

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

LEO MEDEIROS and MICHAEL DOW
Complainants

v.

Docket Nos. 96-BEM-0748, 96-BEM-1461
97-BEM-0527, 97-BEM-0548

PENSKE TRUCK LEASING,
Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

Appearances: Peter J. Kajko, Esq., for Complainants
Barbara M. Hyland, Esq., for Respondent

I. PROCEDURAL HISTORY

On April 11, 1996, Complainant Leo Medeiros (“Medeiros”) filed a complaint with the Massachusetts Commission Against Discrimination (the “Commission”) (No. 96-BEM-0748), claiming that his former employer, Penske Truck Leasing (“Penske” or “Respondent”) subjected him to unlawful sexual harassment in violation of M.G.L. c. 151B, § 4. On May 10, 1996, Complainant Michael Dow (“Dow”) filed a similar sexual harassment complaint against Penske (No. 96-BEM-1461). On February 21, 1997, Medeiros filed a second complaint with the Commission (No. 97-BEM-0527), alleging that Penske subjected him to unlawful retaliation in violation of M.G.L. c. 151B, § 4(4). On February 23, 1997, Dow likewise filed another complaint that similarly alleged Penske engaged in unlawful retaliation (No. 97-BEM-0548).

On April 13, 1999, the Commission found probable cause to credit both Medeiros and Dow's allegations of sexual harassment and retaliation.¹ On April 13, 2001, the Commission certified the cases for Public Hearing. A consolidated public hearing was held before me on July 22 – 25, 2002, in Boston, MA. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at hearing, and the stipulations of the parties. I have likewise considered the proposed Findings of Fact and Conclusions of Law submitted by the parties after the public hearing. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

A. THE PARTIES

1. Complainant Leo Medeiros resides in Medford, MA, and worked for Respondent as an automotive technician ("mechanic") from March 1993 to October 1996. Medeiros is an employee within the meaning of M.G.L. c. 151B, § 1(6).
2. Complainant Michael Dow resides in Stoneham, MA, and worked for Respondent as a "hiker" from April 1995 to September 1996. Dow is an employee within the meaning of M.G.L. c. 151B, § 1(6).

¹ Medeiros and Dow shall be referred to collectively as the "Complainants."

3. Respondent Penske Truck Leasing Company has its principal place of business in Reading, PA, and has numerous truck leasing facilities in Massachusetts, including a location in Medford, MA. Penske has more than six employees in Massachusetts and is, therefore, an employer within the meaning of M.G.L. c. 151B, § 1(5).

4. Medeiros testified that at all times pertinent to this action, he was a highly proficient automotive and truck mechanic (“technician”) and maintained an “A.S.C.” certification in mechanics. In 1993, Penske hired Medeiros as an automotive technician at its facility in Medford, MA. Medeiros’ responsibilities at Penske included all aspects of truck repair and maintenance.

5. As an initial matter, Medeiros readily admitted at the Public Hearing that he lied under oath at his deposition when he denied both having a criminal record and being terminated by another employer. He also acknowledged that he falsely claimed on his employment application that he did not have a criminal record.² Although these types of fabrications often severely undermine a witness’s credibility, I am not convinced that these falsehoods call into question Medeiros’ credibility on the pertinent aspects of this case.³ On a somewhat

² I find it ironic that Penske would claim that this evidence severely undermined Medeiros’s credibility, when Daniel Labrie, who supervised Medeiros at Penske, terminated Medeiros’ employment, and testified on behalf of Penske at the Public Hearing, admitted that he never told Penske that he was terminated by his previous employer or that his termination resulted from a complaint against him for sexual harassment.

³ As stated by the Commission in Baptiste v. County of Barnstable Registry of Deeds, 11 MDLR 1016 (1989), evidence of a witness’s criminal conviction “is generally admissible to impeach the witness’s credibility in both civil and criminal cases, pursuant to M. G. L. c. 233, 521.” However, the Commission is an administrative body whose practices are governed by M. G. L. Chapter 151B, which specifically provides that “[t]he Commission shall not be bound by the strict rules of evidence prevailing in courts of law or equity.” M. G. L. c. 151B, § 5. Although I have considered the evidence of Medeiros lying at his deposition for what it is worth, I am not persuaded that the criminal conviction calls into question the entire

related matter, at the Public Hearing Medeiros also acknowledged that he had filed numerous civil actions in the past, including a wrongful termination claim against another employer. However, Respondent failed to provide sufficient credible evidence that these lawsuits were frivolous in nature or filed in bad faith and, therefore, I give them no weight.⁴

6. In May 1995, Penske hired Michael Dow as a “hiker.” A hiker’s primary job duty is to move trucks from one location to another, or to drive another hiker to another location. At the time of the public hearing, Dow was thirty-four years old and a graduate from Clearway High School, a school for children with learning disabilities. In addition to moving trucks for Penske, Dow helped clean the shop, conduct Preventative Maintenance (“PM”) checks, check tires, conduct circle checks, empty trash, and wash trucks. He stated that his job duties also regularly included providing assistance to the mechanics in the garage. Dow testified that Penske subsequently promoted him to a “sales” position, which involved calling Penske’s competitors to compare rates. He claimed that he was the only hiker ever asked to do this sort of work. I credit Dow’s testimony.

7. “Hikers” are seasonal employees with no set hours and work on an “as needed” basis. However, Dow testified that he typically worked from 7 or 8 a.m. through 3 to 4 p.m., Monday through Friday and, if needed, Saturday. Dow stated

credibility of Medeiros’s testimony. I have had the opportunity to observe Medeiros on the witness stand throughout his testimony, and I have weighed these observations against the evidence of his acknowledged falsehoods. Consequently, I have credited his testimony where appropriate. *See, Baptiste*, 11 MDLR at 1020; *but see, Williams v. Karl Storz Endovision*, 24 MDLR 91, 94 (2002) (testimony lacked credibility where witness had both lied at least twice about her educational experience in an affidavit filed with the Commission, and gave contradictory and confusing testimony).

⁴ Medeiros testified that at some point after being terminated by Penske, he received a lump-sum cash settlement as a result of his suit against a former employer.

that his direct supervisors were Kevin Malloy and Robert Keanes, but he also answered to supervisors Michael Dwyer, Robert Labonte and Brian Hickey.

8. Similar to Medeiros, Dow admitted at the Public Hearing that he had filed numerous civil actions and workers' compensation claims. He also acknowledged having a criminal record. Dow further testified that he had issues with drug and alcohol abuse during the period he worked at Penske. In addition, he suffered from obsessive-compulsive disorder, anxiety, and depression. However, for the reasons stated above with respect to Medeiros' testimony, I do not believe this evidence undermines Dow's credibility and I have credited his testimony where appropriate.⁵

B. ALLEGATIONS OF SEXUAL HARASSMENT

9. In December 1994, Penske hired Frank Botelho as an automotive technician. Both Medeiros and Dow have each claimed that shortly after Botelho started working at Penske, Botelho began to repeatedly physically touch them in a sexually offensive manner and engage in other sexually inappropriate behavior. Specifically, Medeiros provided detailed testimony regarding numerous incidents where Botelho grabbed his buttocks or penis, or tried to kiss him. Dow similarly claimed that Botelho grabbed his nipple, penis, buttock and ear, and made unflattering comments about his penis size. In addition, both Medeiros and Dow described separate incidents where Botelho exposed himself in a sexually crude and offensive manner. Complainants also detailed various incidents where Botelho engaged in similar offensive conduct with both co-workers and supervisory personnel. Furthermore, they both stated that Botelho made

⁵ See, note 3, *supra*.

numerous highly inappropriate sexual comments to coworkers, supervisors, and managers.

10. Medeiros testified that he kept contemporaneous notes of these incidents in a pocket size “weekly planner” (Exhibit 3). He further stated that he and his wife Francine copied the notes into a legible format (Exhibit 33). At his deposition, Medeiros testified that the original notebook had been destroyed or thrown out. However, at the Public Hearing he testified that although he truthfully believed at the time of his deposition that the original had been destroyed, he discovered the original notebook just days prior to the public hearing, whereupon he promptly turned it over to his attorney. Francine Medeiros corroborated her husband’s testimony. She stated that her husband requested that she copy over the diary, correcting the spelling and grammar. She explained how Leo read aloud the entries in the planner while she wrote down what he said almost verbatim, merely correcting for grammar. According to Leo, the dictated or copied version summarized most, but not all, of the entries from the original notebook. He further claimed that he never did a “head to head” comparison between the dictated summary with the original notebook, but he testified that the dictated version was largely accurate as to dates and times. Leo Medeiros then gave the dictated version of the notebook to their attorney, which was turned over to Respondent’s counsel during discovery. Francine testified that she and her husband wanted to destroy the original notebook for fear that their daughter would find and read it. I find Leo and Francine’s testimony regarding the notebook to be credible. In addition, although the dictated version is not identical

to the original, I believe that the changes in the dictated version to be minor in nature and, contrary to Penske's charges, not a self-serving memorialization of the original document.⁶ Lastly, although Botelho claimed he was on vacation at times he purportedly harassed Medeiros, as described in the notebook, for the reasons stated below, I found Botelho's testimony lacked credibility.

11. Botelho worked from 2:30 pm to 11:00 pm, except on Friday when his shift began at 12:00 pm. Although Medeiros' shift began at 7:00 am, he testified that their shifts overlapped by at least an hour Monday through Thursday, and by a few hours on Friday. In addition, Medeiros claimed that Botelho would often come to work early. I credit Medeiros' testimony.

12. Medeiros' problems with Botelho included an incident in August 1995, when Botelho approached him while he was repairing a truck and then whispered, "do you want to see how I pet it?" According to Medeiros, Botelho then pulled out his penis and began to fondle it. Medeiros stated that at that moment, Michael Dwyer, the Service Manager, walked up behind Botelho, saw what Botelho was doing, and told Botelho that he was a "sick fuck." Medeiros claimed that Dwyer then merely walked away shaking his head. I credit Medeiros' testimony.

⁶ The absence of two incidents described in the original notebook, but omitted from the dictated copy, buttress Medeiros' contention that he and his wife inadvertently or mistakenly failed to copy all of the notes from the original. Specifically, the original planner contained the following notations that Medeiros did not include in the dictated version. "March 1, 1996: While I was writing up a R/O at service write up desk he snuck up from behind as if he were reaching to get into cabinet and rubbed my penis laughing saying What [sic]." In addition, that same day, he further wrote "I was on the phone with my wife. He asked if I was speaking to Francine. He said tell her I want some linguica while rubbing me with a screw driver."

13. Medeiros further testified that on December 21, 1995, Botelho grabbed his penis and said it felt nice and big. Medeiros claimed that he immediately went to see District Manager Greg Walker to complain about Botelho's conduct. According to Medeiros, he explained in detail to Walker and Michael Dwyer what had just transpired. Medeiros testified that Walker said he would address the situation immediately and both Walker and Dwyer indicated that they would speak with Botelho. Although neither Walker nor Dwyer testified at the Public Hearing, Penske does not deny that Medeiros complained about Botelho's conduct in December 1995. I credit Medeiros' testimony.

14. Medeiros also testified that after December 1995, Botelho often approached him from behind and grabbed or rubbed his buttocks and said, "You have a nice ass." Specifically, Medeiros stated that on February 15, 1998, Botelho grabbed his buttocks as he was writing up a repair order at the service desk. Medeiros claimed that Supervisor Brian Hickey witnessed this incident, but Hickey merely responded by shaking his head. Medeiros claimed that he yelled to Hickey, "Tell him to keep his fucking hands off me." Although Hickey denied ever witnessing Botelho touch another employee's buttocks or hearing Botelho make any sexual comments, he stated that it was "not a big deal" if one employee either touched a co-worker's buttocks or groin, or said "suck me." He also claimed that he would not be surprised if Botelho had testified that he grabbed other employees' buttocks. I credit Medeiros' testimony regarding this incident.

15. According to Medeiros, the following day Botelho snuck over and rubbed Medeiros' crotch while he worked under a tractor. In response, Medeiros claimed that he tried to kick Botelho and yelled, "Get the fuck away from me." He further stated that Botelho responded by saying, "You should be used to me by now" or words to that effect. I credit Medeiros' testimony regarding this incident.

16. Medeiros also testified that on March 1, 1996, while he spoke to his wife Francine on the phone, Botelho approached him, rubbed Medeiros' crotch with a screwdriver, and said, "Tell your wife that I want some "Linguiça." According to Medeiros, "Linguiça" is a Portuguese sausage and commonly used as slang for "penis." Francine Medeiros corroborated her husband's testimony regarding this phone conversation. Furthermore, Leo Medeiros stated that later the same day, while he was writing up a repair order at the service desk, Botelho snuck up behind him, rubbed Medeiros' penis, and laughed. Medeiros claimed that he then turned toward him and said, "Get away from me." I credit Leo and Francine Medeiros' testimony.

17. Medeiros stated that on March 6, 1996, in the presence of workers from Patriot Tires, Botelho asked him several times if he "sucked pri." Botelho and Medeiros both acknowledged that "pri" is slang for "penis." In addition, Medeiros testified that on March 22, 1996, Botelho again asked him several times if he "sucked pri." Dow likewise testified that Botelho would often say to him and others in the shop, "Do you like to suck pri?" Medeiros also claimed that on March 15, 1996, while talking to a customer from Fidelity Properties, Botelho walked between them and rubbed Medeiros' crotch. According to Medeiros, Botelho told

the customer “Leo was queer and liked it.” Medeiros claimed he replied by saying, “I am going to punch you in the fucking head;” to which Botelho laughed and responded, “Which head?” I credit Medeiros’ testimony.

18. Furthermore, Medeiros claimed that on March 26, 1996, while bent over the seat of a van, Botelho snuck up from behind and started to “hump him” (i.e., physically simulate intercourse). Moreover, Medeiros testified that on April 1, 1996, while standing on a tire to work on a truck, Botelho snuck up behind him and grabbed his crotch from between his legs. He also stated that on April 9, 1996, he was in the men’s room getting changed when Botelho came in the room, approached Medeiros with his penis in his hand, and asked, “Could you do anything with it?”

19. Dow claimed that his first incident with Botelho occurred shortly after Botelho started working at Penske, when Botelho grabbed his nipple. Dow testified that he yelled at Botelho not to do that. He also stated that he never encouraged Botelho’s behavior and frequently told Botelho, “Don’t touch me or there will be problems.” I credit Dow’s testimony.

20. On another occasion, Dow stated that a co-worker named Lawrence came out of the locker-room and told him that Botelho needed him. Dow claimed that when he entered the locker room, “Frank was holding himself and patting himself with his penis exposed saying, ‘Do you like what you see?’” Dow responded by telling Botelho, “You are a sick fuck!” He further testified that he reported this incident to supervisors Kevin Malloy, Robert Keanes and Joe DiGregorio.

According to Dow, all three managers told him, "We'll take care of it", or words to that effect. I credit Dow's testimony.

21. Dow claimed that he felt particularly hurt and damaged when, on three or four occasions, Botelho grabbed Dow's penis and said, "You don't have anything", or "You've got a small dick. How could a woman enjoy you?" Dow testified that he "went ballistic" over these remarks and felt "devastated" particularly because other employees in the shop heard these comments. He further claimed that Botelho said, "A woman has a vagina and she needs it to be filled to have an orgasm... No wonder why your girlfriend broke up with you." On another occasion, Dow claimed that he was walking with his hands full of equipment, when Botelho tried to grab his crotch. Dow stated that he managed to cover his crotch, but could not stop Botelho from grabbing his buttocks. According to Dow, another hiker named Chuck saw this event. Dow testified that it seemed as if Botelho harassed him nearly everyday. He claimed that if he tried to avoid Botelho, Botelho would jump in front him and say, "You love it", or "You like it." I credit Dow's testimony.

22. Jennifer DeManbro testified that she was Dow's girlfriend during part of the period he worked at Penske. She testified that during a telephone conversation with Dow, who was at work, she heard Dow say, "Frank get the fuck away!" Dow then explained to her that Botelho had just come up and grabbed his penis. I credit DeManbro's testimony.

23. Dow testified that he also witnessed Botelho harass Medeiros. Specifically, he stated that he saw Botelho grab Medeiros' groin, penis and

buttocks. On one occasion, he heard Medeiros yell at Botelho to “Get the fuck away”, and further say, “You have a beautiful wife Frankie, what the hell are you doing?” I credit Dow's testimony.

24. Medeiros also claimed to have witnessed Botelho harass Dow. First, Medeiros testified that on March 26, 1996, while Dow was assisting him by holding a light inside a truck, Botelho grabbed Dow's penis. According to Medeiros, Dow responded by warning Botelho, “I am serious, don't fuck around like that.” Medeiros also stated that immediately after touching Dow, Botelho rubbed Medeiros' buttocks and told Dow that Medeiros liked it. In addition, Medeiros testified that on April 23, 1996, Botelho approached him in or near the lunchroom and tried to kiss him. Dow testified that he witnessed this incident and heard Medeiros say, “Stop kissing me”, and “Stop grabbing me.” Immediately thereafter, Dow went into the lunchroom, pulled down the sexual harassment policy off the wall, and showed it to Botelho. According to both Dow and Medeiros, Botelho then started grabbing and wrestling with Dow, saying, “That's what I think of the policy.” Botelho then lowered his shoulder and knocked Dow off balance. I credit Medeiros and Dow's testimony regarding these incidents.

25. Moreover, Dow testified that he repeatedly saw Botelho inappropriately touch other co-workers and supervisors. For example, he stated he saw Botelho grab supervisors Michael Dwyer and Kevin Malloy in the buttocks. He claimed that Dwyer and Malloy each merely told Botelho he was “a sick fuck”. Dow also recalled how Botelho once reached toward Robert Keanes, causing Keanes to jump and run into a door. He stated that Botelho would call Keanes “sunshine” and, in

response, Keanes would call Botelho a “sick fuck” or “sick bastard.” Moreover, Dow testified that Botelho grabbed supervisors Joe DiGregorio and Christopher Lohman and called them fairies. In addition, he stated that he saw Botelho repeatedly grab a sales employee named Al in the penis, buttocks, and the back of his ears. Dow also claimed that he witnessed Botelho grab the nipple and attempt to kiss, on more than one occasion, a co-worker named “Chucky.” Malloy denied witnessing Botelho touch anyone, but acknowledged that Botelho used foul language and engaged in “shop talk.” Neither Michael Dwyer, Robert Keanes, Joe DiGregorio, nor Christopher Lohman testified at the Public Hearing. I credit Dow’s testimony.

26. Christopher Scanlon testified that he worked for Patriot Tire between 1994 and 1997. During this time period, and as part of his job for Patriot Tire, he regularly went to Penske’s facility in Medford and, consequently, got to know Medeiros and Botelho. Scanlon recalled a specific incident at the Medford shop when he saw Botelho reach up and grab a driver’s testicles. He stated that he did not know the driver’s name. He claimed that no one from either Patriot Tire or Penske subsequently asked him about any incidents of sexual harassment at Penske. I credit Scanlon’s testimony.

27. Both Medeiros and his wife Francine testified that they witnessed Botelho engage in similar inappropriate conduct with Botelho’s stepson outside the Medford shop. Specifically, they claimed that on April 15, 1996, Botelho came by the shop early in the morning to pick up his paycheck with his stepson, who was approximately 6 years old. At this time, Francine was waiting in her car for her

husband. While standing near the fuel-island, Botelho told his stepson to show Medeiros his “paws.” After being asked several times to show his “paws”, the boy held his hands up. Botelho then said, “Look at the size of his paws, aren’t they big?” While his stepson held up his hands, Botelho then grabbed the boy’s penis and said, “But he has a little blika.” I credit both Leo and Francine Medeiros’s testimony regarding this matter.

28. At the public hearing, Frank Botelho largely denied the more serious allegations of inappropriate conduct, however, he admitted to “goosing” Medeiros and pinching Dow’s buttocks. Botelho claimed he was just horsing around and other employees, including Medeiros and Dow, participated in this type of behavior. Botelho considered goosing to be merely horseplay and he acknowledged that Penske’s managers were present when these activities took place. He also alleged that Medeiros once made an inappropriate comment about Botelho’s wife. Botelho further stated that he ceased any type of horseplay after being spoken to by management in December 1995. Although I credit Botelho’s testimony that managers were present when he engaged in this conduct and Penske’s managers “talked” to him in December 1995, I refuse to credit the remainder of his testimony. In particular, I found Botelho’s testimony to be completely self-serving. I base this finding on my observations of Botelho during questioning, his avoidance of and inability to properly answer questions, the

numerous inconsistencies in his testimony, and his hostile, smug and arrogant demeanor.⁷

29. Botelho also claimed that shortly after Medeiros complained to management about his conduct in December 1995, he and Medeiros socialized together. Specifically, Botelho testified that Medeiros and another employee, Dina, went Christmas shopping together. Contrary to Botelho's testimony, Medeiros stated that he merely ran into Botelho and Dina at the mall and they then had one drink together at a bar called "Dapper Dan's." Medeiros also claimed the incident might have occurred in December 1994, since he believed Dina did not work at Penske in December 1995. Although it remains unclear exactly when Medeiros and Botelho met, I credit Medeiros' testimony that his meeting Botelho at the shopping mall was coincidental and innocuous.

30. In addition, Botelho denied making any comment about Dow's penis size, or grabbing anyone's crotch. He further testified that he did not have any specific memory of asking Dow if he "sucked pri", however, he stated that he could have made this remark and admitted that he had a bad memory. In addition, Botelho stated that he did not remember whether he told Mrs. Medeiros that her husband "had a big Linguica." Botelho testified that Dow never got upset at him, but he admitted that Medeiros may have once said, "You are a sick fucking asshole." I refuse to credit Botelho's testimony regarding these matters.

⁷ When questioned during cross-examination about the numerous inconsistencies between his deposition and Public Hearing testimony, Botelho incredulously claimed that Complainant's counsel had put words in his mouth.

31. In his deposition, Botelho admitted that he “goosed” Robert Labonte, and grabbed and stuck a screwdriver up Labonte’s buttocks. However, at the Public Hearing, Botelho denied inappropriately touching Labonte. Botelho also denied attempting to kiss anyone at work. Labonte worked at Penske as a mechanic on the 2:30 pm to 11:00 pm shift, the same shift as Botelho. Labonte also functioned as the “lead” in the shop after 5:00 pm. His duties as lead included assigning and checking work, clerical duties, and making and returning phone calls; and, he received extra compensation for these responsibilities.⁸ Contrary to Botelho’s testimony, Labonte testified that Botelho put his arms around him and tried to kiss him, but Labonte considered this conduct to be merely horseplay. Additionally, contrary to Botelho’s deposition testimony, Labonte denied that Botelho touched or squeezed his buttocks or stuck tools up his buttocks. Although Botelho claimed in his deposition that Labonte had asked him if he had “sucked pri”, Labonte denied that either he or Botelho ever made such a remark.⁹ With respect to the horseplay he did observe in the shop, Labonte stated that employees sometimes patted their penis. He also testified that he considered grabbing the buttocks of a coworker to be merely horseplay. He claimed that when Botelho engaged in horseplay, he told him to stop. But he admitted that he never reprimanded Botelho or reported his behavior to a supervisor. Labonte also stated that he had no knowledge of Medeiros’ complaints against Botelho. As a general observation, I likewise find Labonte’s

⁸ Although not pertinent to the ultimate conclusions in this case, I find that Labonte did not exercise supervisory authority.

⁹ Labonte’s testimony is also inconsistent with the testimony of Penske supervisor Brian Hickey, who acknowledged that employees in the shop asked each other “all the time” if they “suck dick” or “suck penis.”

testimony to be self-serving and lacking in credibility. With respect to the interactions between Botelho and Labonte, I believe that Botelho attempted to kiss Labonte, and likely “goosed” and grabbed his buttocks. I also find that Labonte and Botelho each made the remark, “sucking pri.” Lastly, I find that Labonte largely tolerated this conduct and construed it as merely harmless horseplay.

32. As stated above, Medeiros testified that Penske’s managers both witnessed and were subjected to Botelho’s inappropriate conduct. In addition, he claimed that he often complained about Botelho’s behavior to his supervisors. Specifically, he stated that he regularly complained to Service Manager Michael Dwyer, but Dwyer did absolutely nothing to prevent Botelho from continuing his offensive conduct. I credit Medeiros’ testimony that he regularly complained to Dwyer about Botelho’s conduct, in part since Dwyer did not testify at the Public Hearing and, thus, Penske failed to provide any credible evidence to contradict Medeiros’s testimony.

33. Phillip Gibson testified that he worked at Penske for nearly twenty-two years and presently served as Penske’s Area Maintenance Manager for New England, New York and parts of Pennsylvania. He claimed that he oversaw the mechanics at Penske’s facilities in his region, including the technicians at the Medford shop. Gibson stated that in December 1995, Walker informed him of Medeiros’ complainant against Botelho. In response, Gibson claimed that from December 1995 until October 1996, he traveled to Medford at least once a week and spent some time on the shop floor. During this period, Gibson claimed that

he regularly spoke with Medeiros, but Medeiros never mentioned anything about being harassed. However, Gibson admitted that he never asked Medeiros about his sexual harassment allegations. I credit Gibson's testimony.

34. Dow similarly testified that he complained about Botelho's harassment to his supervisors, including Malloy, Keanes, DiGregorio and Dwyer. He claimed the first few times he told Dwyer about Botelho's conduct, Dwyer just laughed. Dow testified that other managers also laughed in response to his complaints and simply told him they would take care of it. In addition, he testified that he regularly complained to Malloy about Botelho's behavior. According to Dow, Malloy merely responded, "Frank's being Frank, I will do something about it." Although Malloy testified that Dow never informed him of having any particular problems with Dow, he paradoxically claimed that Dow "had been affected by Botelho's conduct." Dow claimed that Botelho's harassment did not stop until Penske received notice of his complaint in May 1996. I credit Dow's testimony.

C. PENSKE'S SEXUAL HARASSMENT POLICY AND ITS INVESTIGATION OF MEDEIROS AND DOW'S COMPLAINTS

35. At the Public Hearing, Complainants introduced the deposition testimony of Michael Marsiglia. At the time of the deposition and all other pertinent times, Marsiglia served as Penske's Human Resources Manager for the New England region. Marsiglia's responsibilities included the handling of employee problems within the region, including any complaints or claims. He testified that Penske's sexual harassment policy was in effect for "as long as I can remember" and

believed that it had last been reissued in 1991 or 1992.¹⁰ He stated that the policy would have been issued directly to all employees when it was initially prepared, but he did not believe that Penske distributed the manuals to employees hired subsequent to its initial distribution. He also testified that unless an employee had been employed for about five to six years, an employee would not have received the original mailing regarding the “problem solving form” procedure. Although Penske had posted the sexual harassment policy in the Medford facility, Marsiglia was not sure if the problem solving forms were prominently displayed in the shop.

36. Marsiglia testified that he first became aware of Medeiros’ MCAD complaint on April 20, 1996, when he received a phone call from District Manager Greg Walker. Marsiglia claimed that prior to his conversation with Walker, he had no knowledge of Medeiros’ allegations of sexual harassment and, in particular, no knowledge of Medeiros’ complaint against Botelho made in December 1995.

37. Marsiglia testified that on May 1, 1996, he visited the Medford facility to investigate Medeiros’ complaint. According to Marsiglia, Medeiros told him at this time that “Frankie Botelho had been committing certain actions which he felt were inappropriate over a period of time, actions such as grabbing him bodily, exposing himself, using inappropriate or profane language, and that Leo felt that

¹⁰ Marsiglia summarized Penske’s sexual harassment policy as follows: “Essentially it’s any form of sexual harassment or discrimination that is unlawful. It is not tolerated in the company. Any employee who feels he or she is a victim of either the harassment or the discrimination is to report it either to his or her direct supervisor or to the human resources manager, and the appropriate action will be taken to stop the harassment or discrimination.”

this was annoying to the point where it needed to stop.” Marsiglia stated that Medeiros also told him that he had complained to Walker in December 1995 and believed Walker spoke to Botelho about the matter. He further claimed that Medeiros told him Botelho did not stop and the harassment continued up to the time that he filed his complaint with the Commission. Marsiglia testified that Botelho admitted to committing some of the acts alleged by Medeiros, such as grabbing Medeiros’ buttocks and using inappropriate language, but Botelho claimed this conduct was in the spirit of back and forth joking. Marsiglia indicated that he considered Botelho’s conduct “highly inappropriate.”

38. With respect to Medeiros’ claim that Botelho had exposed himself, Marsiglia indicated that he had received conflicting stories: “Medeiros said it occurred on the work floor, but Botelho and others said it happened in the locker room.” Marsiglia indicated that he did not necessarily believe that Botelho’s removing his penis from his pants in the locker room would be inappropriate since people undress there. He further stated that when he questioned employees about this matter, some people indicated that Medeiros likewise engaged in this behavior. Marsiglia could not recall the names of the employees that provided him with this information.

39. Marsiglia testified that he visited the Medford facility again on May 15, 1996, to complete his investigation. During this visit, supervisor Christopher Lohman told him that Botelho had “done some of these things to him.” According to Marsiglia, Lohman also told him that he had witnessed Botelho harass a rental

employee. Marsiglia further indicated that other employees “might” have told him during the course of his investigation that they witnessed Botelho engage in the type of offensive conduct alleged by Medeiros.

40. Marsiglia eventually spoke with Michael Dwyer in the summer of 1996, after Dwyer returned to work at Penske.¹¹ According to Marsiglia, Dwyer stated that he had been involved in the December 1995 meeting with Medeiros and Walker, when Medeiros first complained about Botelho. However, Marsiglia claimed that Dwyer said he had no knowledge of Medeiros being harassed from December 1995 until he left in March of 1996. I refuse to credit Dwyer’s comments made to Marsiglia as to the truth of whether Dwyer witnessed or had knowledge of Botelho’s actions after December 1995.

41. Marsiglia testified that after concluding his investigation, he considered Botelho’s kissing and attempting to kiss other employees, as well as Botelho’s grabbing and attempting to grab other employees’ buttocks, to be merely “horseplay” and not necessarily sexual harassment. He defined “horseplay” as “any inappropriate, physical behavior which occurs in the workplace that can either negatively affect the safety of our employees or the productivity of our employees.” Marsiglia claimed that under Penske’s sexual harassment policy, “horseplay” between two employees only becomes sexual harassment when an offended employee objects and complains that he has been subject to sexual harassment and takes the steps necessary to report it to management and ask

¹¹ Dwyer left Penske in March 1996, but returned in July 1996.

them to take appropriate action.¹² He believed that neither a kiss nor touching someone buttocks is necessarily sexual harassment, rather, it depends on how the person being touched or kissed viewed that action. Marsiglia indicated that “he was not sure” if Medeiros believed Botelho’s conduct during the period of December 1995 to April 1996, amounted to sexual harassment.¹³ However, Marsiglia considered Botelho’s alleged comment, “Will you suck pri?”, to be inappropriate language and not horseplay. Marsiglia testified that Penske took no action against Botelho other than giving him and Medeiros a memo, dated May 13, 1996, which outlined the company’s policy against horseplay. He further stated that Penske made no efforts to separate Medeiros and Botelho.

42. Gibson similarly defined “horseplay” under Penske’s policies as joking, fooling around, and acting in a non-professional manner. He claimed that horseplay could be anything from pushing and shoving all the way to the grabbing of someone’s buttocks. Gibson also acknowledged that Botelho’s asking other coworkers if they “sucked pri” would be considered unacceptable conduct.

43. Marsiglia claimed he first heard about Dow’s MCAD complaint from Greg Walker on or about May 9, 1996. He testified that he then spoke with Dow on the phone. During their conversation, Dow told Marsiglia that he should speak to his lawyer and, consequently, Marsiglia made no effort to have any further

¹² It remains unclear from the record whether Penske’s sexual harassment policy at this time was inconsistent with the mandate proscribed under G.L. c. 151B, § 3A, or Marsiglia lacked competent knowledge of what constituted sexual harassment under Massachusetts law, or both.

¹³ I find Marsiglia’s testimony to be inconsistent with his previous statements that Medeiros told him that Botelho’s behavior was “annoying to the point where it had to be stopped.”

discussions with Dow. On May 15, 1996, Marsiglia returned to Boston to further investigate Dow's complaint. With respect to Dow's allegation that Botelho exposed himself in the locker room, Marsiglia testified that some employees said it happened while changing in the locker room, while others said it happened elsewhere.

44. Marsiglia stated that as a result of Medeiros' MCAD complaint, Penske re-published its sexual harassment policy. In addition, on May 2, 1996, Marsiglia conducted a 2 – 2 ½ hour sexual harassment training session for all managers, supervisors and anyone with responsibility for managing or supervising other employees. He indicated that Walker, Hickey and Malloy attended the training, but Labonte did not attend the training because he was only a "lead." Marsiglia believed that Penske last conducted this type of training in 1992.

D. RETALIATION

1. Medeiros

45. Medeiros testified that on April 23, 1996, he had a meeting with Walker and Dwyer in Walker's office. According to Medeiros, before the meeting Dwyer had asked him if he was involved in any issues before the MCAD, and Medeiros replied, "No." At the meeting, Walker questioned Medeiros about an expense report related to a trip Medeiros made to Connecticut to attend a training session.¹⁴ Walker then told Medeiros he had received a letter from the MCAD

¹⁴ At the Public Hearing, Respondent's counsel questioned Medeiros at length regarding this expense report, which purportedly sought reimbursement for a telephone call made to an escort service. Medeiros denied making the call, claiming another employee dialed the number. Notwithstanding, Medeiros was not disciplined for this matter and neither Walker nor Gibson apparently considered this issue significant. Penske argued that since Medeiros participated in a prank involving an escort service, he is, therefore, not

regarding his complaint. Medeiros further testified that in this meeting, Dwyer stated he had seen Botelho put his arm around and try to kiss someone.

According to Medeiros, Dwyer said he told Botelho to “stop that.” I credit Medeiros’s testimony regarding this meeting, in part since neither Walker nor Dwyer testified at the Public Hearing and, thus, Penske failed to provide any credible evidence to contradict Medeiros’s testimony.

46. Medeiros further claimed that on April 24, 1996, Penske Vice President Joseph Moleski approached Medeiros and apologized for what had been going on. Medeiros testified that he briefly told Moleski about Botelho’s conduct. According to Medeiros, Moleski said he was sorry that it had come to this. I credit Medeiros’s testimony, in part since Moleski did not testify at the Public Hearing and, thus, Penske failed to provide any credible evidence to rebut Medeiros’ testimony.

47. Although Medeiros’ contemporaneous notes do not describe any further sexually offensive incidents by Botelho after April 24, 1996,¹⁵ Medeiros testified that Botelho began to treat him in a hostile manner. Specifically, Medeiros stated that on or about April 24, 1996, Botelho came in to work, stood beside Medeiros, yelled “Hi pal”, and then began yelling at Medeiros in a furious manner. He further claimed that Botelho yelled out several times that he was “fucking strange”, and he “sucked.” In addition, on April 26, 1996, Medeiros testified that

easily offended by sexual pranks or escapades. Considering the lack of credible evidence on this matter, I decline to draw such an inference.

¹⁵ This is approximately the same time Penske received Medeiros’ MCAD complaint.

Botelho gave him the finger and pointed in Medeiros' face saying, "You wait." I credit Medeiros' testimony.

48. Medeiros also testified that after Penske received a copy of his MCAD complaint, Walker and the other supervisors engaged in a pattern of retaliatory conduct. Specifically, Medeiros claimed that on May 8, 1996, Walker singled him out for criticism and accused him of refusing to follow Hickey's instructions with respect to the installation of a clutch.¹⁶ During that same meeting, Medeiros told Hickey that his back was bothering him and asked if there is anything else he could do since he only had a half-hour left in his shift. Medeiros testified that Hickey told him to help out in the preventative maintenance bay. The next day, Hickey called Medeiros into his office and then sent him home, telling him that he needed a doctor's note before returning to work, "per Walker's order." Medeiros responded by saying there was a doctor's note in his file, but Hickey claimed he could not find his file and Medeiros could not return to work until he got a copy of the medical note from his doctor. The following day, Hickey told Medeiros that he had to go to Penske's doctor for an examination. Medeiros believed that Hickey and Walker ordered him to get a doctor's note and see a physician in retaliation for the filing of his MCAD complaint. I credit Medeiros's testimony.

49. Medeiros claimed that on May 23, 1996, Hickey called him into his office and told him that if he looked at Botelho the wrong way, he would write him up. Hickey acknowledged that he "could have possibly" made this remark. Moreover, Medeiros claimed that at some point thereafter, Walker told Medeiros that he had

¹⁶ See ¶ 55, *infra*.

brought all of this on himself and that, from now on, everyone will be watching the way he walks and what he says. I credit Medeiros' testimony.

50. Medeiros claimed that on or about May 28, 1996, he asked Hickey for the vacation list. Hickey responded that he would post it when he got around to it. Medeiros then asked Hickey if he could takeoff Friday, May 31. According to Medeiros, Hickey said "okay", but three hours later, Michelle, a Penske office worker, told Medeiros that Walker said he could not have Friday off because he had failed to give seven days notice. Medeiros claimed that Penske had never maintained or enforced a seven-day notice requirement. I credit Medeiros' testimony.

51. Medeiros and Dow both acknowledged that they occasionally chatted at work. Medeiros claimed that on June 6, 1996, Walker walked up to him and said, "No more pow-wows in the Parts Room with Mike [Dow]." According to Medeiros, Walker also said that he did not want him to associate with Dow anymore. I credit Medeiros' testimony.

52. Medeiros testified that before Penske received his MCAD complaint, he regularly received personal phone calls at work from his family. However, after he filed his complaint, Penske singled him out and told him that he could no longer receive personal phone calls. Francine Medeiros corroborated her husband's testimony, as she was often told, when she called her husband at work after April 1996, that her husband was "unavailable" or "could not talk." On August 16, 1996, Penske issued a memorandum to all employees on "shop

policies.” The memo included the company’s policy that “employees may receive personal calls on an emergency basis only.” Phillip Gibson testified that the memorandum was submitted to all employees in response employees receiving too many personal calls. I credit Leo and Francine Medeiros's testimony.

53. Medeiros stated that on June 12, 1996, Walker called him into Hickey’s office and then began to yell at him in a very loud manner. He stated that Walker told him, “[I am] sick and fucking tired of you [and] who the fuck do you think you are, you walk around here like you are fucking invincible. Who the fuck is [sic] you to keep notes on everybody?” Medeiros claimed that he explained to Walker that he only kept notes of the times that Botelho sexually harassed him. He stated that Walker then said, “Your fucking job is hanging on a thread”, and “you are on the borderline of insubordination.” According to Medeiros, he tried to open the door to leave when Walker pushed his left shoulder and said he was not finished with him. He testified that Walker then accused him of making wise remarks to another employee. Medeiros denied making any such comments. I credit Medeiros’ testimony in part because Walker did not testify at the Public Hearing, and therefore, Penske did not offer any credible testimony to rebut Medeiros’ testimony.

54. Prior to Penske’s receipt of Medeiros’ MCAD complaint, Medeiros had never received any form of discipline. In addition, Phillip Gibson considered Medeiros to be one of the best mechanics he has ever worked with during his twenty-two years at Penske. Gibson also testified that on a couple of occasions,

he had spoken to Medeiros about becoming a “Lead Service Mechanic.” Robert Labonte similarly claimed that Medeiros was a good mechanic.

55. However, shortly after Penske received Medeiros’ MCAD complaint, Penske began issuing Medeiros written reprimands for poor work performance, which ultimately culminated in his termination in October 1996. Specifically, on May 24, 1996, Medeiros received his first two written warnings from Walker. The first pertained to Medeiros’ alleged failure, on April 29, 1996, to properly install a particular clutch supplied by the customer. (Exhibit 6). Hickey claimed that Medeiros did not follow the proper procedures for installing the clutch, which caused an improper alignment of the clutch’s transmission. Medeiros claimed that he told Hickey, prior to installing the clutch, that it was not appropriate for this type vehicle. Hickey admitted that he selected the clutch assembly for Medeiros. In addition, the subsequent repair order for the vehicle indicated the cause of the clutch failure was “wrong part.” Upon reviewing the repair orders at the Public Hearing, Hickey acknowledged that the paper work was confusing and “did not make any sense.” In addition, Hickey admitted that in his fifteen years as a mechanic, he had worked on only “two to three clutches.”¹⁷ Lastly, Labonte testified that mechanics at Penske are regularly given the wrong parts for jobs, but have never been reprimanded when this occurs because “it is not [the mechanic’s] fault.” I credit Labonte and Medeiros’ testimony regarding this matter.

¹⁷ Hickey stated that he did not like to work on clutches because it was “difficult and heavy work.”

56. The second warning issued to Medeiros on May 24, 1996, merely stated that on May 2, 1996, Medeiros performed his duties “in an unsatisfactory manner which resulted in significant damage to Burnham Unit # 97.” (Exhibit 7). From the limited information provided in the warning, Medeiros claimed he had no idea what, if anything, he did wrong. Medeiros further noted that Greg Walker, who issued the warning, was not a mechanic and had no experience with respect to these repairs. I credit Medeiros’ testimony regarding this matter in part because Walker did not testify and, therefore, Penske offered no credible evidence to contradict Medeiros’ testimony.

57. In September 1996, Dan Labrie began working at the Medford facility as the manager of the service department. Labrie had worked at another Penske facility in New Hampshire before coming to Medford. Labrie testified that when he began working at Medford, the “shop was not running well” and he believed he was responsible for raising the quality of the work up to acceptable standards. At the time Labrie came to Medford, he was aware of Medeiros’ sexual harassment complaint against Botelho, having initially heard about the complaint while he was working in New Hampshire. In addition, Labrie testified that when he started at Medford, Greg Walker mentioned the complaint without going into detail. According to Labrie, Walker merely said the complaint pertained to “name calling”, although Walker might have mentioned “grabbing.”

58. On September 18, 1996, Labrie gave Medeiros two more written warnings. The first reprimand issued pertained to Medeiros’ failure, on September 11, 1996, to make proper adjustments and spending an excessive

amount of time with respect to the installation of a clutch. (Exhibit 8). The reprimand further stated that Medeiros failed to report the status of the repair to his supervisor when he left for the day. Medeiros claimed that when he left work that day, he had told both the lead technician and another technician that he had not completed the repair. The second warning related to a quality control inspection conducted by Labrie on September 13, 1996, of a vehicle Medeiros had just serviced for preventative maintenance ("PM"). (Exhibit 10). According to Labrie, the inspection revealed numerous items out-of-adjustment that Medeiros presumably had repaired or checked. Medeiros insisted that he had performed the work competently. I credit Medeiros' testimony.

59. On October 16, 1996, Labrie terminated Medeiros' employment after giving him two more warnings. The first warning pertained to Medeiros' use of an excessive amount of time spent repairing a dim headlight. (Exhibit 5). Specifically, the warning stated, "after you spent two hours without results, the Lead Tech on duty instructed you to bypass the circuit with a jumper. That process took an additional hour which brought the job total to 3 hours, an unreasonable amount of time for a task of this nature." Medeiros claimed that the headlight was not wired properly and he believed the use of a jumper wire was dangerous and not appropriate even as a temporary repair. Robert Lembo, who worked as a mechanic at Penske since 1967, and Labonte corroborated Medeiros' testimony, stating that the use of a jumper wire to repair a headlight was not a permanent or acceptable repair. I credit Medeiros' testimony regarding the matters pertaining to this reprimand.

60. The last warning claimed that Medeiros spent an excessive amount of time trying to remove a broken huck bolt from a truck. Labrie claimed that Medeiros spent over five hours trying to drill the bolt out, but he could have accomplished the task in one hour by driving the bolt out with a sledgehammer and a punch. The letter concluded, “[Y]our level of performance has been consistently unsatisfactory, and you are hereby terminated.”¹⁸ Labonte testified that drilling out the severed huck bolt was one of three acceptable ways to remove the broken bolt. Robert Lembo corroborated Labonte’s testimony. Labonte also testified that during his nine years at Penske, he had not performed every job correctly and sometimes wasted time on jobs, but had never been disciplined. I credit Labonte, Medeiros and Lembo’s testimony on these matters.

61. On October 21, 1996, Medeiros contested his termination by filing a grievance through his union. In addition to working for Penske as a mechanic, Lembo testified that he served as a shop steward for Medeiros’ union, the International Assoc. of Machinists and Aerospace Workers, AFL-CIO, Automotive Lodge No. 447. In his role as shop steward, Lembo represented Medeiros in the grievance arbitration.¹⁹ Lembo admitted that prior to Medeiros’ grievance, he had handled only one arbitration in the prior twelve to fifteen years. Lembo further acknowledged that Medeiros did not have the benefit of a union lawyer during the grievance and arbitration process. Despite purportedly advocating for

¹⁸ I find it ironic that Labrie would state that Medeiros’ work was “consistently” unsatisfactory, when Labrie had only worked at the Medford facility for little more than one month and Medeiros’ was otherwise considered an excellent mechanic.

¹⁹ Both Lembo and Medeiros testified they had some assistance from a union representative simply referred to as “Scruffy.” However, it remains unclear what role, if any, Scruffy played in the grievance arbitration process.

Medeiros at the arbitration, Lembo testified at the Public Hearing that Penske had “just cause” to terminate Medeiros. However, Lembo acknowledged that he never investigated the circumstances of Medeiros’ termination. He also admitted that he only saw the repair orders given to him by Penske. In addition, Lembo acknowledged that he did not believe Medeiros’ sexual harassment complaint should be brought up at the grievance arbitration. Similarly, he did not believe it appropriate to argue that Penske had disciplined and then terminated Medeiros in retaliation for his complaints even though Lembo knew that Penske had never disciplined Medeiros before it received his MCAD complaint. Lembo, thus, admitted that he never raised these facts or issues at the arbitration. Under these circumstances, I give the arbitration decision relative to Medeiros’ termination no weight whatsoever with respect to whether Penske had legitimate non-discriminatory reasons for terminating Medeiros’ employment.²⁰

2. Dow

62. Dow likewise testified that after he filed his complaint at the Commission, Penske engaged in a pattern of retaliatory conduct. Specifically, Dow claimed that prior to the filing of his complaint, he had never received any form of discipline, except on one occasion when Robert Keanes yelled at him when he dented a truck. In addition, he stated that he had received positive performance reviews and, during one particular evaluation, Keanes and Malloy told him, “Your doing great.” Dow also claimed that his supervisors promoted him to a sales position with the

²⁰ Medeiros and Lembo both acknowledged that Penske had offered Medeiros his job back prior to the arbitration hearing, but Medeiros rejected the offer because Penske refused to pay Medeiros for his lost wages incurred since the date of the termination. I similarly give this evidence no weight in my considerations.

responsibility of finding out the pricing of Penske's competitors. After the filing of his complaint, however, he stated that his supervisors yelled at him every day. In addition, Dow's motor vehicle tires were slashed at work. When he complained to management about this, they said, "Mike, I don't want to hear it." Moreover, he testified that supervisor Joe DiGregorio and co-worker Walter Magurn both threatened Dow at various times. He claimed Magurn said to him, "You're a rat, not a man." He further stated that DiGregorio and Magurn, while facing him, would both "punch" their hands together in a threatening manner. Dow specifically complained to management about DiGregorio and Magurn's threats. He also stated that he went to the police and filed an application for a criminal complaint. According to Dow, the Court issued a protective order requiring Magurn to stay away from him. I credit Dow's testimony, in part since DiGregorio and Magurn did not testify at the Public Hearing and because Penske failed to offer any credible evidence to rebut Dow's allegations regarding these particular matters.

63. In addition to the abuse and threats from supervisors and co-workers, Dow testified that after he filed his MCAD complaint, Penske refused to assign him work. Prior to filing his complaint, he claimed that he had worked 35-60 hours a week. Afterwards, his hours were reduced dramatically despite constantly making it known to management that he was both available to work and physically and mentally capable of working. He claimed that management always told him they did not need him to work, although they hired two new hikers. Dow testified that he complained to supervisor Robert Keanes about the reduction in hours. In response, Dow claimed that Keanes "went nuts and turned red and yelled." He

also stated that Keanes told him “You’re not a good worker”, “You’re going to be out of here soon”, and “You’re outta here.” I credit Dow’s testimony.

64. At all pertinent times hereto, Kevin Malloy was responsible for calling in hikers. As stated above, hikers at Penske are employed on an “as needed” basis. He testified that for various periods, Dow was totally unavailable for work for emotional, health and family issues, or would simply fail to report to work after being called in. However, Malloy acknowledged that Dow’s name continued to appear on the list of eligible “hikers.” On or about September 8, 1996, Dow told Malloy that the week of September 15, 1996, would be his last week at Penske. Dow acknowledged that he left Penske to work at Data Destruction Services, because he needed a well-paying job to pay his bills. I partially credit Malloy’s testimony that after May 1996, Dow was unavailable for work for periods of time, or would fail to report to work after being called in.

E. DAMAGES

1. Medeiros

65. Medeiros’ claimed that that he earned approximately \$43,969.15 per year (\$845.56/week) from Penske at the time of his termination.²¹ After being fired, Medeiros worked for Butler Services, Inc.; however, he earned substantially less than he had received from Penske. According to his 1996 tax return, Medeiros earned \$30,478.47 from Penske for the period of January until his termination in October; and, \$4,644.28 from Butler Services, Inc. for the period of October – December 1996. In 1997, Medeiros earned \$32,043.75 from Butler. In 1998, he

²¹ Medeiros obtained this figure from his 1995 tax returns.

earned \$20,158.91 from Butler and \$9,455.00 from Pro-Tech Automotive Service, Inc. Medeiros claimed that he began to earn as much as had at Penske in 1999.

66. Medeiros testified that the sexual harassment he experienced at Penske caused him significant emotional distress. Specifically, he claimed that his sexual relationship with his wife suffered greatly, as he unable to sexually perform as well or as frequently as he could prior the harassment at Penske. During the course of his testimony on his relations with his wife, Medeiros became visibly distraught and very upset. Francine Medeiros corroborated her husband's testimony that he experienced both great mental anguish and a change in his behavior towards his family, including an adverse and substantial effect upon their sexual relations. However, Leo and Francine both acknowledged that a child was conceived and born during the period he claimed to be distraught over his problems at Penske.

67. Leo Medeiros also claimed that it became increasingly difficult to maintain an emotional attachment to his wife and children, and he often found himself reluctant to embrace them or expose his emotions. Prior to the offensive incidents at Penske, Medeiros claimed he had no such issues and enjoyed a deep emotional and physical relationship with his wife and children. Francine Medeiros likewise testified that her husband's experiences at Penske made him emotionally detached and very difficult to approach. She claimed that she first noticed a change in her husband's demeanor when he began to describe Botelho's behavior, including comments about his penis and buttocks. She stated that her

husband's behavior around their children also became different, as he no longer wanted to be touched or hugged in front of other people. Both Leo and Francine Medeiros also testified that the emotional impact of the harassment magnified the distress he had recently suffered as a result of the discovery that their young daughter had been sexually molested. According to Leo Medeiros, the events at Penske brought the raw emotion of these events back to the surface and added to his great anguish, grief, and emotional distress. I credit Leo and Francine Medeiros' testimony regarding these matters.

68. Leo Medeiros testified that after being terminated from Penske, he and his wife had a difficult time paying their bills. He claimed they had to rely upon credit cards in order to pay their mortgage and they would often deposit cash advances into their bank accounts. Francine Medeiros corroborated her husband's testimony. She also stated that as a result of the loss of his job, she had to borrow money from family members, including several thousand dollars from her parents. In addition, she testified that their obligation to pay the entire medical insurance premium under COBRA significantly aggravated their financial problems. I credit Leo and Francine Medeiros' testimony.

2. Dow

69. Malloy acknowledged that he had a relatively close relationship with Dow when they worked together at Penske. He testified that Dow had been affected by Botelho's conduct, claiming that Dow was a "sensitive guy." Dow claimed that he "loved" his job at Penske, had made friends at work, and "wanted to be at Penske a long time." He testified that the harassment he received at Penske made

him feel “violated” and “raped.” In particular, he claimed that Botelho’s comments about his penis were very disturbing, “I will go to my grave with that comment.” At the Public Hearing, Dow became visibly upset when he testified about the distress he suffered as a result of the harassment. He also acknowledged that he suffered from obsessive-compulsive disorder and was very obsessive over his physical features.²² As a result of Botelho’s unflattering comments about his penis, Dow claimed that he became highly sensitive about this matter, regularly asking his girlfriends whether he is “ok”, or if they think he is “too small?” He testified, “I cannot get what happened out of my mind. The way he would grab me and talk about my penis size.” Dow testified that he never had any issues about his penis prior to Botelho’s comments. He also claimed that Botelho’s harassment had a horrible effect on his relationship with his ex-girlfriend, Jennifer DeManbro. Specifically, he stated that after the incidents with Botelho, DeManbro would yell at him that there was nothing wrong with him sexually. He claimed that she eventually broke up with him because he had “no confidence.” DeManbro corroborated that Dow appeared to be ashamed about the incidents at Penske. Moreover, she testified that after he described his interactions with Botelho, she would express her shock and anger to him. I credit Dow and DeManbro’s testimony.

70. Dow testified that he went to counseling as a direct result of the distress he suffered from the hostile work environment at Penske. He offered medical records from the Choate Health Systems indicating numerous visits for anxiety and

²² His therapist indicated on March 6, 1997, that Dow had three cosmetic surgeries in the last 1½ years.

depression during the period of March 6, 1997 to April 3, 1997. His medical records indicate “an extensive history of anxiety and [obsessive compulsive disorder]” as well as “a history of mood disorder and anti-depressant medications.” Penske noted that Dow’s medical records mentioned “sexual harassment” on only two of his twenty-two visits, but mentioned problems related to his family on eleven occasions. Dow stated that he is still feeling the distress attributable to the harassment he experienced at Penske, but he is getting better.

III. CONCLUSIONS OF LAW.

A. SEXUAL HARASSMENT

Massachusetts General Laws, c. 151B, § 4(16A) prohibits sexual harassment in employment. Sexual harassment is defined as “sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (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. M.G.L. c. 151B, § 1(18); College-Town Division of Interco v. MCAD, 400 Mass. 156, 165 (1987); see, Massachusetts Commission Against Discrimination Sexual Harassment in the Workplace Guidelines, at 2, 4 (2002) (“Sexual Harassment Guidelines”).

Complainants have alleged that Penske created a hostile work environment, through the actions of coworker Frank Botelho, and then failed to take adequate steps to remedy the situation. As an initial matter, it is well settled in Massachusetts that the type of same-sex conduct alleged in this case falls within the statutory definition of sexual harassment and is prohibited by G. L. c. 151B, s. 4 (16A). Melnychenko v. 84 Lumber Co., 424 Mass. 285, 290-291 (1997); see, Ramsdell v. Western Massachusetts Bus Lines, Inc., 415 Mass. 673 at 678, n.4 (1997) (harassing conduct need not be motivated by sexual desire in order to constitute sexual harassment). Therefore, in order to establish a case of hostile work environment sexual harassment, each Complainant must establish by a preponderance of the evidence that (a) he was subject to gender-based unwelcome verbal or physical sexual conduct; (b) the words or acts were sufficiently severe or pervasive to alter his conditions of employment and create an abusive working environment; and, (c) the harassment was carried out by an employee of Penske exercising supervisory authority or Penske knew or should have known of the harassment and failed to take prompt remedial action. College-Town, 400 Mass. at 162; see, Sexual Harassment Guidelines, at 4.

1. **UNWELCOMENESS**

In order to make out a prima facie case of hostile work environment sexual harassment, each Complainant must establish that he was subjected to unwelcome conduct; meaning conduct that he subjectively found to be hostile and abusive. College-Town, 400 Mass. at 162; Ramsdell v. Western Mass. Bus Lines, 415 Mass. 672, 677 (1993); Williams v. Karl Storz Endovision, 24 MDLR

91, 106-107 (2002); see, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (“if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment”).

I conclude that Complainants clearly found Botelho’s conduct to be hostile and abusive. First, Penske acknowledged that in December 1995, Medeiros complained about Botelho’s conduct to general manager Greg Walker and supervisor Michael Dwyer. In addition, I credited Medeiros’ testimony that on February 15, 1998, after Botelho grabbed his buttocks, Medeiros yelled to supervisor Brian Hickey, “Tell him to keep his fucking hands off me.” Moreover, I credited both Medeiros and Dow’s testimony that they repeatedly told Botelho to stop and leave them alone. For example, I credited Medeiros testimony that after Botelho grabbed his buttocks or groin, he would yell, “Get the fuck away from me”, or “Get away from me.” Dow likewise testified that he heard Medeiros say to Botelho, “Stop kissing me”, and “Stop grabbing me.” Although Botelho denied that Medeiros ever complained to him, he acknowledged that Medeiros might have told him, “You are a sick fucking asshole.” In addition, Dow testified credibly that he initially warned Botelho, “Don’t touch me or there will be problems”; and when Botelho subsequently grabbed Dow’s penis, Dow responded by telling him, “I am serious, don’t fuck around like that.” Dow also responded to Botelho’s actions by telling him, “You are a sick fuck”, and “You are a sick fucking prick.”

Penske argued that Medeiros and Dow voluntarily participated and, in some cases, initiated this behavior; and, therefore, they did not find this type of

conduct unwelcome. However, the record contains scant credible evidence to support this conclusion. In fact, only Botelho specifically accused Complainants of engaging in this type of conduct and, as described above, I found his testimony to be almost entirely lacking in credibility. Although Marsiglia, as part of his investigation of Medeiros' complaint, stated "people told me that" Medeiros similarly exposed himself in the locker room, Marsiglia could not recall who gave him this information; consequently, I give no weight to this unsubstantiated hearsay testimony. Furthermore, even if I found that Medeiros voluntarily participated to a limited degree in some of the sexual escapades that permeated the workplace, his limited participation would not bar recovery on his sexual harassment claim. Rosati v. Town of Warren Board of Health, 19 MDLR 34, 38 (1997) (the fact that an employee may have infrequently joked with the alleged harasser does not demonstrate that the alleged harasser's entire course of conduct was welcome); see, Ramsdell, 415 Mass. at 678, n.4 (complainant engaged in sexual banter because she needed to fit into the environment and minimize workplace friction).

In addition, Penske has argued that Medeiros could not have found Botelho's conduct abusive or hostile, since Medeiros and Botelho allegedly went shopping together shortly after Medeiros complained about Botelho's conduct in December 1995. However, Botelho's testimony regarding this incident lacked credibility and I found the evidence regarding this social interaction to be vague and conclusory. Moreover, even if Medeiros and Botelho did meet at a shopping mall on one occasion, the evidence still overwhelmingly supports the conclusion

that Medeiros found Botelho's conduct to be abusive and hostile. See, Melnychenko, 424 Mass. 285, 287-288 (although plaintiffs socialized with the harassing supervisor, court still found that supervisor unreasonably interfered with plaintiffs' work performance by creating a hostile and sexually offensive work environment). Consequently, I conclude that each Complainant has established that Penske subjected them to unwelcome hostile and abusive conduct.

2. SEVERITY AND PERVASIVENESS

Each Complainant must also prove that Botelho's conduct was sufficiently severe or pervasive so as to alter their conditions of employment and create an abusive working environment. In determining whether a work environment is sufficiently hostile or abusive, "all of the circumstances [must be looked at], including the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating (or a mere offensive utterance), and whether it unreasonably interferes with an employee's work performance." Faragher v. City of Boca Raton, 524 U.S. 775, 787-788 (1998), Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 619-620 (1996), Williams v. Karl Storz Endovision, 24 MDLR 91, 107 (2002).

Here, I credited Medeiros' testimony that beginning in August 1995 and continuing through April 1996, Botelho repeatedly tried to kiss him, grabbed his groin or penis on at least five different occasions, rubbed his crotch with a screwdriver, grabbed and rubbed his buttocks, and "humped him" (i.e., physically simulated intercourse). Moreover, Medeiros testified credibly that Botelho exposed himself on two occasions. In the first incident, Botelho exposed his

penis to Medeiros on the work floor in August 1995 and stated, “Do you want to see how I pet it.” On the second occasion, in April 1996, Botelho exposed his penis to Medeiros in the men’s room and asked if he “could do anything with it.” In addition, Botelho told Medeiros, “Tell your wife that I want some “Linguiça”,²³ and, “You have a nice ass.” Botelho also repeatedly asked him if he “sucked pri.” Lastly, I credited Medeiros testimony that he heard Botelho tell a customer, “Leo was queer and liked it.”

With respect to Dow, I credited his testimony that Botelho grabbed his buttocks or penis on at least four occasions. Dow also testified credibly that when Botelho grabbed his penis, Botelho often ridiculed him by commenting, “You don’t have anything”, “You’ve got a small dick. How could a woman enjoy you?” and, “A woman has a vagina and she needs it to be filled to have an orgasm... No wonder why your girlfriend broke up with you.” In addition, I credited Dow’s testimony that Botelho exposed himself in the men’s room and asked Dow, “Do you like what you see?” Lastly, when Dow sought to avoid Botelho’s offensive gestures, Botelho would say to him, “You love it”, or “You like it.”

Penske has argued that the social context of its workplace as a “predominately blue collar, labor intensive, male work environment” must be taken into consideration. It also asserted, without any credible foundation in the record, that “male on male horseplay is the common form of socialization in that workplace environment.” In addition, Penske claimed that the conduct here is distinguishably from the behavior exhibited in Oncale v. Sundowner Offshore

²³ As stated above, “Linguiça” is a Portuguese sausage and commonly used as slang for “penis.”

Services, Inc., 523 U.S. 75, 81 (1998) (employee forcibly subjected to sex-related humiliating actions, physically assaulted in sexual manner, and threatened with rape), and in Melnychenko, 424 Mass. at 286-287 (supervisor grabbed the genitals, fondled the buttocks, squeezed chest, rubbed privates, asked for sexual favors, and exposed himself to employees). Rather, Penske claimed that the type of conduct exhibited in this case was merely sophomoric “male to male horseplay”; and, thus, neither severe nor pervasive enough to create an objectively hostile or abusive work environment. I disagree.

Penske correctly points out that conduct unacceptable in an office environment, for example, may otherwise be acceptable in an automotive garage. However, where an employee repeatedly exposes himself and grabs the genitals of coworkers in an unwelcome manner, it would be difficult not to find that such conduct constituted an objectively hostile or abusive work environment, regardless of the type of workplace. Although Botelho’s conduct may not have as offensive or outrageous as the harassers behavior in Oncale or Melnychenko, Botelho’s actions were nonetheless debasing, disgusting, repulsive, and far beyond the margin of mere sophomoric horseplay. He engaged in this outrageous conduct with the aim of embarrassing and tormenting Complainants, which it did. Thus, Botelho’s conduct clearly did have the purpose and the effect of undermining Complainants’ ability to do their jobs and participate fully in the workplace. Consequently, I conclude that Botelho’s conduct was sufficiently severe or pervasive so as to alter Medeiros and Dow’s conditions of employment

by creating an intimidating, hostile, humiliating, and sexually offensive work environment.

3. PENSKE'S KNOWLEDGE OF BOTELHO'S CONDUCT

In order to establish a prima facie case of sexual harassment, Complainants must also prove that Penske knew or should have known of the harassment and failed to take prompt remedial action.²⁴ Both Medeiros and Dow have met this burden.

Medeiros testified credibly that Dwyer witnessed Botelho expose himself in August 1995. Penske also acknowledged that Medeiros complained about Botelho's conduct to Walker and Dwyer in December 1995; and, in response, Walker merely "talked" to Botelho. In addition, I credited Medeiros' testimony that on February 15, 1996, Supervisor Brian Hickey witnessed Botelho grab Medeiros' buttocks. Medeiros claimed that he then yelled to Hickey, "Tell him to keep his fucking hands off me." Moreover, Medeiros testified credibly that he regularly complained to Dwyer, however, Dwyer did absolutely nothing in response to his complaints.

I also credited Dow's testimony that he reported Botelho's conduct to supervisors Kevin Malloy, Robert Keanes and Joe DiGregorio. According to Dow, Malloy commented, "Frank's being Frank", and all three managers told him, "We'll take care of it", but apparently, they never did. Dow also testified credibly that he repeatedly saw Botelho inappropriately touch other co-workers and supervisors. For example, he stated he saw Botelho grab Dwyer and Malloy in the buttocks, and

²⁴ Complainants have not alleged that Botelho exercised supervisory authority.

in response, Dwyer and Malloy merely told Botelho he was “a sick fuck.”

Furthermore, Dow stated that Botelho tried to grab supervisor Robert Keanes, and also called Keanes “sunshine.” According to Dow, Keanes would merely tell Botelho that he was a “sick fuck” or a “sick bastard.” Moreover, Dow testified credibly that Botelho would grab supervisors Joe DiGregorio and Christopher Lohman and called them fairies.

Christopher Scanlon, a regular visitor to Penske’s Medford facility, also testified credibly that he saw Botelho reach up and grab a person’s testicles. In addition, Penske’s Human Resource Manager, Michael Marsiglia, testified that during his investigation of Medeiros’ complaint, supervisor Christopher Lohman told him that Botelho had both “done some of these things to him”, and harass a rental employee. Marsiglia further stated that other employees “might” have told him that they witnessed Botelho engage in this type of conduct. Lastly, even Botelho admitted that Penske’s managers and supervisors were present when he engaged in “horseplay”, which he described as goosing and pinching the buttocks of co-workers.

Under these circumstances, I find that Complainants have clearly established that Penske’s supervisory personnel knew about and tolerated Botelho’s conduct. I also believe that Botelho engaged in this type harassing conduct in an open manner and with impunity. Penske’s managers and supervisors ignored Medeiros and Dow’s complaints and merely construed Botelho’s behavior as innocent horseplay. Consequently, it is clear that Penske had knowledge of Botelho’s conduct and did nothing to stop it. It is also clearly

reasonable to conclude that Penske should have known that Botelho would continue to engage in this type of harassing conduct after Medeiros complained about such behavior in December 1995.

In summary, Complainants have each established by a preponderance of the evidence that Botelho engaged in unwelcome severe and perverse verbal and physical conduct of a sexual nature. In addition, Penske knew or should have known about the harassing conduct and failed to take prompt remedial action. Therefore, I conclude that Penske is liable for unlawful sexual harassment in violation of M.G.L. c. 151B, § 4(16A).

B. RETALIATION

Complainants have also charged Penske with engaging in unlawful retaliation. M.G.L. c. 151B, § 4(4) makes it unlawful for an employer to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under c. 151B or because he has filed a complaint, testified, or assisted in any proceeding alleging a violation of c. 151B. Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), *citing*, Bain v. Springfield, 424 Mass. 758, 765 (1997); *see*, Sexual Harassment Guidelines, at 25-28.

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, 22 MDLR at 25, *quoting*, Ruffino v. State Street Bank and Trust Co, 908 F. Supp. 1019, 1040 (D. Mass. 1995). In the absence of any direct evidence of retaliatory motive, as in this case, the

Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665-666 (2000); Yeskevicz v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001).

Consequently, in order to establish a prima facie case of unlawful retaliation, each Complainant must prove that: (1) he engaged in protected activity; (2) Penske knew he had engaged in protected activity; (3) Penske subjected him to an adverse employment action; and, (4) a casual connection existed between the protected activity, known by the retaliator, and the adverse employment action. Morris v. Boston Edison Co., 942 F. Supp. 65, 68-69 (D. Mass. 1996); Ruffino, 908 F. Supp. at 1044; Kelly, 22 MDLR at 215; Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995). Once Complainants have established a prima facie case of retaliation, the burden of production shifts to Penske to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Penske meets this burden, then Complainants must show by a preponderance of the evidence that Penske acted with retaliatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); see, Abramian, 432 Mass at 117. Complainants 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, Complainants retain the ultimate burden of proving that Penske's adverse action was the result of retaliatory animus. *Id.*; Abramian, 432 Mass at 117.

1. Medeiros

I conclude that Medeiros has established a prima facie case of unlawful retaliation. First, Medeiros engaged in protected activity when he filed his initial sexual harassment complaint with the Commission. Penske received his complaint on or about April 20, 1996 and shortly thereafter, began subjecting Medeiros to numerous adverse employment actions. Specifically, Walker singled Medeiros out for criticism, made him take unnecessary steps to verify a doctor's note, denied him the privilege of receiving phone calls from his family, and denied him a vacation day on the pretense that he had not given adequate notice. Moreover, Walker told Medeiros that he had brought all of the problems with Botelho on himself and subjected Medeiros to adverse scrutiny by warning him "everyone will be watching" his every move. Medeiros further testified credibly that supervisor Brian Hickey told him, "If you look at Frankie [Botelho], I will write you up." Walker also instructed Medeiros not to associate with co-complainant Michael Dow. In addition, on June 12, 1996, Walker verbally and physically abused Medeiros.

More importantly, within weeks of Penske's receipt of Medeiros' complaint, Walker began a pattern of retaliatory disciplinary action. Prior to Penske's receipt of the complaint, Medeiros had never been subjected to any form or discipline and he was considered an outstanding mechanic. Notwithstanding, on

May 24, 1996, Walker gave Medeiros two written warnings for poor work performance. In addition, in September and October 1996, Labrie wrote up Medeiros another four times, the last one culminating in his termination. Considering the proximity in time between Penske's knowledge of the protected activity and the discipline, a casual connection can clearly be inferred between Penske's receipt of Medeiros' MCAD complaint and the subsequent adverse employment actions. Hochstadt v. Worcester Foundation for Experimental Biology, Inc., 425 F. Supp. 318 (D. Mass. 1971), *aff'd*, 545 F.2d 222 (1st Cir. 1976); Kelly, 22 MDLR at 215-216; Therefore, Medeiros has established a prima facie case of retaliation.

The burden of production now shifts to Penske to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. With respect to Medeiros' claims that Walker and Hickey unjustifiably forced him to obtain a doctor's notice for his backache and denied him a vacation day, I find that Penske failed to provide any credible reasons for such actions. Moreover, Penske failed to provide any legitimate reason why Walker and Hickey scrutinized Medeiros' every move, warned him that he would be written-up if he dared look at Botelho, and threatened him with the loss of his job. In addition, Penske failed to provide any reason why Walker subjected Medeiros to verbal and physical abuse on June 12, 1996, or prohibited Medeiros from conversing with Dow.

With respect to the disciplinary notices, Penske claimed that it disciplined and subsequently terminated Medeiros because his work performance had

deteriorated substantially and it relies on the numerous written notices issued in May, September, and October 1996. However, I believe Medeiros has successfully established that the disciplinary actions were motivated by retaliatory animus. Specifically, the first warning issued by Walker on May 24, 1996, pertained to Medeiros' alleged failure to properly install a particular clutch supplied by a customer. This incident occurred on April 29, 1996, less than two weeks after Penske received Medeiros' complaint. Prior to the installation, Medeiros told Hickey that the clutch was inappropriate for the particular vehicle. When the clutch's transmission subsequently fell out of adjustment, Walker wrote-up Medeiros even though Hickey admitted that he supplied Medeiros with the particular clutch and had little knowledge or experience with these type of repairs. Penske's repair orders also substantiate that the clutch supplied by Hickey was "the wrong part" for the vehicle. In the second warning issued on May 24, Walker merely stated that Medeiros performed his duties "in an unsatisfactory manner which resulted in significant damage to Burnham Unit # 97." However, at the Public Hearing, neither Hickey nor any other witness for Penske could provide a credible reason for the issuance of this warning. Furthermore, Medeiros testified credibly that Walker was not a mechanic and had no experience with respect to this type of repair.

With respect to the four written warnings issued by Dan Labrie in September and October 1996, I believe Labrie singled-out Medeiros for scrutiny and issued these notices with the intent of terminating Medeiros' employment. As a general matter, I found Labrie's testimony regarding these incidents to be

lacking in credibility. For example, Labrie “coincidentally” performed a quality control inspection in September 1996 on a truck recently serviced by Medeiros. With respect to the second warning, Labrie claimed Medeiros used an excessive amount of time repairing a dim headlight and failed to use a jumper cable to fix the problem. Medeiros and other auto technicians called by Penske testified, however, that the use of a jumper wire to repair a headlight was not a permanent or acceptable repair. Lastly, Labrie wrote-up and then terminated Medeiros’ employment after he allegedly spent an excessive amount of time removing a broken huck bolt from a truck. Contrary to Labrie’s testimony, Medeiros and other witnesses acknowledged that the method he used to remove the huck bolt was acceptable and appropriate. Moreover, Labonte testified that he sometimes wasted time on jobs without incurring any disciplinary action.

In summary, Medeiros has established a prima facie case of unlawful retaliation. In particular, I found that a causal connection existed between Penske’s receipt of his MCAD Complainant and the subsequent adverse employment actions. Although Penske articulated legitimate reasons for the disciplinary actions, Medeiros successfully established that the reasons proffered by Penske were false and that it acted with retaliatory animus. Consequently, Complainant has proven that Penske is liable for unlawful retaliation in violation of M.G.L. c. 151B, §§ 4(4), (4A).

2. DOW

I likewise conclude that Dow has established a prima facie case of retaliation. The filing of his complaint with the Commission on May 10, 1996, constituted protected activity and I credited Dow's testimony that after Penske received his complaint, it subjected him to various adverse employment actions. First, Dow testified credibly that his supervisors began to constantly yell at him and criticize his work. In addition, supervisor Joe DiGregorio and co-worker Walter Magurn accused Dow of being a "rat" and then made physically threatening gestures, prompting Dow to seek a restraining order. Moreover, Dow testified that Penske then refused to give him work. Prior to filing his complaint, Dow claimed that he worked 35-60 hours a week. Afterwards, he testified that his hours were reduced dramatically despite constantly making it known to management that he was both available to work and physically and mentally capable of working.

Having established a prima facie case of retaliation, the burden of production shifts to Penske to establish legitimate, non-retaliatory reasons for its actions. With respect to the reduction in hours, Kevin Malloy testified credibly that during the summer of 1996, Dow would be totally unavailable for work for emotional, health and family issues, or would simply fail to report to work after being called in. Dow admitted that he suffered from an alcohol and drug problem during this period. Although Dow's name continued to appear on the list of hikers eligible for work, I credited Malloy's testimony that Penske essentially stopped calling him for work because he remained unreliable. Dow also failed to provide any credible evidence

that Penske's rationale for not calling him in for work was false or motivated by retaliatory animus. Consequently, Dow has not established that his loss of hours was attributable to any unlawful retaliation.

However, Penske failed to produce any credible rationale to rebut Dow's prima facie case that its supervisors unjustifiably yelled at him and criticized his work after receiving his MCAD complaint. In addition, Penske did not provide any credible evidence to contradict Dow's claim that a supervisor and co-worker called him a "rat" and made physically threatening gestures. In my opinion, this conduct clearly falls within the definition of unlawful conduct under G.L. c. 151B, § 4(4), since Penske discriminated against Dow because he both opposed practices forbidden under c. 151B and filed a complaint with the Commission.²⁵

Consequently, I conclude that Penske engaged in unlawful retaliation when its supervisors and managers berated and threatened Dow after Penske received his MCAD complaint. However, Penske has articulated legitimate non-retaliatory reasons for not calling Dow in for work in the summer of 1996. In addition, Dow has not established that his reduction in hours were motivated by discriminatory animus or otherwise proved a claim of retaliatory or constructive discharge. Moreover, Dow has not provided any credible evidence that the hostile treatment he received from his managers hindered or prevented him from going to work and, therefore, he is not entitled to lost wages as a result of Penske's unlawful retaliation.

²⁵ This conduct would also constitute an attempt to "intimidate, threaten, or interfere" with Dow's exercise or enjoyment of his right to work in a setting free from discrimination and retaliation in violation of G.L. c. 151B, § 4(4A).

IV. REMEDY

M.G.L. c. 151B, § 5 authorizes the Commission to grant remedies to make Complainants whole, including back pay and emotional distress damages.

College-Town v. MCAD, 400 Mass. 156, 68-169 (1987); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 181-182 (1985).

A. MEDEIROS

Medeiros is entitled to lost wages stemming from his wrongful retaliatory discharge. Medeiros claimed that he earned approximately \$43,969.15 (\$845.56/week) from Penske at the time of his termination. After being fired, Medeiros worked for Butler Services, Inc., but at a substantially lower rate of pay. According to his 1996 tax return, Medeiros earned \$30,478.47 from Penske for the period of January until his termination in October; and, \$4,644.28 from Butler Services, Inc. for the period of October – December 1996. Therefore, for 1996, he lost \$8,846.40 [$\$43,969.15 - (\$4,644.28 + \$30,478.47)$] in earnings. In 1997, Medeiros earned \$32,043.75 from Butler and, thus, he suffered a wage differential of \$11,925.40. For 1998, he earned \$20,158.91 from Butler and \$9,455.00 from Pro-Tech Automotive Service, Inc., for an annual total of \$29,613.91; resulting in a wage differential of \$14,355.24. Medeiros testified credibly that his pay did not return to the level he received from Penske until 1999. Consequently, Medeiros is entitled to a total of \$35,127.32 in back pay representing the lost wages he incurred from the time of his termination through 1998.

In addition, Medeiros is entitled to monetary damages in compensation for the emotional distress he suffered as a direct and probable result of Penske's unlawful sexual harassment and unlawful retaliation. Buckley Nursing Home, 20 Mass. App. Ct. at 182. Both Medeiros and his wife Francine provided moving and very credible testimony about the distress he suffered as a result of Botelho's assaults and Penske's failure to take any effective remedial action. Although a child was conceived and born during the period Medeiros worked at Penske, I credited the Medeiros's testimony that their sexual relationship suffered greatly, as he was unable to sexually perform as well or as frequently as he could prior to experiencing the problems at work. Medeiros also testified credibly that it became increasingly difficult to maintain an emotional attachment to his wife and children and he often found himself reluctant to embrace or expose his emotions to his children. Prior to the offensive incidents at Penske, Medeiros claimed he had no such issues and enjoyed a deep emotional and physical relationship with his wife and children. Francine Medeiros corroborated her husband's testimony that he experienced both great mental anguish and a significant change in his behavior toward his family. She testified that her husband's experiences at Penske made him emotionally detached and very difficult to approach. She also claimed that she first noticed a change in her husband's demeanor when he began to describe the things Botelho did and said to him. She stated that her husband's behavior around their children also became different, as he no longer wanted to be touched or hugged in front of other people.

Both Leo and Francine Medeiros stated that the emotional impact of the harassment magnified the distress he had previously suffered as a result of the discovery that their young daughter had been sexually molested. According to Leo Medeiros, the events at Penske brought the raw emotion of these events back to the surface and added to his great anguish, grief and emotional distress. In addition, the reduction in Medeiros' income, and their obligation to assume 100% of their health insurance premiums under COBRA, forced the family to borrow money and use credit cards to meet expenses and, thus, added to the stress already inflicted upon the family.

Penske claimed that the stress Medeiros suffered, if any, is attributable in whole or in part to the anxiety related to the abuse suffered by their daughter. Generally, it is not unusual for a complainant to suffer distress caused by factors separate and apart from the discriminatory act. Rosati v. Town of Warren Bd. of Health, 19 MDLR 34, 38 (1997); Fiske v. R.P. Liquor, Inc., 16 MDLR 1042, 1057 (1994); Norman v. Andover Country Club, 15 MDLR 1394, 1422 (1993). Moreover, the presence of other significant stressors in a complainant's life does not absolve a respondent from liability for the distress caused by its actions. Franklin Publishing Co., Inc. v. MCAD, 25 Mass. App. Ct. 974, 975 (1988); Fiske, 16 MDLR at 1957. A finding of discrimination alone permits the inference of emotional distress as a normal adjunct of discrimination. Samuelson v. Sungard Financial Systems, Inc. 20 MDLR 49, 52 (1998).

Although it is likely that some of the stress Medeiros experienced is related in part to situation with his daughter, absent any other credible evidence

to the contrary, I believe most of the distress he attributed to Penske is in fact a direct and probable result of the hostile and retaliatory work environment. As stated above, I found Botelho's conduct to be severely degrading, nauseating, and repulsive. Moreover, Penske's managers ignored and tolerated Botelho's behavior, and then engaged in a blatant pattern of retaliation after Medeiros filed his complaint with the Commission. Under these circumstances, I have little doubt that the Penske's unlawful conduct greatly exacerbated the mental anguish he experienced as a result of the harm to his daughter. Therefore, I conclude that Leo Medeiros is entitled to an award of \$105,000.00 in damages in compensation for the emotional distress he suffered as a direct and probable consequence of Penske's unlawful conduct.

B. DOW

As stated above, Dow has failed to establish that his reduction in hours at Penske resulted from any discriminatory animus. He also failed to prove a claim for retaliatory or constructive discharge. Moreover, Dow has not claimed that the hostile treatment he received at Penske hindered or prevented him from going to work. Consequently, he is not entitled to lost wages as a result of Penske's unlawful conduct. However, Dow is entitled to monetary damages in compensation for the emotional distress he suffered as a direct and probable result of Penske's unlawful sexual harassment and retaliation.

Dow gave compelling and credible testimony on the impact of Botelho's harassing behavior on his emotional well being, claiming he felt "violated" and

“raped.” As described above, Dow testified that he suffered from obsessive-compulsive disorder and was, thus, very concerned about his physical features. Consequently, Botelho’s remarks about Dow’s penis size disturbed him greatly. After Botelho made these remarks, Dow claimed that he became highly sensitive about this matter, regularly asking his girlfriends whether he is “ok”, or if they think he is “too small?” He testified, “I cannot get what happened out of my mind. The way he would grab me and talk about my penis size.” He further stated that “[he] will go to my grave with that comment.” Dow testified that he never had any issues about this matter prior to the harassment at Penske. He also claimed that Botelho’s assaults had a horrible effect on his relationship with his ex-girlfriend, Jennifer DeManbro. He testified that she eventually broke up with him because he had “no confidence.” DeManbro corroborated Dow’s testimony and further claimed that Dow appeared to be ashamed about the events that occurred at Penske.

Dow’s medical records indicate that he had an extensive history of anxiety, obsessive-compulsive disorder, mood disorder, and anti-depressant medication. However, as discussed at length above, it is not unusual for a complainant to suffer distress caused by factors separate and apart from the discriminatory act. Moreover, the presence of a significant history of anxiety and psychological ailments in Dow’s life would not absolve Penske from liability for the distress directly caused by its actions. In this case, Botelho’s severe and pervasive harassment greatly disturbed Dow and caused him severe emotional harm. I believe Botelho’s grabbing of Dow’s privates and the remarks about his penis

deeply impacted his emotional well being, particularly since Dow was very obsessive about his physical features.

The medical records, however, do not support Dow's claim that the counseling he received was the direct and probable result of Penske's unlawful conduct. Specifically, Dow sought counseling for only one month beginning in March 1997. Although the records document in great detail Dow's problems with anxiety, anger, and obsessive-compulsive disorder, the records only sparingly refer to "sexual harassment", and instead often refer to problems with his family. Notwithstanding, I believe the emotional harm he suffered while employed at Penske was significant. Moreover, Penske's supervisors and managers exacerbated the harm by witnessing, tolerating, and ignoring Botelho's offensive behavior without taking any prompt or effective remedial action. Lastly, after Dow filed his MCAD Complainant, his supervisors and co-workers engaged in threatening and disturbing retaliatory conduct. Under these circumstances, I conclude that Michael Dow is entitled to an award of \$75,000.00 in damages in compensation for the emotional distress he incurred as a direct and probable consequence of the Penske's unlawful conduct.

C. TRAINING

As described in detail above, the record contains clear and convincing evidence that Penske's supervisors and managers witnessed, tolerated, and ignored Botelho's outrageous and degrading behavior. In addition, Penske's management, including its Human Resource Manager, Michael Marsiglia,

considered this disgusting conduct merely sophomoric horseplay. Moreover, the record contains credible evidence that Penske failed to comply with the provisions of M.G.L. c. 151B, § 3A, with respect to creation and dissemination of a sexual harassment policy. Lastly, the sexual harassment training provided by Marsiglia in May 1996, appeared to be wholly insufficient, considering that Marsiglia lacked a competent grasp of the law in Massachusetts with respect to sexual harassment, and afterward, Penske's managers engaged in a pattern of retaliatory conduct toward both Medeiros and Dow.

Under these circumstances, I believe a comprehensive course of training for all employees, managers and supervisors, in the areas of sexual harassment and retaliation would be appropriate to address what appears to be a systemic and pervasive problem at Penske's Medford facility.

V. ORDER

Based on the foregoing findings of fact and conclusions of law, Respondent, Penske Truck Leasing, is hereby ordered:

1. To pay Complainant, Leo Medeiros, within sixty (60) days of receipt of this decision, the sum of \$35,127.32 in back pay, and the sum of \$105,000.00 in damages for emotional distress, for a total award of \$140,127.32, plus interest at the statutory rate of 12% per annum from the date the complaint was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

2. To pay Complainant, Michael Dow, within sixty (60) days of receipt of this decision, the sum of \$105,000.00 in damages for emotional distress plus interest at the statutory rate of 12% per annum from the date the complaint was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.
3. To conduct basic annual training sessions on sexual harassment and unlawful retaliation in employment for all managers, supervisors, and employees located at Respondent's facility in Medford, MA. This training requirement shall also apply to all management personnel who supervise employees working at the Medford facility, but are not located at the facility. With respect to such training:
 - a. Each training session for employees must be at least two (2) hours in length and each training session for managers and supervisors must be at least three (3) hours in length. All company employees, as of the date of the training session, are required to attend. No more than twenty-five (25) persons may attend each training session. Respondent shall repeat this training, once each calendar year for the next five (5) years, for all new employees who were hired after the date of the initial training session.
 - b. Within thirty (30) days of the receipt of this decision, Respondent shall select a trainer to conduct the initial training sessions. The trainer must be selected from the list of trainers who have completed the Commission-certified discrimination prevention-

training program, available from the Commission's Director of Training. Within one week of Respondent's selection of a trainer, a copy of this hearing decision must be forwarded to the trainer for his or her review.

- c. At least one month prior to the training date, Respondent must submit a draft training agenda to the Commission's Director of Training for approval; and, provide the Commission's Director of Training with one-month advance notice of the training date(s) and location(s). If the Commission decides to send a representative to observe the training sessions, Respondent will provide the Commission representative with unfettered access to the training sessions.
- d. Within one month after the completion of the training, Respondent must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.
- e. In the event that Respondent's agency is sold, materially changed, or taken over by new management, any and all successor purchasers, assignors, managers, or operators of Respondent's agency (hereinafter referred to as the "new owners") shall be

responsible for fulfilling the training requirements specified in this decision if any of the following shall apply:

- i. The majority of the managers and supervisors employed by Respondent as of the date of this decision continue to work for the new owners as of the succession date;
 - ii. The majority of Respondent's governing board (e.g., board of directors, trustees) as of the date of this decision continues to serve on the new owner's board as of the succession date;
 - iii. The new owners are relatives of Respondent, or previously employed by Respondent as a manager or supervisor; or,
 - iv. Respondent continues to retain an interest in the successor entity.
- f. For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.
4. The parties shall notify the Clerk of the Commission as soon as the above-described ordered payments have been made. If Respondent fails to comply with the terms of this Order within the time periods allotted, Complainants are instructed to immediately notify the Clerk of the Commission.

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 periods allotted, Complainant should notify the Clerk of the Commission.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 7th day of February, 2003.

EDWARD R. MITNICK,
Hearing Officer