

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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PAULA MINDEL,  
Complainant

v.

DOCKET NO: 96-BEM-0760

CHELSEA CLOCK COMPANY,  
Respondent

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AMENDED DECISION OF THE HEARING OFFICER UPON  
REMAND FROM SUPERIOR COURT

This matter comes before me upon a remand from the Superior Court for further proceedings consistent with the memorandum and order of the Appeals Court, instructing me to clearly state the testimony deemed to be credible with respect to certain findings of fact in my decision of May 16, 2001, specifically findings of fact numbers 4, 5, 6, 7, 8, 9, 13, 14, 16, 17, 19, 21, 28, 31, 32, 36, 37 and 40. Accordingly, the amended decision below incorporates the instructions of the Appeals Court.

II. FINDINGS OF FACT

1. Paula Mindel was hired by Respondent in April 1995 as a customer service representative. Patsy Young, then Customer Service Supervisor, was Complainant's immediate supervisor. Robert Brunault, then Respondent's National Sales Manager, was Young's supervisor. Complainant's annual salary was \$24,000.00.

2. Respondent Chelsea Clock Company, located in Chelsea, Massachusetts, manufactures high quality clocks for sale to retail and jewelry stores, as well as to businesses. It does not sell its products directly to customers. Respondent employs more than six employees and is an employer within the definition of M.G.L. ch. 151B. Douglas “Bruce” Mauch is Respondent’s Vice-President and Richard Leavitt is Respondent’s President.

3. Complainant testified that although Patsy Young provided her with step-by-step instructions on entering invoices and purchase orders into the computer, she received no formal training, a written job description or a written list of her job duties. I do not credit this testimony, which was disputed by Young, who testified credibly that she provided Complainant with numerous pages of written procedures, produced at the public hearing, at the commencement of her employment.

4. Complainant testified that approximately a week or two into her employment, she encountered Jose Otero, an employee in Respondent’s brass production area. I credit her testimony.

5. Complainant testified that whenever Otero saw her, he would whistle at her. At first, Complainant was not offended and would wave to Otero, however, over time, Otero’s greeting became a “wolf whistle”. Complainant testified that she immediately

stopped acknowledging Otero when the nature of the whistle began to change. I credit her testimony.

6. Complainant testified that she reported Otero's conduct to Young, who replied, "Oh, that's just Jose. He doesn't mean anything and don't pay attention to him." I credit her testimony.

7. Complainant testified that in order to avoid Otero, she began using the front entrance of the building to get to her workstation, although the rear entrance was closer to the area where she parked her car. After a couple of weeks, Complainant resumed using the rear entrance to the building. I credit her testimony.

8. Otero continued to whistle at Complainant after she resumed using the rear entrance. She testified that she continued to complain to Young, who dismissed her concerns. Complainant stated that she dreaded going through the basement of the building. I credit her testimony that Otero continued to whistle at her. I do not credit her testimony that Complainant continued to complain to Young, or that she dreaded going through the basement of the building.

9. On one occasion, when Complainant was entering the basement carrying coffee and donuts, Otero jumped out of an alcove, startling her and nearly causing her to spill the coffee and donuts. Complainant testified that when she reported this incident to Young, however, Young "laughed it off." I credit this testimony.

10. Complainant testified that on various occasions, while she was in the computer room, making photocopies, Otero would stare at her through the window from outside the building. Complainant testified that she complained to Young about this conduct, however, Young replied that Otero was probably just emptying trash. I do not credit Complainant's testimony that she repeatedly reported these incidents to Patsy Young. In her complaint to this Commission, Complainant states that she "finally complained about Otero to Bob Brunault." I do not believe her testimony that she told the Commission's intake worker about her complaints to Young, but the intake worker simply failed to include them, as it is unlikely that these crucial details would not have been transcribed at the time of intake.

11. Complainant testified that on one occasion in November 1995, as she ate in the lunchroom, Otero asked Complainant to go out with him. Complainant responded that she was not interested, and that she had a son Otero's age. Otero then gestured as if holding and tickling a baby, and said to Complainant, "I want you to say, 'Oh, Jose, you're my little baby.'" Complainant testified that this conduct humiliated and sickened her. Complainant testified that Young then entered the lunchroom and Otero told Young that she was "looking good." Young smiled and left the room. I credit this testimony.

12. It was Respondent's custom to distribute turkeys to its employees at Thanksgiving time. According to Complainant, when she went to retrieve her turkey, Otero was present and told her that she was "the best woman in the place" and that he had

saved the best turkey for her. Complainant was bothered by Otero's remarks. I credit this testimony.

13. In early December 1995, Respondent hired Carol Spano (now Cusack) through L & L Associates, an employment agency. L & L placed Spano with Respondent at Bob Brunault's request for a "part-time to full-time to permanent" customer service representative. Complainant testified that Young told her that Spano had been hired to help out during Respondent's busy holiday season. Complainant assisted in training Spano, who told Complainant that she would not consider working full-time at Chelsea Clock because she was caring for a friend's young child. I credit Complainant's testimony. Brunault testified that Spano was hired as a replacement for Complainant, whose employment he intended to terminate. I do not credit Brunault's testimony. Spano testified that she was told she would replace Complainant. I do not credit Spano's testimony.

14. Respondent held its Christmas party on Friday, December 22, 1995. Complainant testified that at this party she gave a gift to Richard Leavitt, who told her that it was a pleasure having her on his team, that she was doing a great job and to keep it up. I credit her testimony.

15. Complainant testified that after the party, as she cleaned her desk, Otero entered the area and ran toward her with arms outstretched. As he advanced, Complainant covered her face, pulled her arms close to her body, and turned away. She

stated that Otero grabbed her and wrapped his arms around her. Complainant turned her head and Otero kissed her neck. Complainant screamed and Otero ran out. After this incident, Complainant began shaking, was upset and felt violated. She then grabbed her pocketbook and jacket and went out to her car. I credit this testimony.

16. Complainant returned to work on December 27, 1995. She stated that she did not report the hugging and kissing incident to anyone because Young, Mauch and Leavitt were on vacation until after the New Year. She did not tell Brunault, who was present on December 27<sup>th</sup>, because of her lack of confidence in him. In addition, the production area where Otero worked was shut down for the week and Complainant believed that Otero would not be at work that week. I credit her testimony.

17. On Thursday, December 28, 1995 at about 4:00 p.m., Complainant, Brunault and Spano were present when Otero entered the customer service area and asked them what time they were going home. Brunault responded that they would be leaving at 5:00 p.m. Complainant testified that after Otero left, she told Brunault she felt threatened by Otero. I credit her testimony that she told Brunault that she felt threatened by Otero; this testimony was corroborated by Brunault. Complainant testified that she also told Brunault about all of the incidents with Otero, including the whistling, jumping out at her, asking her out, looking at her through the window of the computer room and the hugging and kissing incident at the Christmas party. I credit her testimony that she told Brunault about all the incidents. Spano and Complainant walked out together to Complainant's car, and Complainant gave Spano a ride to the local mall. I credit

Complainant's testimony that she walked out with Spano and gave Spano a ride to the mall.

18. When Complainant reported to work at 8:00 a.m. on Friday, December 29, 1995, Spano was present, although Spano usually began work at 11:00 a.m. Spano told Complainant that Brunault had called her the night before requesting her to report to work early.

19. Brunault then called Complainant into his office and informed her that her employment was terminated. According to Complainant, Brunault told her the reasons for her termination were that she had overcharged a customer by \$3.00 for shipping and had used Young's computer. Complainant asked Brunault if the real reason for her termination was her complaint about Otero, but Brunault denied this was the reason. After returning from lunch, Complainant collected her personal belongings. She pleaded in vain with Brunault to reconsider his decision, and he helped her pack her things into her car. I credit this testimony.

20. Complainant testified that as she was leaving the building, she saw Mauch in Respondent's parking lot and said to him, "I don't believe it. I've just been terminated." According to Complainant, Mauch responded that he did not know what had happened, but that he had enjoyed working with Complainant. When asked about this conversation at the public hearing, Mauch testified, "I don't remember it." I credit Complainant's

testimony regarding this encounter. I believe that Mauch was unaware of the termination at the time.

21. Bruneault testified that on Friday, December 29, 1995, he contacted L & L Associates, and told Susan Yerdon, L & L's president, that he had an additional position to fill. I credit his testimony that he called Yerdon. However, I do not credit his testimony that he intended to fill Spano's position. The job order form completed by Yerdon in response to this call indicated that the job had been open for "one day", and that the job was for a "replacement" The word "HOLD" was written over this job order form. (Exh. C-12). Bruneault testified that the position was never filled. I credit his testimony that the job was not filled.

22. On January 3, 1996, Complainant telephoned Leavitt and told him about her termination. According to Complainant, Leavitt expressed surprise and agreed to meet with Complainant that day to discuss her termination. At the meeting, Complainant told Leavitt she believed Brunault had fired her because of her complaints about Otero. Leavitt responded that he did not think there was a connection. Complainant told Leavitt how much she loved her job and wanted to remain employed at Chelsea Clock. Leavitt responded that he had once been fired from a job and that he understood how she felt. According to Complainant, Leavitt called her a valued employee, but he did not get involved in personnel decisions. However, he suggested that Complainant may have been too upset to understand the reasons for her termination, and therefore agreed to arrange

another meeting between Complainant and Brunault, so that Brunault could again explain his reasons for terminating her employment. I credit this testimony.

23. At Leavitt's direction, Complainant met with Brunault on January 22, 1996. Brunault repeated the reasons for her termination given on December 29, and stated that, in addition, Complainant constantly asked Patsy Young questions. Complainant stated that she took notes of the meetings with Brunault and Leavitt, but discarded these notes three weeks before her scheduled deposition in this matter. I do not credit Complainant's testimony regarding the taking of notes. I find it incredible that Complainant would destroy notes that would support her testimony.

24. Terry Kubarsky-Engel has worked at Respondent since 1985. She has been an outside sales representative since 1993. Kubarsky-Engel testified that she observed numerous mistakes in orders prepared by Complainant during the course of Complainant's employment, and that in June 1995 she complained to Patsy Young about these mistakes. According to Kubarsky-Engel, in late October or early November 1995, Young and Brunault told her that they intended to terminate Complainant's employment after the busy season in early January. I do not credit this testimony, which I find self-serving.

25. Patsy Young testified that between August and September, she had numerous discussions with Complainant concerning Complainant's work performance problems. Young met with Complainant on October 6, 1995 for a performance review. At the

meeting Young discussed various performance issues, such as problems with back orders, using incorrect product code numbers, scheduling orders, incorrect invoicing, making personal telephone calls and a general lack of product knowledge. According to Young, Complainant apologized for some of the performance problems, but denied making personal phone calls. Young testified that Complainant was upset about the entire discussion, cried and asked if she was about to be fired. I do not credit this testimony in its entirety. While I believe that Young had problems with Complainant's performance, I believe that Young exaggerated the extent of these problems to enhance Respondent's position in this matter.

26. Young testified that at the end of the meeting, she told Complainant that she was "on notice" and it was up to her to do what was necessary to maintain her job. According to Young, Complainant thanked her for bringing the matters to her attention and for allowing her to retain her job. She promised to try to do better. Young testified that the same day, she created a written memorandum of this October 6 meeting. I do not credit this testimony.

27. A memorandum purporting to memorialize the meeting was introduced into evidence, and listed in detail Complainant's shortcomings. This undated memorandum was neither signed by Complainant or shown to her. Young testified that her failure to date the memorandum and have it signed by Complainant were "oversights". She stated that Complainant's performance improved slightly after this meeting and her personal

calls ceased. I do not credit this testimony. I believe that this document was created after the fact in order to bolster Respondent's position in this matter.

28. Robert Brunault oversaw the customer service department and had daily discussions with Patsy Young about the activities of the customer service area. Brunault testified that during the summer of 1995, he had numerous discussions with Young about Complainant's job performance and stated that several areas of Complainant's work needed improvement. Brunault set forth a plan to improve Complainant's performance in the summer of 1995, during a conversation with Complainant. Brunault was aware that Young planned to meet with Complainant on October 6, and reviewed the areas of concern with Young ahead of time. Brunault testified that he maintained a folder dating back to July 1995 containing examples of mistakes made by Complainant, as did Young. Brunault did not know what happened to this folder, and the only examples of mistakes made by Complainant produced at the public hearing were dated from November and December 1995. Brunault stated that Young provided him with copy of Young's memorandum within a day after the October 6 meeting. He testified that he noticed the memorandum was undated because that was "a sore spot" with him. He asked Young if she gave Complainant a copy of the memorandum and Young responded that she had. This contradicted the testimony of Young, who stated that she did not provide Complainant with a copy of the memorandum. Brunault testified that he, along with Young and Leavitt formulated a plan to replace Complainant. I do not credit any of Brunault's testimony as set forth in this paragraph, as it contradicts the testimony of Young and is not credible.

29. Young testified that in late October or early November, when Complainant's performance failed to improve, Young and Brunault decided to hire an additional employee through a temporary employment agency. They agreed that if the additional employee performed to their satisfaction, she would replace Complainant. I do credit this testimony. I believe that a temporary employee was hired to help out during the busy season, leaving open the possibility of full-time permanent employment after the first of the year.

30. Young testified that she called L & L Associates and told Susan Yerdon that Respondent planned to replace a current employee and they were seeking someone to train as a replacement. Brunault also testified that he spoke with Yerdon regarding replacing a current employee in late December 1995 or early January 1996. According to Brunault, he, Patsy Young, Rick Leavitt, and Mauch decided in early November to terminate Complainant's employment at the end of the busy Christmas season. I do not credit this testimony.

31. Brunault testified that during the first three weeks of December he counseled Complainant about her failure to keep organized papers having to do with paying Respondent's sales representatives. I do not credit this testimony.

32. Brunault testified that on December 28 or 29, he telephoned Patsy Young, who was out of town on vacation and told her that he was going to terminate Complainant's employment. He explained that the decision had been made to set a date certain for Complainant's termination because of Complainant's having been paid for a "snow day". I do not credit this testimony.

33. Susan Yerdon of L & L Employment Agency testified that in November 1995, she contacted Patsy Young during a routine solicitation call and sent Young some written information about L & L. She spoke to Brunault several days later. According to Yerdon, Brunault told her he needed a customer service employee to begin part-time while training and then become permanent. Brunault told her that he was replacing a current employee, and to keep the matter confidential. I find it incredible that Yerdon, who testified that she dealt with hundreds of people every year, was able to recall the contents of this conversation so clearly more than five years later.

34. On December 30, 1995, the day after Complainant's termination, Brunault again called L & L and requested a temporary employee to replace a job that had been open for "one day". Although Brunault testified that he intended to replace Spano, who had taken over Complainant's job, Spano remained on the payroll of L & L, never became an employee of Chelsea Clock and was terminated for poor attendance in January 1996. The word "HOLD" is written on the form completed by Yerdon in response to this telephone call by Brunault. According to Brunault, at some point after the call to Yerdon, he told her to put a hold on the job because, Respondent "...often use[s] people from

other departments to answer the phones. We may have decided to have someone fill in.” I believe that Brunault directed L & L to place a hold on this job because he did not want it to appear that Complainant was being replaced by someone other than Spano.

35. Spano worked at Chelsea Clock through January 1996 for a total of less than three months. She remained on L & L’s payroll throughout her employment. In February 1996, Spano was let go for poor attendance. L & L then referred Eileen Merlo, who worked full-time at Respondent for a short period, until failing to report to work.

36. Susan Yerdon testified that on December 29, 1995, Brunault contacted her and said that another position had opened up the day before and he was looking for a replacement. Yerdon further testified that Brunault later told her to place a “hold” on the job because he was not sure whether it would be full-time or part-time. I do not credit this testimony.

37. Bruce Mauch runs the manufacturing operation at Respondent and Brunault reported to him. Mauch testified that there was a snowstorm in the area beginning December 19, 1995, causing seven employees, including Complainant, to remain out of work on December 20. Mauch decided that those who had remained out of work would not be paid for the day, unless they chose to use accrued vacation time. As Complainant had not accrued vacation time, she should not have been paid. However, according to Mauch, on December 27 when he examined the payroll checks covering the previous week, he noticed that Complainant had been paid for the 20<sup>th</sup> as a personal day. He was unable to determine how Complainant was paid a personal day. Her timecard for that

week did not designate how she should have been paid and was not approved by a supervisor. Mauch and Brunault discussed the matter and determined that paying Complainant would establish a poor precedent and would cause resentment among those who were not paid for the day. After a discussion, Mauch suggested that they simply issue a new check, deducting a day's pay, but Brunault wanted to avoid an argument with Complainant about whether she should have been paid. They therefore determined that rather than reduce Complainant's paycheck, they would simply fix a date certain for Complainant's termination, since they intended to terminate her employment in the near future. Brunault fixed December 29 as Complainant's termination date. Mauch testified that Complainant was not terminated for the "snow day" incident, but rather the date of her termination was moved up because of it. Mauch insisted that Complainant was terminated for poor performance. I credit Mauch's testimony that he did not wish to pay Complainant for the "snow day". However, I do not credit his testimony that he had already planned to terminate Complainant's employment for poor performance and moved the termination date up because of the snow day.

38. Mauch testified that Brunault approached him on the afternoon of December 28 and said that there was a problem with Complainant's pending termination. Brunault told Mauch that Complainant had informed him that she felt uncomfortable around Otero who had been making unwanted advances toward her. Brunault wanted to know if he should postpone Complainant's termination in light of this complaint. Mauch told Brunault that it was a serious matter and to document the allegations, but that it had nothing to do with Complainant's termination, which would proceed. I do not credit this

testimony. I find it self-serving. I believe that Complainant's complaint about Otero was a consideration in making the decision to terminate Complainant's employment.

39. On January 3, 1996 Mauch became aware that Complainant was meeting with Leavitt, but he was not present at the meeting. After the meeting, Mauch asked Leavitt if Complainant had referred to sexual harassment allegations against Otero and Leavitt responded that Complainant had not referred to any such allegations.

40. Mauch testified that he met with Otero on January 3, 1996 regarding Complainant's complaint. According to Mauch, Otero told him that he was friendly with Complainant and denied engaging in any offensive conduct. Mauch advised Otero to be careful in his actions and if he heard any further complaints he would institute disciplinary action against him. Mauch memorialized this conversation in a handwritten memorandum immediately after meeting with Otero and placed the memorandum in Otero's personnel file. (Exh.R-37). I credit this testimony.

41. Richard Leavitt, president of Chelsea Clock, is primarily involved in the marketing and sales area of Respondent. According to Leavitt, Complainant came into his office three or four times during her employment to discuss how much she enjoyed working for Respondent. At these meetings, Complainant never complained about problems with Otero. I credit this testimony.

42. Leavitt testified that he is very familiar with Respondent's customer service area. According to Leavitt, in spring of 1995, he became aware of problems with

Complainant's performance. He initially received reports from field sales representatives who were having difficulty with inaccurately placed orders. By summer, Complainant's supervisors were reporting problems to him. In addition, Leavitt was aware of the meeting between Young and Complainant in October 1995. In December, he became involved in the decision to replace Complainant and encouraged Brunault and Young to act quickly to terminate her by the end of the year. I do not credit this testimony to the extent that Leavitt was involved in the decision to terminate Complainant's employment.

43. Leavitt returned from vacation on January 2, 1996 and learned that Complainant wanted to meet with him. He testified that he met with Complainant on January 3, 1996, consistent with his practice of meeting with employees who have been terminated. Complainant was quite upset at having been terminated, and Leavitt attempted to explain some of the reasons. He suggested that Complainant cool off for a few days and then talk again to Brunault. Leavitt denied saying at this meeting that Complainant was a valued employee and denied saying, "I can't believe it. I came back and found that you are gone. I'm so surprised." I find it incredible that Leavitt would meet with Complainant after her termination and further set up another meeting with Brunault to discuss her termination merely to assist her in understanding the reasons for her termination. I believe instead that these meetings were arranged to determine the likelihood of Complainant's filing a sexual harassment complaint as well as for "damage control".

43. Complainant produced several letters addressed to her from customers of Chelsea Clock expressing thanks for her assistance in the sale of products.

44. Complainant testified that she loved her job at Respondent and looked forward to going to work because something fascinating happened every day. Complainant testified that she felt productive and appreciated by staff and clients. I credit this testimony.

45. After her termination, Complainant was shocked, disbelieving and devastated. For the next few months, she was depressed and unable to function, would stay in bed and stopped going to the beauty parlor. She felt victimized and hurt, and was unable to socialize or interact with family and friends. She lost her self-confidence and continues to experience fear of going places alone. Complainant testified that she felt degraded and humiliated at having to receive unemployment benefits, because she had always been self-sufficient. A friend of Complainant's, as well as Complainant's son, corroborated this testimony. I credit this testimony, although I do not believe that Complainant was "unable to function" as she became reemployed after a short period of time.

46. Complainant was next employed at a printing company, from March 1996 to the summer of 1996 when the company went out of business. From approximately December 1996 through summer of 1998, Complainant worked for Prime Communications. She was terminated from this position.

47. Complainant next worked as a receptionist in a dental office. Her job was eliminated after the dentist sold his practice. She then worked as a receptionist in another doctor's office. She was terminated from that position when the person she was hired to replace returned to work.

### III. CONCLUSIONS OF LAW

#### A. Respondent's Motion to Reopen Record

The hearing in this matter lasted seven days stretched over a one-month period. On the last day of hearing, the Complainant testified in rebuttal for a period of approximately one hour and ten minutes, from 4:30 p.m. to 5:40 p.m. Respondent's counsel requested a continuance of the proceedings in order to prepare for cross-examination of the Complainant and possible sur-rebuttal. The undersigned instructed Respondent's counsel that the hearing would not be continued, but that he would be permitted 45 minutes to cross-examine Complainant. Respondent's counsel refused to cross-examine Complainant under these terms and the hearing was adjourned. Following the hearing, Respondent filed a motion to reopen the hearing on the grounds that it was unreasonable to expect counsel to effectively cross-examine the Complainant and to present sur-rebuttal in the time allotted and that the undersigned's decision to limit cross-examination was arbitrary, capricious and in violation of G.L. ch. 30A. Complainant filed an opposition thereto. The motion to reopen the record was denied.

The ruling to limit cross-examination was not an abuse of discretion. It must be noted that during Complainant's case in chief, Respondent's counsel, an experienced,

able and thoroughly prepared attorney, cross-examined Complainant for the entire afternoon of the first day of hearing and for the better part of the second day of hearing. Further, throughout the hearing, Respondent's counsel vigorously defended this case. Here, Complainant's rebuttal consisted of evidence that Respondent's customers were happy with her work, as were her supervisors. Respondent's counsel chose not to cross-examine Complainant on this point. There is simply no basis to support Respondent's contention that a ruling limiting cross-examination of the Complainant in rebuttal constituted an abuse of the wide discretion afforded the fact-finder in an administrative proceeding.

#### B. Sexual Harassment

M.G.L. Ch. 151B, sec. 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. See, Collegetown Division of Interco. v. MCAD, 400 Mass. 156, 165 (1987). Complainant alleges that Otero's conduct created a hostile work environment. As Otero was not a managerial employee, Complainant must show that Respondent knew or should have known about the conduct in order establish its liability. Id. Complainant has alleged that she repeatedly informed her immediate supervisor, Patsy Young, about this

conduct, and that Young brushed off these complaints. I did not credit Complainant's testimony that she complained to Young. Complainant's assertion that she reported this crucial information to the Commission's intake worker who then failed to include it in the complaint seems implausible, and Young denied that Complainant registered any complaints with her about Otero's conduct. Moreover, I believe that Complainant would not have hesitated to go directly to Leavitt with concerns about Otero's conduct, as Complainant had frequently discussed work-related matters with Leavitt and had taken direction from him during her employment. I conclude that Complainant did not complain about Otero's conduct until December 28 when she informed Brunault about his conduct. Moreover, I conclude that, excluding the kiss, Otero's conduct consisting of whistling, jumping out at Complainant, asking her out and imagining himself as her "baby", did not create a hostile work environment for Complainant. Although she ceased entering the office via the rear door for a short period of time because of Otero's whistling, Complainant resumed going through the rear door because it was more convenient. I do not believe she would have again taken her original route had she been disturbed by Otero. Moreover, Complainant met with Leavitt during her employment on several occasions to express how much she enjoyed her work. I believe she felt comfortable enough with Leavitt to tell him about Otero's conduct, had it interfered with her ability to perform her job. Therefore, I conclude that Respondent did not engage in unlawful sexual harassment in violation of G.L. ch. 151B.

### C. Retaliation

Complainant has alleged that she was terminated in retaliation for having complained of sexual harassment. In order to establish a prima facie case of retaliatory termination, Complainant must show that she engaged in a protected activity, that Respondent was aware of that activity, and that she was subsequently subjected to an adverse employment action and, absent other evidence establishing retaliatory intent, the adverse action followed the protected activity within such time that retaliatory intent can be inferred. Cimino v. BUT Electronics, 18 MDLR 197 (1996). I conclude that Complainant has established a prima facie case of unlawful retaliation. She engaged in a protected activity when she complained to her superiors about Otero's conduct. The day after her complaint, her employment with Respondent was terminated. Retaliatory intent can be inferred from the time frame alone.

Once a prima facie case of retaliation is established, the burden shifts to Respondent to articulate a legitimate, nondiscriminatory reason for its actions. If the Complainant can show that the employer's articulated reason is a pretext for unlawful discrimination, she may prevail. Complainant may demonstrate pretext if the employer's explanation for the action has no reasonable support in the evidence or is wholly disbelieved and hence, is transparently pretextual. Wheelock College v. MCAD, 371 Mass. 130, 138 (1976). Moreover, a showing of pretext requires proof that but for the employer's intent to discriminate, the adverse employment action would not have been imposed. Fontaine v. Ebttec, 415 Mass. 309, 315 fn.8 (1993). Respondent offers two reasons in support of its decision to terminate Complainant's employment on December 29, 1995. First Respondent produced evidence of Complainant's unsatisfactory job performance and her managers' plan to hire and train her replacement and then terminate

her employment. Further Respondent contends that Complainant's employment was terminated earlier than planned because of her having been paid for a "snow day". Therefore, I conclude that Respondent has met its burden of articulating legitimate, non-discriminatory reasons for terminating Complainant's employment. However, Complainant was able to demonstrate that Respondent's articulated reasons were suspect. Respondent's assertion that Carol Spano was hired expressly to replace Complainant does not stand up to scrutiny. Brunault did not offer a credible explanation for calling the temporary agency *the day after* Complainant's termination seeking a "replacement". His claim that he was seeking a replacement for Spano does not follow logically. If Spano had been originally hired to replace Complainant, then there should have been no reason to replace Spano, who remained on L & L's payroll. While I believe that Complainant had some performance problems, I do not believe Respondent's claim that there was a long-range plan known to the company's president and vice-president to terminate her employment after the holidays. If Complainant's performance had really been so poor, it is difficult to believe that she would have been kept on during the busy holiday season, especially if Spano had been performing satisfactorily. It is more believable that Spano was employed through a temporary agency to help out during the holiday season. Moreover, Patsy Young's memorandum purporting to reflect Complainant's performance evaluation of October 6, 1995 was undated and never shown to Complainant, leading me to conclude that the memorandum was not written at the time of the meeting, but rather was created at a later date to bolster Respondent's assertion that Complainant was a poor employee. Respondent also asserts that that Complainant was terminated at the end of December, rather than in mid-January, as planned, because she had been paid for a day

she did not work. Respondent explained that it chose to terminate her instead of docking her pay because of Brunault's reluctance to engage in a discussion with Complainant about the reasons for not paying her. While I believe that the "snow day" may have contributed to Respondent's decision to terminate Complainant's employment at this time, I do not believe that it was the "but for" reason.

Thus, although, Respondent presented some credible evidence of its dissatisfaction with Complainant's job performance, Complainant's testimony coupled with the fact that her termination followed her protected activity in such close proximity leads me to conclude that Respondent viewed Complainant as a disgruntled employee and a troublemaker, in part because she lodged a complaint of sexual harassment.

Complainant has the burden of showing that her performance problems were not decisive in Respondent's decision to terminate her. She has persuaded me that the complaints about her performance were exaggerated as a post-hoc justification for her termination in retaliation for her sex discrimination complaint. In this case, Complainant has proved by a preponderance of evidence that she would not have been terminated but for having engaging in protected activity. I therefore conclude that the Respondent has engaged in unlawful retaliation in violation of G.L. 151B.

#### IV. DAMAGES

The Commission is authorized to award damages resulting from unlawful discrimination, including damages for lost wages and emotional distress. Bournewood Hospital v. MCAD, 371 Mass 303, 315, 316 (1976).

Complainant testified about the distress that she suffered as a result the loss of the job she enjoyed. She testified to being shocked, devastated and disbelieving, losing interest in her appearance and her desire to leave the house. I conclude that Complainant is entitled to damages in the amount of \$20,000.00 to compensate her for her distress.

I conclude that Complainant is also entitled to compensation for lost wages. Complainant made \$7,375.90 in 1996. In addition, she received \$4,004.00 in unemployment compensation benefits. In 1997, however, she earned \$25,420.00, more than she would have made at Respondent. I conclude that Complainant's back pay period ended in 1997 when she began to earn more than she would have made at Respondent. If Complainant had remained at Respondent, through 1996, she would have made \$24,000.00. Thus Complainant is entitled to lost wages in the amount of \$12,620.10 [ $\$24,000.00 - (\$7,375.90 + \$4,004.00)$ ]

## V. ORDER

For the reasons stated above, Respondent is hereby ordered:

- (1) Cease and desist discriminating on the basis of retaliation
- (2) to pay Complainant Paula Mindel the sum of \$12,620.10 for lost wages, 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 pay to Paula Mindel the sum of \$20,000.00 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.

Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within 30 days of receipt of this order.

SO ORDERED, this 20th day of May, 2005.

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JUDITH E. KAPLAN  
Hearing Officer