

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
SARAH APSEY,
Complainant

v.

DOCKET NO. 97-BEM-1115

GKA, INC. & DAVID KREUTZER,
Respondents

Appearances: Robert Wolkon, Esq. for Complainant
David Kreutzer, pro se

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

I. PROCEDURAL HISTORY

On April 4, 1997, Complainant Sarah Apsey, filed a complaint with the Massachusetts Commission Against Discrimination charging Respondents GKA, Inc. and its President, David Kreutzer with sexual harassment, gender discrimination and retaliation in violation of M.G.L. c. 151B, §4. Complainant alleged that Respondent Kreutzer sexually harassed her by repeatedly making physical and verbal sexual advances toward her while she was employed as his Executive Coordinator. Complainant also alleged that Respondent GKA failed to properly investigate and remedy the sexual harassment, and retaliated against her by continuing to assign her to work and travel alone with Kreutzer. Complainant further alleges that GKA retaliated against her by

issuing several memos to her falsely accusing her of encouraging sexually inappropriate behavior in the workplace, which occurred only after she complained about Kreutzer's sexual harassment.

Attempts to conciliate this matter were unsuccessful and the Investigating Commissioner certified the case for a public hearing. A Pre-Hearing Conference was held on April 24, 2003. The Respondents did not appear, after being duly notified of the Conference. On April 29, the Investigating Commissioner issued an Order imposing sanctions on the Respondents pursuant to 804 C.M.R. 1.16(a), for failure to respond to discovery requests, failure to attend the pre-hearing conference and for otherwise obstructing the proceedings and ordered that a Public Hearing be scheduled forthwith.

A Public Hearing was held before me on July 28, 2003. The Complainant was represented by counsel, and was the only witness at the hearing. The Respondent Kreutzer appeared pro se and purported to represent the Respondent GKA. Respondent Kreutzer also noted that he had filed a chapter 7 personal bankruptcy which was proceeding. Complainant objected to Kreutzer's representation of GKA, asserting that because he is not an attorney he could not represent the corporate respondent. I ruled that as president of GKA, Kreutzer was in a position to represent the interests of the allegedly now defunct company. Relying on the court's ruling in In re Mohawk Greenfield Motel Corporation, 239 B.R. 1 (Bankrcty. D. Mass. 1999), I ruled that the hearing could proceed, notwithstanding Respondent Kreutzer having filed for bankruptcy.

Pursuant to the Order of the Investigating Commissioner and its imposition of sanctions against Respondents, I did not allow Respondent Kreutzer to introduce

evidence or present any defenses at the hearing. He was allowed only to cross-examine the Complainant.

On October 30, 2003, Complainant submitted a Post-Hearing Memorandum with proposed findings of fact and conclusions of law. Respondent Kreutzer instead submitted a request for a ruling on his motion to remove the sanctions imposed by the Investigating Commissioner and requested an enlargement of time to file a post-hearing brief. The Motion to remove the sanctions was denied. Respondent Kreutzer filed a post-hearing brief on February 7, 2004 along with a Motion to Dismiss, a denial of all charges and a notice that he was appealing the Order of Sanctions denying him the right to introduce evidence and put forth a defense. Respondent Kreutzer also submitted a copy of Motion of the Debtor to Avoid Judicial Liens allowed with respect to Sarah Apsey on 8/19/03 by the Bankruptcy Court for the District of Massachusetts . Kreutzer asserts that this Order of the Bankruptcy Court prohibits Complainant from placing a judicial lien on real property located at 110 Lexington Street, Weston, MA., which was owned by Kreutzer prior to a chapter 7 bankruptcy liquidation in March 2003, which forced a sale of the property at auction. However the Bankruptcy Court's Order may ultimately impact Complainant's ability to recover any monetary damages in this matter, I do not read this Order as precluding the Commission from issuing a decision in this matter. See In re Mohawk Greenfield.

I have carefully reviewed and considered the entire record and evidence before me, including the testimony, all exhibits, the proposed findings of fact, conclusions of law, and supporting arguments. Unless otherwise indicated, all findings of fact are based on the un rebutted testimony of the Complainant which I found to be credible.

II. FINDINGS OF FACT

1. Complainant began working for Respondent, GKA in December, 1995 after graduating from college in 1993 with a business degree. GKA employed six or more employees and is an employer within the meaning of G.L. c. 151B s. 1. GKA provided business consulting services and long- term strategies in the field of “systems dynamics.” Complainant described “systems dynamics” as the application of a complicated mathematical process utilizing human dynamics to effect change in a corporation. As the Office Manager for GKA’s subsidiary, known as MicroWorlds, Complainant’s starting salary was \$20,000. Her responsibilities included creating marketing materials, organizing filing systems, providing customer service and technical support, filling orders, dealing with vendors, and promoting GKA at various industry conferences. Exhibit 1.

2. After six months with GKA, Complainant received an outstanding performance review, resulting in a thirty percent raise (to \$26,000) and a promotion to the position of Executive Coordinator for the company President, David Kreutzer. Exhibits 2, 3. Complainant testified she felt “great” about her job and felt she was learning and growing on the job. Following her six month performance review and raise, Complainant believed there was the “potential for an excellent future with the company.”

3. Complainant stated that during the next several months GKA expressed satisfaction with her attitude, capabilities and strong desire to learn. She promoted the company and coordinated Kreutzer's appearances and course materials for various conferences and events. Her responsibilities included traveling with Kreutzer to various

conferences, along with in-office maintenance of Kreutzer's client correspondence and conference materials. Complainant and Kreutzer shared an office at GKA and she stated that, initially, her working relationship with him was fine and she felt he respected her work.

4. During this time, various members of the GKA Management Committee remarked to Complainant that she was performing admirably, and that she was serving well as a “buffer” between Kreutzer and other GKA employees with whom he had a history of conflict.

5. At all times relevant to the events at issue Complainant was 26 years old and Kreutzer was in his mid-40's. In addition, Complainant's position with GKA was her first professional job after graduating college.

6. Complainant testified that she traveled alone with Kreutzer at least two times per month. In the spring and summer of 1996, Complainant traveled with Kreutzer to at least four different out-of-state meetings. One such meeting was a facilitation engagement held in July, 1996 at Pepsi-Cola in Somers, New York. During this engagement, Kreutzer was participating in a “team facilitation” exercise for a group of approximately fifteen people. Complainant was assisting him. During the course of this exercise, Kreutzer came up behind Complainant, who was seated, and placed his hands under her hair and rubbed the back of her neck. Complainant testified that she was visible to all the other participants and she froze in panic. She was shocked by this conduct and was made to feel totally unprofessional in the midst of a room full of clients. I find Complainant's testimony about this incident to be credible.

7. During the months following the Pepsi meeting, Kreutzer initiated several conversations with Complainant during which he suggested that they get together socially outside of the office. On one occasion, Kreutzer stated that he wanted to take Complainant to a theater production. On another occasion, he asked Complainant if he could take her to a movie. He asked her to go out with him and his son saying that his son was special to him and so was she. On each occasion, Complainant declined these invitations, expressly stating to Kreutzer that she was not interested in seeing him socially, and that she did not think it was appropriate considering their professional relationship.

8. In addition, Kreutzer often initiated conversations with Complainant regarding various women he was dating, or wanted to date, telling her that he was dissatisfied with his relationships. On each such occasion, Complainant, who felt uncomfortable with these conversations, told Kreutzer that she did not want to know the details of his personal life and she would change the subject to business matters. She never initiated conversations with him about social or personal matters.

9. In early September 1996, Kreutzer began to completely avoid contact or communication with Complainant. He didn't come to work or if he was there he ignored her. He avoided coming to their shared office space and did not return her phone calls. This caused Complainant great distress and concern over the performance of her duties as Kreutzer's Executive Coordinator, which, to be done properly, required constant contact and communication with him. During this time, Kreutzer repeatedly avoided discussions with Complainant when she informed him she needed to meet with him regarding urgent

business matters. As a result, Complainant began to worry about whether she could do her job and described her emotional state as scared, frustrated and panicked.

10. On September 9, 1996, Kreutzer came into their shared office space and sat down. When Complainant informed Kreutzer that she needed his input and approval regarding various projects she was working on, he responded that he could not discuss them with her. Complainant then told Kreutzer she felt he was ignoring and avoiding her and that this was impacting her ability to properly perform her job.

11. At this juncture in the conversation, Kreutzer closed the office door. He admitted to Complainant that he had been avoiding communicating with her. Complainant told Kreutzer he had created a “lose-lose” situation by his recent statements and actions and by making sexual advances toward her. Kreutzer responded by telling Complainant, “It doesn't need to be that way. If you and I were together, you could be on the Board of Directors.” Kreutzer then continued making a rambling series of statements to Complainant, including: “you're all I think about...you're so beautiful...I just want to be with you...I love your blonde hair...I melt when I see you...the reason I don't come into the office is because I can't function around you...I get turned on when I see how good you are with clients.” When Complainant inquired why he was doing this, he began telling her how much he cared about her and fantasized about her and wanted her to be the mother of his child. According to Complainant he then said, “I often tell you about women I date, but I really haven't had any relationships with women. When I go out with women, all I do is think about you. I have trouble with any other relationships because I am only thinking about you.” I find Complainant's testimony about this occurrence to be completely credible

12. Complainant's response was a combination of fear and paralysis. She stated the situation was like a "car wreck." She also felt like "a deer in the headlights," powerless, and incapable of responding to Kreutzer. She began to feel unsafe and that she must get out of the room. She told Kreutzer before leaving the room that they could not have a romantic relationship, and that they needed to devise a way to work together professionally. She suggested that they "build a wall" between them so they could communicate and work professionally. Kreutzer then responded "if you must build a wall, let it be a brick wall, not cement, so the bricks can be removed if we want them to." Kreutzer remarked further "I know you could construe all of this as sexual harassment, and if you want to go to a lawyer to discuss this, I will even pay for it." At this point, Complainant ended the discussion. I find Complainant's testimony to be entirely credible.

13. The following day, Complainant reported all of the above events, including each of the above statements by Kreutzer, to GKA's then Chief Operating Officer, Ginny Wiley. She also had a meeting with David Packer, the Chief Financial Officer, to report Kreutzer's conduct. Complainant informed each of these officers that she was fearful of any confrontation with Kreutzer, and believed that she was in danger of losing her job. She stated that they were not surprised, but they were "appalled, apologetic and supportive." Wiley assured her she'd take care of the problem.

14. On September 11, 1996, Wiley and Kreutzer met with Complainant. Kreutzer admitted to and apologized for his inappropriate conduct. Wiley then informed Complainant that there would be no repercussions regarding her job. Complainant left that meeting hopeful that the situation had been addressed and resolved by GKA management, and that further incidents would not recur.

15. Complainant testified that the next few weeks were “stiff and uncomfortable” but they got work done despite Kreutzer’s failure to respect professional boundaries. On October 6, 1996, Kreutzer telephoned Complainant at GKA and went off on a tirade, screaming and yelling that he was in charge but decisions were being made without him. He proceeded to make disparaging statements about various individuals at GKA, and was critical of management. Immediately after this telephone conversation, Complainant went to speak to Dave Packer, because she did not believe it was her responsibility to handle such tirades. As she entered Packer’s office, Kreutzer called again to tell Complainant everything he had just told her was confidential. He further advised her that he questioned her loyalty and commitment to him, and that he felt he could not trust her because she had reported the incidents of September 9 to GKA management.

16. Immediately following this telephone conversation, Complainant believed she could no longer function as a valuable employee at GKA, because of what she viewed as Kreutzer’s reprisals. Not knowing what else to do, Complainant prepared her written resignation, which she delivered to Packer on October 7, 1996. Exhibit 4. Complainant felt she had no choice but to resign since she had gone through all proper channels and felt that Wylie and Packer could not protect her.

17. In her resignation letter, Complainant described the circumstances that forced her to leave GKA. She also proposed an interim work arrangement which would allow her to continue her job responsibilities without having any contact with Kreutzer until her replacement could be found or she secured another job. Id. Complainant asked to work at home 32 hours a week and to work only 8 hours in the office when Kreutzer

was not there. Complainant believed she needed time to find another job and felt this proposal was reasonable.

18. On October 16, 1996, Complainant received a response to her resignation letter from GKA management. Exhibit 5. This memo attempted to deny previously admitted conduct by Kreutzer, and to shift to Complainant a portion of the blame for Kreutzer's sexual advances. The memo also contained allegations about Complainant's own conduct in the office, including inappropriate dress, provocative or flirtatious actions, and having overly intimate interactions with clients. Complainant testified that GKA management had never raised any of these issues with her. I find that the allegations against Complainant raised in this memo are not credible, and constitute an act of retaliation by GKA management for Complainant's reporting Kreutzer's sexual misconduct.

19. Upon receipt of the October 16 memo, Complainant informed Packer that she was too upset to discuss the memo, and she left for the day. The following day, she met with Packer and specifically denied the charges in the October 16 memo. She was asked by Packer to sign the memo, but she refused to do so. Complainant testified that she believed GKA management was attempting to protect the company by this memo which essentially repudiated Kreutzer's previous admission that he had sexually harassed Complainant.

20. During the next several weeks, Kreutzer continued to make inappropriate comments and gestures toward Complainant. These included telling her "I want to do so much for you, but now I can't because of this situation." I find that this remark was

retaliatory, and was intended to chastise Complainant for reporting Kreutzer's sexual advances and implied she had damaged her career by doing so.

21. Subsequent to Complainant's refusal to sign the October 16 memo, GKA management prepared a second memo on October 21, 1996. While this memo acknowledged that Kreutzer had engaged in some wrongful conduct, it also implied that Complainant was partially to blame for a situation that Kreutzer created and controlled and in which she was victim. Complainant again refused to sign this memo. I find that this second memo also constitutes an act of retaliation by GKA management for Complainant having reporting Kreutzer's sexual misconduct.

22. On October 28, 1996 Complainant was assigned to travel with Kreutzer to a conference in Winnipeg, Canada. She specifically requested that she and Kreutzer travel separately, and that they have hotel rooms on separate floors. On the first night of their trip, Kreutzer knocked on the door of Complainant's room telling her that his room was across the hall, and that his key did not work. He asked if he could come in to Complainant's room but she refused to open the door, and told Kreutzer she would call the front desk about him obtaining another key. Complainant was so upset by Kreutzer's transparent attempt to visit her room that she cancelled her meeting with another associate, did not leave her room, and did not sleep all night.

23. The following week, Complainant was assigned to travel with Kreutzer to a conference in New York. At various times during this trip, Kreutzer made inappropriate gestures toward Complainant, such as staring, smiling and winking at her, causing her extreme discomfort.

24. On November 15, 1996, Complainant submitted written notice that she was leaving GKA, effective November 29, 1996. Exhibit 7. She testified that she felt she had no choice but to resign anew, as she could no longer work under the hostile and intimidating circumstances caused by Kreutzer, while GKA continued to require her to travel alone with him. Moreover, it had become clear to her that GKA was either unwilling or unable to control and remedy Kreutzer's continuing harassing behavior.

25. For the next ten days, Complainant attempted to perform her job responsibilities, notwithstanding her fear of communicating with Kreutzer. During this time, Complainant learned that GKA management had not informed Kreutzer of her resignation. When she addressed this issue with Packer, he offered her no support or assistance, and instructed her to discuss the reasons for her resignation directly with Kreutzer. On November 25, 1996, Complainant submitted a memo resigning, effective immediately. Exhibit 8.

26. In addition to the above incidents, Complainant testified to other instances of sexually inappropriate and offensive behavior that were permitted to occur at GKA, with the knowledge and participation of management. Complainant testified that she witnessed an employee farewell party at which the company served a cake with breasts on it, and another party for a female member of GKA management at which the company served a cake with a penis on it.

27. For several months after she left GKA, Complainant suffered distress and anxiety over the incidents described above. Complainant testified that this was her first professional job and her first real work experience. She didn't know how to explain what had happened, how to move forward, or what to do professionally. She felt she couldn't

function and didn't know how to look for another job because she needed to put the experience in perspective. As a result, she got really depressed. She felt her trust had been betrayed and felt humiliated and deflated. She found herself crying at night, losing sleep and distancing herself from people she knew. She questioned her ability to work in the field again. After nine months of no full time regular job, Complainant sought psychological counseling to help her cope with the anxiety she experienced as a result of the experience. She ceased therapy after nine months and was determined she'd have to learn how to deal with the residual pain. In her words, "she had to get out there and move on and swallow some of it and move forward." Sometimes she would panic at job interviews and other days she felt good. She still feels "leery and apprehensive to work for someone she doesn't know." She stated that her current boss and previous boss are friends of hers and she may work for friends for the rest of her life.

28. Complainant was earning \$26,000 per year with benefits at GKA in November of 1996. At the time she resigned she had no job to go to. From December 1996 to December of 1997 Complainant secured some contract work through her contacts in the field. During the next year she earned approximately \$15,000 to \$18,000 from this contract work, but had no benefits. There is no evidence in the record suggesting the value of her benefits at GKA. I find that Complainant lost wages in the amount of \$9,500 during the year following her resignation. Complainant testified that she was in a very difficult situation in terms of seeking another full time job because she did not want to discuss the circumstances of her separation from GKA and couldn't use GKA as a reference.

III. CONCLUSIONS OF LAW

a. Sexual Harassment

M.G.L. c. 151B, §4, paragraph 1, prohibits workplace discrimination, including sexual harassment and gender-based harassment. Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 676-77 (1993). M.G.L. c. 151B, §4, paragraph 16A, also prohibits sexual harassment in employment. Doucimo v. S & S Corporation, 22 M.D.L.R. 82 (2000). 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, or sexually offensive work environment. M.G.L. c. 151B, §1, paragraph 18.

Complainant alleges two types of workplace harassment prohibited under M.G.L. c. 151B: “quid pro quo” sexual harassment and “hostile work environment” sexual harassment. Gilman v. Instructional Systems, Inc. and Weiler, 22 M.D.L.R. 237 (2000). Complainant alleges that she was subjected to Kreutzer’s sexual advances as a condition of continued employment, potential advancement, and in order to maintain communications with him that were necessary for her to perform her job. She also alleges that these sexual advances created an intimidating, hostile, or offensive work environment.

In order to establish a prima facie case of “quid pro quo” sexual harassment, Complainant must show that (1) she is a member of a protected class; (2) she was subjected to a supervisor's unwelcome sexual advances; (3) the tangible terms and conditions of her employment were then adversely changed; (4) the change was causally connected to her rejection of the supervisor's sexual advances. See e.g., Rushford v. Bravo's Pizzeria and Restaurant and O'Brien, 22 M.D.L.R. 171 (2001); Shanley v. Pub 106, Inc., 22 M.D.L.R. 333 (2000); Hinojosa v. Durkee, 19 M.D.L.R. 14, 16 (1997).

In order to establish a “hostile work environment” sexual harassment claim Complainant must prove by credible evidence that: (1) she was subjected to sexually demeaning conduct; (2) the conduct was unwelcome; (3) the conduct was objectively and subjectively offensive; (4) the conduct was sufficiently severe or pervasive as to alter the conditions of her employment and create an abusive work environment; (5) her employer knew or should have known of the harassment and failed to take prompt and effective remedial action. College-Town, Division of Interco, supra, 400 Mass. at 162 ; Parent v. Spectro Coating Corp., 22 M.D.L.R. 221 (2000). The alleged harassing conduct must be both objectively and subjectively offensive from the perspective of a reasonable person. Ramsdell, supra, 415 Mass. at 677. In addition, Complainant must show that the “conduct [did in fact] affect and interfere with her work environment.” Couture v. Central Oil Co., 12 M.D.L.R. 1401 (1990).

Complainant has proven that she is a member of a protected class because of her gender (female). I credit her testimony that Kreutzer, who was President of the company and her direct supervisor, repeatedly made unwelcome sexual advances to her and requested that she consider a more intimate relationship with him beginning in the

summer of 1996 and continuing through the autumn of that year. The tangible terms and conditions of her employment were then adversely impacted as a result of her rejection of Kreutzer's sexual advances. Kreutzer's conduct rendered Complainant virtually unable to do her job which required frequent communication and interaction with him. Her job involved frequent travel with Kreutzer which became increasingly difficult to almost impossible.

I also find that Complainant was intimidated, humiliated, and stigmatized because of the hostile work environment resulting from Kreutzer's sexual harassment, and that the conduct was sufficiently severe or pervasive as to alter the conditions of her employment and create a hostile and abusive work environment. The evidence further supports a finding that Complainant's employer knew of the harassment and failed to take prompt and effective remedial action. Even absent notice to other members of management, Kreutzer's position as president of the company and Complainant's direct supervisor, renders the company vicariously liable for his conduct. See College-town div. of Interco v. MCAD, supra. 400 Mass. at 165. However, Complainant directly communicated with the other officers of the company about Kreutzer's inappropriate and offensive behavior and they failed to take the necessary action to remedy the harassment. I credit Complainant's testimony that she complained to GKA management about Kreutzer's conduct in a timely fashion, and attempted in good faith to work with them to remedy the situation to no avail.

I also conclude based on my observation of Complainant's demeanor during her testimony, that she was fearful, shocked, and offended by Kreutzer's conduct, this his conduct was unwelcome to her and that she clearly communicated her distress and

discomfort to Kreutzer and other managers of GKA. I also find that her offense to Kreutzer's conduct was objectively reasonable, and that his conduct was sufficiently continuous and pervasive to interfere with her work environment.

Based on all of the above, I conclude that the credible evidence supports Complainant's assertions that she was subjected to both "quid pro quo" and "hostile work environment" sexual harassment and gender discrimination by Respondents.

B. Retaliation

M.G.L. Chapter 151B, §4, paragraph four, prohibits an employer from retaliating against an employee who has participated in protected employment activity. This provision makes it unlawful "[f]or any person, employer . . . to discharge, expel or otherwise discriminate against any person because [s]he has opposed any practices forbidden under this chapter or because [s]he has filed a complaint, testified or assisted in any proceeding under section five." Retaliation is "motivated, at least in part, by a distinct intent to punish or rid the workplace of someone who complains about an unlawful practice." Fountas v. Medford Public Schools, 22 M.D.L.R. 264 (2000), citing, Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

The "retaliation" provision is broadly interpreted to apply to instances where a complainant has orally "opposed" an unlawful employment practice or action under M.G.L. c. 151B. The statutory protection against employer retaliation extends, therefore, to "informal voicing of complaints" alleging discrimination. Proudy v. Trustees of Deerfield Academy, 19 M.D.L.R. 83, 88 (1997); Sumner v. United States Postal Service, 899 F.2d 203, 209 (2nd Cir. 1990). The Commission has found liability for unlawful

retaliation when an employee complained about unlawful discrimination, but did not file a formal discrimination charge. Aubourg v. American Drug Stores, 21 M.D.L.R. 238, 242 (1999).

Since a link between the protected employment activity and the adverse employment action(s) at issue is not always explicit, the Commission can infer a causal connection where the timing of events makes such an inference reasonable. Kealy v. City of Lowell, Department of Public Schools, 21 M.D.L.R. 19 (1998), citing, Cimino v. BLH Electronics, Inc., 5 M.D.L.R. 1263, 1287 (1983); Hochstad v. Worcester Foundation for Experimental Biology, 425 F. Supp. 318 (D. Mass. 1976).

The second element of retaliation, adverse employment action, requires that the employer must “take something of consequence from the employee, ... by discharging or demoting her, reducing her salary, or divesting her of significant responsibilities (citations omitted), or (2) withhold from the employee an accoutrement of the employment relationship. Blackie v. Maine, 75 F.3d 716, 725 (1st Cir. 1996).

I find that Complainant has satisfied all of the elements of her prima facie retaliation claim. The undisputed evidence in the hearing record clearly establishes that Complainant participated in protected employment activity when she complained to Packer and Wiley regarding Kreutzer’s sexual harassment. Kelley v. Plymouth County Sheriff’s Department, et. al., 22 M.D.L.R. 208 (2000), citing, Morris v. Boston Edison Company, 942 F. Supp. 65, 69 (D. Mass. 1996). The evidence in the hearing record also shows that Packer and Wiley received Complainant's oral complaint about Kreutzer’s sexual harassment of Complainant. In addition, Kreutzer knew about Complainant’s

complaint to Packer and Wiley about his conduct, and her opposition to his conduct after the September 1996 incidents.

The evidence in the hearing record also shows that Complainant suffered the following adverse employment actions within two or three weeks of her oral opposition to Kreutzer's sexual harassment: (1) continued harassment and retaliation by Kreutzer in the form of screaming at her, accusing her of being disloyal, and telling her he could not trust her because she had reported his conduct to others in management; (2) the issuance of two separate memos falsely accusing Complainant of inappropriate behavior in the workplace; and (3) continued assignments to travel alone with Kreutzer after she requested that they have no contact. The timing of these actions shortly after she engaged in the protected activity of reporting Kreutzer's sexual harassment raises a reasonable inference that Respondents GKA and Kreutzer were motivated by retaliatory intent. Mindel v. Chelsea Clock Co., 23 M.D.L.R. 133 (2001); Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1018 (D. Mass. 1995).

Once Packer and Wiley learned about Kreutzer's alleged harassment, Respondent GKA had an obligation to immediately conduct a "fair, thorough investigation" of Complainant's allegations, and take prompt, effective remedial action, if appropriate. College-Town, Division of Interco, *supra*, 400 Mass. at 167-168. At minimum, Respondent GKA was required to: (1) interview other witnesses who may have witnessed the offensive or discriminatory conduct; (2) take appropriate remedial action reasonably calculated to end the harassment or discrimination, and impose discipline, if appropriate; (3) maintain a well-publicized and enforced anti-harassment policy; (4) produce evidence that it provided adequate training to its managers and supervisors on how to identify and

respond to a sexual harassment complaint. Edmonds v. Modern Continental/Obayashi, M.C.A.D. No. 94-BEM-0056 (2000); Barbot v. Hapco Farms, Inc., M.C.A.D. No. 92-SEM-0376 (1997). The evidence in the hearing record clearly establishes that Respondent GKA failed to satisfy any of these requirements.

Once Complainant establishes a prima facie case, the burden of production shifts to Respondent GKA to articulate a legitimate, non-retaliatory reason for its employment actions. Lipchitz v. Raytheon Company, 434 Mass. 493, 501 (2001); Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 118 (2000).

I conclude that Respondent GKA has failed to meet its burden to produce a legitimate, non-discriminatory reason for its employment actions as they relate to Complainant following her complaint of sexual harassment. Respondent GKA's memos accusing Complainant of inappropriate behavior in the workplace are not credible and are unsupported by the evidence in hearing record.

I further conclude that there is no evidence in the hearing record establishing that management at Respondent GKA counseled or disciplined Kreutzer regarding his misconduct. I am persuaded that Respondent GKA's purported dissatisfaction with Complainant's behavior on the job is an exaggerated post-hoc justification for the issuance of the two memos, and was in retaliation for her sexual harassment complaint.

Based on my review of the record, I find that Complainant has proven by a preponderance of the evidence that Respondents GKA and Kreutzer retaliated against her in response to her participation in prior protected EEO activity. I conclude, therefore, that Respondent GKA has engaged in unlawful retaliation in violation of M.G.L. c. 151B.

C. Constructive Discharge

Complainant alleged that she was constructively terminated from her position as Respondent Kreutzer's Executive Assistant in retaliation for having complained about Kreutzer's sexual harassment. In order to establish a prima facie case of constructive discharge, Complainant must establish that her working conditions were so intolerable that a reasonable person would have been forced to resign. Jorge v. Silver City Dodge, 15 M.D.L.R., 1518, 1532 (1993), affd., Silver City Dodge v. MCAD, Bristol Superior Court No. 96-00293 (1999); Norman v. Andover Country Club, 15 M.D.L.R. 1395, 1419 (1993); Choukas v. Ocean Kai Restaurant, 19 M.D.L.R. 169, 171 (1997).

Based on the foregoing evidence, I conclude that Complainant has established a case of constructive discharge. She testified that after making several suggestions to Respondent GKA about ways for her to effectively do her job but have minimal contact with Kreutzer, she was forced to quit because GKA did not, or would not, take any steps to control Kreutzer's unlawful behavior. Respondent GKA also took no disciplinary action against Kreutzer. It also continued to require Complainant to travel alone with Kreutzer after she reported incidents of sexual harassment. Furthermore, in retaliation for her having made these complaints, GKA attempted to shift part of the blame for Kreutzer's unlawful behavior to her. Given that GKA failed to take adequate steps to ensure Complainant's safety and security, and to maintain a work environment that was free of sexual harassment and discrimination, I find that Complainant was left with no choice but to resign her employment.

I conclude that Kreutzer's mere presence in the workplace, coupled with his ongoing harassment of and retaliation against Complainant, plus Respondent GKA's failure to take adequate steps to insure Complainant's security, would have caused a reasonable person in Complainant's situation to believe that her situation was so intolerable that she was forced to leave her job. See Jorge v. Silver City Dodge, *supra*, 15 M.D.L.R. at 1532. I therefore conclude that Complainant was constructively discharged from her employment at Respondent GKA.

D. Damages

Upon a finding of discrimination, the Commission is authorized to award damages resulting from Respondents' unlawful discrimination, including Complainant's proven lost wages, out-of-pocket expenses, and emotional distress. M.G.L. c. 151B, §5. See, Baldelli v. Town of Southboro Police Dept., 17 M.D.L.R. 1541 (1995); Bournewood v. M.C.A.D., 371 Mass. 303, 315-16 (1976).

M.G.L. c. 151B, §5 authorizes the Commission to award lost wages after a finding of discrimination. Lost wages is a calculation of the money Complainant would have earned had she remained working at Respondent GKA.

Based on the evidence adduced at the hearing, I find that Complainant is entitled to an award of \$9,500 for lost wages, said amount being the difference between what she would have made at GKA from December of 1996 through December of 1997 and the amount she was able to earn from subsequent employment that year. I find that Kreutzer and GKA shall be jointly and severally liable for such damages.

A finding of discrimination, by itself, permits an inference of emotional distress as a normal adjunct of such discrimination. Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824, quoting, Buckley Nursing Home, Inc. v. M.C.A.D., 20 Mass. App. Ct. 172, 182 (1985). An award of emotional distress damages can be sustained even in the absence of physical injury or psychiatric consultation. Id.; College-Town, Division of Interco, supra, 400 Mass. at 169; Franklin Publishing v. M.C.A.D., 25 Mass. App. Ct. 974, 975 (1988).

Permissible considerations to measure and compensate for the emotional distress include such factors as the nature, severity, and duration of Complainant's emotional distress. See, Baldelli v. Town of Southboro Police Dept., 18 M.D.L.R. 167, 169 (1996).

I conclude that Complainant is entitled to damages for emotional distress she suffered as a result of Respondent Kreutzer's sexual harassment and Respondent GKA's failure to take effective action to remedy the situation and its unlawful retaliation. Complainant testified credibly regarding how the Respondents' conduct affected her physically and mentally. Complainant testified that she was emotionally distraught, felt paralyzed in terms of her career, did not know how to move on, and experienced disassociation from everyday life. She became depressed and felt the need to seek psychological counseling after several months without regular full time employment. Complainant also testified that she continued to experience stress and anxiety for several years after she left GKA whenever she had to attend industry conferences at which she knew or feared that Kreutzer would be present, and that her choice of jobs was limited by her level of comfort with the employer and that she chose to be employed by friends.

Based on the evidence adduced at the hearing, I find that Complainant is entitled to an award of \$75,000 for damages caused by the emotional distress she suffered as a

result of the conduct of the Respondents GKA and Kreutzer. I find that Kreutzer and GKA shall be jointly and severally liable for such damages.

Pursuant to G.L. c. 151B s. 5, I also find that Respondents shall be liable for a civil penalty in the amount of \$10,000.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority vested in the Commission by s. 5 of G.L. c. 151B, I hereby order the following:

- 1) Respondents shall pay to Complainant within 60 days of the receipt of this decision, the amount of \$9,500 in damages for lost wages with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made.
- 2) Respondents shall pay to the Complainant within 60 days of the receipt of this decision the sum of \$75,000 in damages for emotional distress suffered as a result of Respondents' unlawful acts with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made.
- 3) Respondents shall immediately cease and desist from engaging in acts of sexual harassment in the workplace.
- 4) Respondents shall pay a civil penalty in the amount of \$10,000.

The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made.

Any party aggrieved by this decision may file an appeal to the full commission pursuant to 804 C.M.R. 1.23. The Complainant may file a petition for attorney's fees within 10 days of receipt of this decision.

So Ordered this 22nd day of March, 2004.

Eugenia M. Guastaferr
Hearing Officer

