caliri's assertions and his motive for lying. Had she done so, she would likely have understood that Caliri was not candid with her and was operating from a retaliatory motive. Moreover, after Rene Doulos read Complainant's letter fully apprising Respondent of her allegations against Miller, she apologized to Complainant and offered her a job at another location. In light of the above, I conclude that Complainant's termination would not have occurred but for

her having complained repeatedly about Miller's sexual harassment and I conclude that it was retaliatory and in violation of G.L.c. 151B § 4(4).

IV. REMEDY

Pursuant to G.L. c. 151B §5, the Commission is authorized to order remedies that will effectuate the purposes of this chapter. This includes the authority to make a complainant whole by restoring her to the position she would have been in absent the discrimination. The Commission has the power to award back pay and damages for emotional distress, to order affirmative relief, including training and to assess civil penalties, where appropriate.

In this case, Complainant seeks back pay for a period of time after she was terminated from Respondent. Complainant testified that her earnings varied from a range of \$400 to \$800 per week while at Jimbos. Her estimation of the average amount of her tips and wages is grossly inconsistent with her W2 forms for the years 1996 and 1997. Those W2 forms indicate that she earned \$16,768 and \$16,025 at Jimbos in 1996 and 1997 respectively. Complainant testified that she reported all her tips to Respondent and that they were factored into the statement of earnings on her W2 but she did not know how Respondent factored her tips into her W2 earnings. While it may be reasonable to assume that Complainant earned more in tips than was reflected in her W2 forms, there is little credible evidence from which I might reasonably conclude, how much this was. While Complainant testified that she averaged about \$400 or more per week at Jimbos than she earned in her subsequent jobs, I cannot rely on this testimony given the widely conflicting information on her

W2 forms. Since no W2 forms nor tax returns were submitted for the years of 1998 and 1999, there is no documentation from which to compare Complainant's wages in 1996 and 1997 to the subsequent two years. Given the lack of reliable evidence regarding how wages and tips were reported or calculated for tax purposes, and the lack of documentation regarding Complainant's income in subsequent years, I am unable to make a reasonably accurate assessment of any back pay due Complainant and I therefore decline to make any such award.

Complainant also makes a claim for damages for the emotional distress she suffered as a result of Miller's conduct and her termination. "Emotional distress damage awards, when made, should be fair and reasonable, and proportionate to the distress suffered." Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). The factors to consider when making awards of such damages were articulated in Stonehill, as follows: "(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication)." *Id.* at 576.

I conclude that Complainant suffered emotional distress resulting from Miller's treatment of her and from what she rightly perceived to be a retaliatory termination. Complainant testified credibly that she felt degraded and humiliated by the sexually offensive behavior Miller directed at her compounded by the fact that her mother witnessed some of this conduct. She felt angry and frustrated that Respondent allowed the conduct to continue for so long, without taking any effective measures to ensure that it ceased. Complainant testified that the ongoing harassment and her

subsequent termination left her mentally, physically and emotionally stressed. I credit her testimony that she had anxiety attacks that exacerbated her chronic asthma condition. She suffered from increased anxiety and inability to focus. Complainant was referred by her primary care physician to a therapist with whom she had one visit in December of 1997. While she did not remain in therapy she discussed with the therapist her feelings of loss of self esteem and embarrassment resulting from her employment situation. Complainant also testified to feelings of anxiety that would re-surface when she started a new job, but stated she has felt better as time has passed. Complainant clearly experienced other sources of stress in her life and had seen a therapist and been treated for headaches previously. Notwithstanding, I am persuaded that being subjected to a sexually hostile work environment by Miller and being fired from her job as a result of her complaints were significant contributing factors to her emotional distress. Given all of the above, I conclude that Complainant is entitled to an award of damages for emotional distress in the amount of \$40,000.

I also conclude that this matter presents an appropriate case for training of Respondent's staff.

Based on the forgoing findings of fact and conclusions of law, I hereby enter the following order:

(1) Respondent shall pay to Complainant the sum of \$40,000 in damages for emotional distress, with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue.

(2) Respondent shall take measures to ensure that its employees cease and desist from engaging in further acts of sexual harassment in the workplace.

(3) Respondent shall take measures to ensure that its entire staff receives training annually in issues related to sexual harassment for the next 5 years and shall report to the Commission on an annual basis as to its compliance with this Order, noting the date, time, and location of each training, identifying the trainer and the training agenda and providing names and positions of each individual trained.

The parties shall notify of the Clerk of the Commission regarding compliance with this Order.

This decision represents the final Order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 C.M.R. 1.23 by filing a Notice of Appeal to this decision with the Clerk of the Commission within ten days of receipt of this Order and a Petition for Review within thirty days of receipt of this Order.

So Ordered this 13th day of March, 2006

Eugenia M. Guastaferr
Hearing Officer