

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION, NANCY ARCADIPANE, and
CHASITY SCHAUFUS,
Complainants

v.

Docket No. 00-131340
00-131341

A.W. CHESTERTON COMPANY,
Respondent

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

Appearances: Stephen Schultz, Esq., for Complainants.
Kenneth J. Martin, Esq., and Keith M. McLean, Esq.,
for Respondent.

I. PROCEDURAL HISTORY

On May 9, 2000, Complainants Nancy Arcadipane (“Arcadipane”) and Chasity Schaufus (“Schaufus”) filed separate complaints with the Massachusetts Commission Against Discrimination (the “Commission”) against their former employer, A.W. Chesterton Company (“Respondent”). Complainants alleged that Respondent engaged in unlawful sexual harassment by creating and maintaining a hostile and abusive work environment in violation of M.G.L. c. 151B.

On October 3, 2002, the Commission issued a lack of probable cause finding with respect to Arcadipane’s sexual harassment claim, but amended the complaint *sua sponte* to add a claim for unlawful gender based harassment. On October 31, 2003, the Commission similarly issued a lack of probable cause

finding as to Schaufus' sexual harassment claim, but likewise amended Schaufus' complaint *sua sponte* to add a claim for gender based harassment. On August 12, 2003, the Commission certified Arcadipane and Schaufus' claims for a Public Hearing. The Commission subsequently amended the certification order on August 25, 2003, to include the issue of whether Arcadipane's claim was timely filed.¹

On April 1, 2, and 5, 2004, a Public Hearing was held before me in Boston, MA. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the Public 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

1. Complainant Nancy Arcadipane is a female who worked for Respondent as an administrative assistant in the Environmental Health and Safety ("EHS") Department from 1996 to December 20, 1999. Arcadipane is an employee within the meaning of M.G.L. c. 151B, § 1(6).

2. Complainant Chasity Schaufus is a female who similarly worked for Respondent as an administrative assistant in the EHS Department from June 15,

¹ The original certification order already included the issue of whether Schaufus' claim was timely.

1998 to November 12, 1999. Schaufus is an employee within the meaning of M.G.L. c. 151B, § 1(6).

3. Respondent A.W. Chesterton Company is a corporation with an office in Stoneham, Massachusetts. It is uncontested that Respondent employed more than six employees and, therefore, is an employer within the meaning of M.G.L. c. 151B, § 1(5).

4. At all relevant times hereto, Linda Loreth held the position of manager at Respondent and supervised Complainants and the other employees in the EHS Department. Both Arcadipane and Schaufus testified that they had a very good relationship with Loreth. Loreth testified she received a significant amount of management training with Respondent, including a 16-20 week program that addressed team building, and how to handle complaints and conflict in the workplace.

5. In 1996, Respondent hired Alex Krauss as data entry operator in the EHS Department. Many of Krauss' coworkers, including Complainants, testified that Krauss engaged in inappropriate, bizarre, and occasionally hostile and frightening behavior at work. For example, David Cook, who is a male, testified that Krauss "gave me the creeps" when they occasionally interacted at work. Cook described Krauss as very unique, emotional, introverted, and socially inept. In particular, Cook stated that Krauss had, on separate occasions, attempted to talk to him about a sex scene of a movie, discussed the death of his brother and the nature of dying, brought up how a friend was killed at the airport, and once

remarked that he would come over unannounced to Cook's house. Additionally, Cook and another male coworker, Karl Chopelas, claimed that Krauss was a "close talker" who regularly stood very close to them when they had a conversation. Loreth acknowledged that Krauss had problems interacting with people and she described him as very introverted, soft spoken, and reflective.²

6. As an example of Krauss' inappropriate conduct, Ann Choate, a female coworker who worked in the EHS Department,³ testified in her deposition that after Krauss objected to something she had done, he responded, "I wish I had a loaded gun so I could put it to your head."⁴ Choate did not indicate in her deposition that she believed Krauss made this remark to her because she was a woman. As a result of this incident, Respondent referred Krauss to a counselor. According to Loreth, the counselor did not believe Krauss posed a danger to others but opined that Krauss was "devoid of all social skills" and recommended that he receive further counseling. Respondent then gave Krauss a verbal warning. Although Loreth described Krauss' remark to Choate as a "verbal assault", she believed the verbal warning was appropriate considering he had never previously engaged in any similar offensive conduct.

² During his testimony at the Public Hearing, Krauss answered even the simplest questions in a very slow and methodical manner.

³ While employed with Respondent, Ann Choate went by her maiden-name, Ann Caveney. However, the parties have consistently referred to her by her married name.

⁴ Although neither Arcadipane nor Schaufus witnessed this incident, they both testified credibly that they became aware of Krauss' conduct during the course of their employment. Specifically, Schaufus claimed that Choate told her about Krauss' remark in November 1999. Arcadipane testified that another coworker, Ginger Adams, told her about the incident sometime prior to November 1999. Adams apparently witnessed the incident between Choate and Krauss.

7. The central work area in the EHS Department consisted of two offices adjoining a small area with four cubicles. At all relevant times, Loreth worked in one of the offices. From April 1997 through December 1998, Ann Choate occupied the other office until she left Respondent. Krauss, Arcadipane and another administrative assistant, Ginger Adams, worked in the cubicles. In June 1998, Schaufus replaced Adams as an administrative assistant and likewise worked in the cubicle area. After Choate left Respondent in December 1998, Krauss moved into Choate's old office. In March 1999, Respondent hired Maureen Smith to fill Krauss' old position and she worked in the cubicle area. At all relevant times, Krauss was also the only male employee located in the central work area of the EHS Department and he primarily worked and interacted with Loreth, Choate, Adams, Arcadipane, Schaufus, and Smith.

8. At the outset of their employment, Arcadipane and Schaufus each received and read a copy of Chesterton's employee handbook, and signed an acknowledgement that stated they had read the contents of the handbook. The handbook included a policy prohibiting unlawful harassment, including sexual harassment. Both Arcadipane and Schaufus admitted that after they received the handbook, they knew an employee could report any incident of harassment to either their manager or human resources. Additionally, Respondent held an in-house sexual harassment seminar conducted by an outside consultant, which Arcadipane attended. Arcadipane acknowledged that the seminar included instructions to employees on how to respond and report incidents of harassment. Respondent also hired a consultant to train its managers on sexual harassment.

Loreth admitted, however, that the company's sexual harassment policy was not posted in a prominent place in the EHS Department.

9. Arcadipane and Schaufus each testified that Krauss engaged in several incidents of offensive, obscene and threatening conduct. However, both Complainants admitted that with only a few exceptions (discussed below), they did not complain about or report most of these incidents to Loreth or any other supervisor until either the end of or after their employment with Respondent.

10. First, Arcadipane claimed that in or about 1997, she witnessed Krauss engage in disturbing and volatile behavior toward Choate. Specifically, Arcadipane testified that Choate was describing a funny story about a date when Krauss started pacing and then yelled, "I don't want to hear anything about Linda's fucking sex life." Arcadipane did not complain about or report this incident to Loreth or anyone else at Respondent. However, Loreth admitted that Choate told her about Krauss' outburst. Loreth testified that she did not investigate or speak to Krauss about this matter.

11. Additionally, both Arcadipane and Schaufus testified that Krauss constantly touched his buttocks and crotch. Arcadipane stated that Krauss looked like he was "picking his underwear out of his crack" and claimed that he rubbed his crotch "every time that I saw him." Similarly, Schaufus testified that Krauss looked as if he was trying to dislodge a "wedgie." Neither Complainant claimed that Krauss put his hand inside of his pants. Maureen Smith testified that she also witnessed Krauss touching his buttocks, but she believed the act

was an involuntary “tick” and she did not believe it was inappropriate.⁵ Krauss denied ever touching his buttocks in an inappropriate manner. Loreth also claimed that she never witnessed Krauss engage in this conduct. I credit Complainants’ testimony; however, they did not offer any credible evidence that Krauss deliberately engaged in this behavior or only committed these acts in their presence or in presence of other female co-workers.

12. Both Complainants also testified credibly that Krauss would stand very close to each of them in an intimidating manner when he spoke to them. However, as mentioned above, male employees similarly testified that Krauss would engage in this behavior with them. Specifically, coworkers Karl Chopelas and David Cook each testified credibly that Krauss would stand close to them while conversing.

13. Arcadipane and Schaufus testified that Krauss once stated that if you spell-check the letter “x” on the computer, then “sex” is one of the word options that comes up. Schaufus claimed that Krauss made this remark between June and August 1998. Although neither Complainant complained about or reported this incident, Loreth admitted that she heard Krauss’ comment, but did not believe it was inappropriate or offensive.

14. In addition, both Complainants testified that on another occasion, Krauss told them about the premise of a “Mad About You” episode in which the main character had taken Viagra and then had a “hard-on.” Schaufus believed this

⁵ Smith has worked for Respondent from March 25, 1999 to the present date.

incident occurred before November 1999. Krauss admitted to discussing the episode with people at work, but denied ever using the term, “hard-on.” Neither Arcadipane nor Schaufus complained about or reported this matter to a supervisor. I credit Complainants’ testimony with respect to this matter.

15. Both Arcadipane and Schaufus testified that on another occasion, Krauss told them that he had dialed the phone number for Blue Cross/Blue Shield, but the number connected to a sex-phone line. Krauss claimed that he told Loreth about this incident because he knew that the phone numbers dialed from work were recorded and he did not want Loreth to think he intentionally called a sex line. Loreth corroborated Krauss’ testimony. She also claimed that she did not feel his comment was inappropriate. Krauss testified that he then told his co-workers about the sex-line number because he did not want them to make the same mistake. Maureen Smith stated that she heard Krauss explain the matter and was not offended by his conduct. Although I credit Krauss’ testimony that the Blue Cross/Blue Shield number did connect to a sex chat line, I believe he told his coworkers about this matter to make a boorish joke.

16. Arcadipane and Schaufus also stated that, prior to November 1999, Krauss initiated several conversations about murdered women.⁶ Specifically, they testified that Krauss discussed a story in the news where a woman was found murdered at the airport.⁷ Arcadipane also claimed that on another

⁶ As stated above, David Cook testified credibly that Krauss initiated similar discussions with him. Thus, Krauss did not appear to target Complainants based on their sex with respect to discussing these stories.

⁷ Schaufus testified that Krauss made this comment during her first few weeks of employment with Respondent, on or about June 1998.

occasion, Krauss initiated a conversation about a story in the news where a nanny was murdered. According to Arcadipane, Krauss mentioned that the victim had attended his church. Schaufus believed Krauss told her that he knew the woman murdered at the airport as opposed to the nanny. Arcadipane testified that on a different occasion, Krauss described a television program where a woman was murdered. She claimed Krauss then told her that he had dreamed he was the murderer from the program. Loreth acknowledged that Arcadipane told her about Krauss' remarks regarding his dreams and Loreth found the story "very disturbing"; however, she never spoke to Krauss about the matter. According to Loreth, she asked Arcadipane if she wanted her to talk to Krauss about the nightmare conversations, but Arcadipane said, "No." I credit Loreth's testimony with respect to her conversations with Arcadipane on this matter. I also credit Complainants' testimony with respect to these incidents. I further find the discrepancies between Arcadipane and Schaufus' versions of Krauss' gruesome conversations to be de minimus and inconsequential.

17. Both Complainants testified credibly regarding an incident in November 1999, in which Krauss engaged in extremely threatening and offensive conduct. Apparently, on November 17, 1998, Krauss told Arcadipane that someone had been calling her phone in the afternoon and then hanging-up after he picked it up. Krauss insisted that the calls came from Arcadipane's mother, even though Arcadipane assured him that it could not be her mother. Arcadipane told Krauss not to pick up the phone and to let the calls be answered by her voice mail. The next day, November 18, Krauss complained to Arcadipane that the same thing

had happened again and he reiterated that he believed it was her mother who had hung up on him. At this point, Schaufus stood up and told Krauss to “stop badgering Nancy” and stop picking up Nancy’s phone. Both Arcadipane and Schaufus testified that Krauss then got visibly angry, approached Schaufus, and screamed at her, “You’re a fucking bitch”, “Mind your own fucking business”, and “Shut the fuck up.” They claimed that he also banged on the file cabinets. Both Complainants testified that Krauss had greatly frightened them. Loreth was not in the office at the time, but when she returned, Complainants told her what had transpired. On November 20, 1998, Respondent issued Krauss a written warning as a result of this incident. The warning required Krauss to “seek guidance and support to control and manage feelings and behavior.” The warning further indicated that the matter will be reviewed in six months. Loreth commented that she gave Krauss a written warning because it was his second incident and he had clearly stepped over the line.⁸ However, Loreth admitted that Respondent did not have a progressive discipline policy and she had never suspended or terminated an employee at Respondent during her sixteen years as a supervisor. Krauss signed the written warning to indicate his receipt of the document, but expressly noted his disagreement with the action, stating: “Any statement made by me to Chastity Schaufus was in response to verbal assault on me by the latter...I sincerely hope such hostile situation will no longer be

⁸ Although I concluded, as discussed in detail below, that Krauss did not target Complainants on the basis of their sex and, therefore, did not engage in unlawful gender discrimination, Respondent’s response to Krauss’ volatile behavior on this occasion strikes me as grossly insufficient and ineffective. In particular, Respondent’s mere issuance of a written warning to Krauss, without any requirement that he obtain any further counseling or anger management training, appears abhorrently inadequate. Moreover, despite the seriousness of this incident and Krauss’ refusal to accept any real responsibility for his conduct, shortly thereafter Respondent promoted Krauss and gave him a new office. Thus, I believe Respondent clearly failed to take any reasonable or effective remedial action in response to this incident.

tolerated by the company. For my part, should any offense have been taken by anything said by me, please accept my sincere apologies.” I credit Complainant’s testimony regarding this incident.

18. Loreth admitted that she never subsequently checked to see if Krauss had obtained any “guidance” with respect to his behavior, and she believed that the written warning did not require Krauss to seek counseling. In addition, less than a month after the issuing the written warning, Loreth completed Krauss’ annual evaluation and rated his overall performance as “very good.” Specifically, Loreth gave Krauss almost all “2’s” (i.e., “very good performance”), with the sole exception of giving him a “4” (i.e., “improved performance needed to meet requirements job”) with respect to the attribute for: “Builds and maintains productive working relationships. Treats others with respect. Cooperates with co-workers.” Loreth also hand wrote on the evaluation, “Good work is overshadowed with negative people skills and can completely change the review if not put in check.” Notwithstanding Loreth’s concerns about Krauss’ communication problems and relationship issues with his coworkers, only a couple of months later, in February 1999, Loreth promoted Krauss to the position of regulatory associate and translator. Krauss also moved into the vacant office previously taken by Choate.⁹

19. Arcadipane and Schaufus also testified that in February 1999, Krauss dropped a magazine advertisement on each of their respective desks, which

⁹ Loreth and Krauss now worked in the two offices, respectively, while all of the other employees worked in cubicles in the central office area.

contained a picture of Michelangelo's "David", a famous statute of a nude male. The script on the ad stated, "Lost the Dongle." Although Arcadipane claimed she did not find the picture of the statute offensive, she was offended by the manner in which Krauss put the ad on top of her work. Loreth stated that Krauss showed her the ad, but she did not find the picture offensive or inappropriate. Schaufus claimed that after Krauss showed Loreth the ad, she heard Loreth say, "It must be some male's attempt at advertising." Schaufus testified that after Krauss showed the ad to Arcadipane and Loreth, he came over and put it on her keyboard. Schaufus stated that she merely brushed it aside. Krauss admitted to showing the ad to his co-workers, but stated he did not intend to offend anyone and only showed them the advertisement because he thought it was funny. Although Arcadipane typed a report of this event on her computer, she never gave the report to Loreth or anyone else at Respondent. After Arcadipane stopped working for Respondent, someone found her statement on her old computer and brought it to Loreth's attention. The note stated:

Before 12 noon on this date (February 26, 1999), Alex Krauss approached my desk and said to me, "Hey Nance what do you think of this?" I was working on a survey for Linda (Loreth) and had papers in front of me but he shoved a magazine on my desk on top of the papers that I was working on. It was a picture of a famous statute of a nude male. I picked up the magazine and handed it back to him and then proceeded to ask him why he showed it to me. He said, oh I should have known that it would offend you and then made a remark about the kind of advertisement put in computer.

I credit Arcadipane and Schaufus' testimony regarding this matter. Although Complainants did not introduce sufficient credible evidence that the ad was

offensive or inappropriate, I find that Krauss did deliberately show this ad to his coworkers and supervisor to make a sexual joke or innuendo.

20. Arcadipane testified that sometime after November 1999, she discovered that Krauss had gone into her desk. She admitted that when she brought this matter to Loreth's attention, Loreth acted immediately to remedy the situation by leaving the key to the supply closet elsewhere in the office. Loreth testified that employees regularly went into Arcadipane's desk to get the key to the supply closet. I credit Loreth's testimony. I further find that Arcadipane failed to introduce any credible testimony that Krauss' conduct on this occasion was inappropriate.

21. Schaufus further testified that sometime just prior to her ending her employment with Respondent, Krauss told her he could follow her out of work. She further alleged that within the last couple days of her employment at Respondent, Krauss stood close to her and raised his voice. Again, Schaufus admitted to never reporting these incidents to anyone at Respondent until her exit interview. In addition, as described above, David Cook, a male coworker, alleged that Krauss engaged in similar conduct toward him.

22. In November 1999, Schaufus left her employment with Respondent. She testified that she left as a result of the hostile working environment and her fear of Krauss. Prior to her departure, she had an exit interview with Carol McDermottroe, who worked for Respondent as a human resource generalist. According to Schaufus, she told McDermottroe that she was leaving Respondent

because of Krauss. Schaufus further testified that she told McDermottroe about all of her interactions with Krauss. McDermottroe corroborated Schaufus' testimony that they discussed Krauss' conduct, but McDermottroe did not believe she told her about all of the alleged incidents. On the "Termination Exit Interview" form, McDermottroe wrote that Schaufus left Respondent as a result of "another job opportunity due to threat of explosion (anger) by another co-worker." McDermottroe also indicated that Schaufus expressed to her Krauss interfered with her ability to do her job. McDermottroe further wrote that Schaufus "was not happy with the way Alex situation was handled 3 months after incident, Alex was promoted."

23. Arcadipane also testified that Krauss engaged in hostile and frightening conduct during a staff meeting on December 13, 1999. During this meeting, which was attended by both male and female employees, Krauss became visibly emotional, allegedly because his grandfather and brother were very ill and he was falling behind in his work. Arcadipane testified that Krauss started to cry and stated to Loreth, "I'm flipping out." However, Arcadipane admitted that Krauss never raised his voice, swore, or threatened anyone at this meeting. She also acknowledged that Krauss neither spoke to her at this meeting, nor made any physical movements in her direction. Maureen Smith, who attended the meeting, stated that she was not offended or frightened by Krauss' actions. After the meeting, Arcadipane left work and eventually went home for the rest of the day because she feared being near Krauss. Arcadipane then telephoned Loreth after she arrived home and told her that this incident had upset her, and she did not

know if she could continue to work in such a hostile and fearful place. According to Arcadipane, Loreth responded by stating she wasn't sure there had been an incident. Arcadipane claimed Loreth then mentioned that she was disappointed with her for going home and not finishing her work. Arcadipane testified that Loreth then asked her whether she was going to use sick leave for taking the afternoon off. At the Public Hearing, Loreth admitted that she admonished Arcadipane on this occasion for not getting her work done. I credit Arcadipane's testimony regarding this incident, including her fearfulness of Krauss. However, she failed to introduce any credible evidence that Krauss directed his outburst toward the women in the office or blamed his emotional break-down on her or any other woman. In fact, I believe this incident supports the finding that Krauss may have been emotionally instable, but not someone with a predilection for violence toward women.

24. On December 20, 1999, one week after this incident, Arcadipane resigned. Similarly to Schaufus, Arcadipane testified that she left due to the hostile working environment and her fear of Krauss. At the time of her resignation, Arcadipane prepared a five page letter which she gave to Respondent. Although the letter described some of the Krauss' incidents of bizarre behavior, the letter did not specifically reference "sexual" or "gender" harassment. In addition, she failed to describe a vast majority of her current allegations, including: Krauss' touching his crotch and buttocks, misdialing the Blue Cross/Blue Shield telephone number, spellchecking the letter "x", discussing the premise of a "Mad About You" episode, standing too close to her when they

spoke, and the conversations regarding the murders of the nanny and the woman at the airport. Arcadipane did attach a list of “inappropriate conversations” that she had with Krauss. She wrote on the list:

How Alex almost committed suicide after the breakup of romantic relationship.

How he hated his grandfather. How he was living in the basement of his grandfather’s home in Winchester, MA and how was told by his grandfather to move out.

He told me he lived with his father and stepmother in Connecticut (prior to moving in his grandfather’s basement), that he did not get along with his stepmother and was told by his father to leave.

Problems living with roommates.

Told me that a family member had committed suicide.

A conversation about a tv show he watched about a young woman that was murdered by three young men in Texas. He told me he dreamed about what had happened only that he was the murderer.

Talked to me about his nightmares.

Told me more than once that he felt suicidal. When he told me he was suicidal, I told him to immediately pick up the phone, call his primary care physician and get a referral to see someone right away. He told me he tried therapy in the past and it didn’t work. He then put on his jacket and left the office for a couple of hours. He was crying, very emotional and I was very uncomfortable and felt nervous after this conversation. I did tell Alex he could not talk to me about such matters anymore.

25. Schaufus testified that during her employment at Respondent, she would go into the bathroom at work and cry after having an interaction with Krauss. She also claimed that she continued to break into tears as a result of her “reliving the fear” she endured while working for Respondent. In addition, she stated that she could not sleep and experienced nightmares in which she dreamed that Krauss would show up at her house. She claimed the nightmares have continued since

she left Respondent. Schaufus had secured new employment prior to her leaving Respondent and thus did not suffer any lost wages.

26. At the time Arcadipane left Respondent, she was earning \$12.99 per hour and working 37½ hours per week. Although she applied for two jobs in February 2000, she did not obtain a new job until approximately September 18, 2000. Thus, Arcadipane claimed that she lost \$18,510.75 in wages during her nine months of unemployment.

27. Arcadipane testified that Krauss' intrusion into her personal space made her feel trapped, uncomfortable, and claustrophobic. She further claimed that she was "always on edge" and frightened because of Krauss' behavior.

Arcadipane stated she was so fearful of Krauss that she arranged for her husband to call her twice a day to check up on her. Moreover, she testified that after she stopped working for Respondent in December 1999, she cried every day until August 2000. Arcadipane also claimed that she became so upset about how her career had ended at Respondent that she experienced diarrhea, headaches, and stomach aches. Furthermore, she stated she could not sleep, had a hard time concentrating, and regularly felt "sad." She testified that her depressed emotional state made it too difficult for her to look for work. Eventually, in approximately August 2000, she began taking a prescription medication (Celexa) for her depression, which enabled her to function better and, thus, pursue and obtain employment.

III. CONCLUSIONS OF LAW

1. TIMELINESS OF COMPLAINTS

Respondent has asserted that Complainants' claims are untimely. During the period relevant to their respective complaints, M.G.L. c. 151B, § 5 required a complainant to file a charge of discrimination with the Commission within six months after the alleged discriminatory act. The failure of a complainant to file within six months of the discriminatory act complained of operates as a bar to proceeding before the Commission. However, the Commission has recognized an exception to the six month filing requirement where a complainant alleges facts "which indicate that the unlawful conduct complained of is of a continuing nature." MacNeal v. Boston Public Schools, 23 MDLR 132, 135 (2003); Morrissey v. Holiday Inn, 23 MDLR 74, 77 (2003); see, 804 C.M.R. s.1.10(2) (continuing violation exception to the six-month statutory filing requirement); see also, Cuddyer v. The Stop & Shop Supermarket Co., 434 Mass. 521, 531 (2001) (continuing violation exception recognizes that some discrimination claims involve a series of related acts that must be viewed in their totality to adequately assess their discriminatory nature and impact); Rock v. MCAD, 384 Mass. 198, 205-08 (1981) (upholding "continuing violation" regulation). In order to invoke the continuing violation doctrine, a complainant must show that "the alleged events are part of an ongoing pattern of discrimination, and there is a discrete violation within the six-month limitations period to anchor the earlier claims." Cuddyer, 434 Mass. at 531-32. Consequently, a complainant must establish that at least one incident of unlawful conduct occurred, "which standing alone might not necessarily support her claim, but which substantially relates to earlier incidents

of abuse, and substantially contributes to the continuation of a hostile work environment, such that the incident anchors all related incidents, thereby making the entirety of the claim for discriminatory conduct timely." *Id.* at 533

Complainants filed their charges with the Commission on May 9, 2000. They must, therefore, establish that a discrete violation occurred on or after November 9, 1999, in order for their complaints to be deemed timely. Although the overwhelming majority of the incidents of harassment occurred prior to November 1999, both Complainants testified credibly that on November 17, 1999, Krauss verbally assaulted Schaufus in a severely disturbing and hostile manner in Arcadipane's presence. Although this incident, standing alone, does not necessarily support Complainants' respective claims of gender-based harassment, I believe this incident substantially relates to the earlier incidents of alleged hostile behavior by Krauss. Consequently, I conclude that Complainants' claims are timely.

2. **GENDER-BASED HARASSMENT**¹⁰

M.G.L. c. 151B, § 4(1) prohibits employment discrimination on the basis of gender. Gender discrimination prohibited under the statute encompasses a work environment pervaded by abuse and harassment. College-Town Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987). To establish a prima facie case of

¹⁰ Both prior to, during, and after the Public Hearing, the parties raised the question of whether Respondent engaged in "sexual harassment" as initially alleged in Complainants' complaints to the Commission. I do not believe the sexual harassment claim was certified for my consideration in light of the "lack of probable cause" findings with respect to those claims and the amendments, sua sponte, adding claims of gender-based harassment. However, analyses of these claims under these theories are very similar. Moreover, notwithstanding whether the issues are framed as sexual harassment or gender-based harassment, I find that Complainants have failed to establish that Respondent created an unlawful hostile work environment in violation of c. 151B.

unlawful harassment based on gender, each Complainant must show that: (1) she is a member of a protected class; (2) she was the target of speech or conduct based on membership in such class; (3) the speech or conduct was sufficiently severe or pervasive to alter her terms or conditions of employment and create an abusive working environment; (4) the harassment was carried out by an employee with a supervisory relationship to her or the employer knew or should have known of the harassment and failed to take prompt remedial action. Fluet v. Harvard University, 23 MDLR 145, 150 (2001); Kelley v. Plymouth County Sheriff's Department, al., 22 MDLR 208, 213 (2000); Beldo v. University of Massachusetts, 20 MDLR 105, 111 (1998). In the case at hand, Complainants must show that their respective work environment was pervaded by gender-based harassment or abuse that posed a barrier to their full participation in Respondent's workplace. College-Town, 400 Mass. 162 (1987); Morrissey, 23 MDLR at 78; Fluet, 23 MDLR at 145.

I conclude that Complainants have failed to establish a prima facie claim of gender-based harassment. Specifically, they failed to show that Krauss targeted them because of their sex. The evidence in the record supports the conclusion that Krauss' bizarre behavior was chiefly aimed at both male and female co-workers. For example, David Cook, a male co-worker, testified credibly that Krauss "gave [him] the creeps", especially after Krauss had, on separate occasions, attempted to talk about a sex scene of a movie, discussed the death of his brother and the nature of dying, brought up how a friend was killed at the airport, and once remarked that he would come over unannounced to

Cook's house. Similarly to Complainants, Cook and another male coworker, Karl Chopelas, also claimed that Krauss was a close talker who got in your face when having a conversation. In addition, on December 13, 1999, at a staff meeting attended by both male and female employees, Krauss had a volatile and emotional breakdown and no credible evidence exists to support the conclusion that his outburst was aimed at or attributed to women.

Moreover, Complainants failed to introduce any credible evidence that Krauss made sexist, prejudicial, derogatory, or stereotypical comments about women, or had ridiculed or insulted the Complainants because of their sex. Complainants' also did not offer any credible evidence that Krauss deliberately touched his private parts or only engaged in this behavior in their presence or in presence of other female co-workers. Although no evidence in record indicated that Krauss discussed his weird dreams with men or verbally accosted any male coworkers, I am still not persuaded that Krauss targeted his female co-workers. As stated above, Krauss was the only male working in the main office of the EHS Department. In addition, he engaged in similarly bizarre and inappropriate behavior with Cook, a male coworker, even though Krauss did not work closely with him or in the same office. I believe Complainants were simply exposed to more episodes of Krauss' strange conduct simply because they worked in close proximity to him, and not as a result of their gender. Under these circumstances, Complainants cannot establish a prima facie case of gender discrimination and, therefore, failed to show that Respondent violated M.G.L. c. 151B.

IV. ORDER

For the reasons set forth above, the complaints in this matter is hereby dismissed. 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 5th day of January, 2005.

Edward R. Mitnick,
Hearing Officer