

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION)
AGAINST DISCRIMINATION and)
SCOTT TINKHAM)
Complainant)
v.) Docket No. 98-BEM-0437
THE FLATLEY COMPANY,)
KEVIN MURPHY and)
JENNIFER FLATLEY)
Respondents)

Appearances:

Mary Wynne Gianturco, Esq., for Complainant
Richard L. Neumeier, Esq., for Respondents The Flatley
Company, Kevin Murphy and Jennifer Flatley

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 30, 1998, Complainant Scott Tinkham filed a complaint with the Massachusetts Commission Against Discrimination (hereafter: the Commission). The complaint charged The Flatley Company (hereafter: Flatley), Kevin Murphy and Jennifer Flatley with discrimination based on his sex (male) and in retaliation for his participation in protected activity in violation of G.L. Chapter 151B, §4, paragraphs 1, 4, 4A and 16A. Complainant alleged that the Respondents

discriminated against him when they sexually harassed him from 1996 through January 1998. Complainant also alleged that Respondent Flatley terminated him on January 22, 1998 in retaliation for an internal sexual harassment claim he filed on January 8, 1998. (Joint Exhibit No. 1).

Attempts to conciliate this matter were unsuccessful. On December 20, 2001, Investigating Commissioner Walter J. Sullivan, Jr., certified this case for a public hearing.

I held a public hearing in this case on November 18 and 19, 2002. On January 30, 2003, Respondents filed revised proposed findings of fact and conclusions of law with the Commission. Complainant filed his proposed findings of fact and conclusions of law with the Commission on January 31, 2003.

I have carefully reviewed and considered the entire record before me, including the testimony, all exhibits, proposed findings of fact, conclusions of law and supporting argument. To the extent the proposed findings and conclusions of law are not in accord with my findings and conclusions, they are rejected. I have omitted certain proposed findings and conclusions of law as not relevant or unnecessary to a proper determination of the material issues presented. I have modified other findings and conclusions of law to render them acceptable.

II. Findings of Fact

1. Complainant Scott W. Tinkham is a male who currently lives in Needham, Massachusetts. From June 14, 1994 until January 22,

1998, Complainant worked for Flatley in its Commercial/Industrial/Retail Division (hereafter: the Commercial Division) in Braintree, Massachusetts. (Joint Stipulation Nos. 1, 3 and 5).

2. Flatley is a real estate development company that had approximately 500 employees from January 1996 through January 1998. During this period, the Commercial Division had approximately 100 employees, including 30 employees in its Braintree Office. At all times relevant to the instant complaint, Flatley was an employer within the meaning of G.L. c. 151B, §1, paragraph 5.

3. Ursala A. Ryan has worked for Flatley since September 27, 1994. From November 1997 until March 1999, Ms. Ryan was the Controller for the Commercial Division. In her position, Ms. Ryan was responsible for the Commercial Division's overall financial systems and reports, including accounts receivables and payables, month- and year-end closings, costs controls and the accurate reporting of expenses.

4. Edith Sanchez Shea¹ worked as an accounting manager in the Commercial Division from January 1996 to May 1999. From February 1996 to April 1997, Ms. Sanchez directly supervised Complainant. Complainant testified that he had a good working relationship with Ms. Sanchez while employed at Respondent Flatley.

5. Kevin F. Murphy worked as the Operations Manager in the Commercial Division from January 1996 through January 1998.

¹Throughout the public hearing, the witnesses referred to Edith Sanchez Shea as Edith Sanchez or Edith Bono.

During the period relevant to this complaint, Mr. Murphy reported directly to Ralph "Butch" Vatalaro, Senior Vice President.

6. Jo Ann M. Keyes has worked for Flatley since September 1981. During the period relevant to this complaint, Ms. Keyes was the Vice President of Lease Administration and the Director of Human Resources in the Commercial Division. In this position, Ms. Keyes supervised lease administration staff and oversaw insurance and personnel functions in the Operations Division.

7. Nancy McDougall worked as the Marketing Director in the Commercial Division from September 1995 through May 1998.

8. Jennifer Flatley, a college student, worked as a summer intern in the Marketing Division from June 1997 to August 1997 and from December 20, 1997 until January 15, 1998. Ms. Flatley is the niece of Thomas Flatley, the owner of Flatley. During her employment as an intern, Ms. Flatley reported to Ms. McDougall and also worked with Ms. Sanchez in the Accounting Department of the Commercial Division.

9. Michael Carey worked as an accounting manager in the Commercial Division from March 1996 through December 1999.

10. John Caulfield worked as an analyst in Flatley's Common Area Maintenance (CAM) Division from Spring 1995 to Spring 1999. Mr. Caulfield reported directly to Ms. Sanchez during the time period relevant to this complaint.

11. At all times relevant to the instant complaint, Complainant worked on the same floor in the Braintree Office with the

Flatley employees who testified at the public hearing.

Employment History

12. On June 14, 1994, Complainant began working for Respondent Flatley as a staff accountant at an annual salary of \$28,000. (Joint Stipulation Nos. 1 and 2). Complainant performed accounting work for approximately 15 mall properties that were assigned to him in Respondent Flatley's Retail Division.

13. On or about December 22, 1994, Complainant received a \$1,500 bonus for his work on a team that successfully completed a Commercial Division audit. (Joint Exhibit No. 7).

14. On March 8, 1995, Complainant received an "average+" overall rating on his annual performance appraisal. (Joint Exhibit No. 8). Complainant also received a \$2,500 raise as part of his performance review.

15. On February 22, 1997, Complainant received an "above average" overall rating on his annual performance appraisal. (Joint Exhibit No. 9). Based on his performance appraisal ratings in February 1997, Complainant received a \$1,500.00 salary increase. (Joint Exhibit No. 10).

16. In April 1997, Flatley promoted Complainant to a utility or energy analyst position. Ms. Ryan directly supervised Complainant in this position from April 1997 until January 22, 1998. (Stipulation No. 6). During this period, Ms. Ryan also directly supervised three accounting managers: Ms. Sanchez, Mr. Carey and Kevin McCall.

17. Ms. Ryan testified that while she supervised Complainant, she was "happy" with his work and did not have any "problems" with his job performance.

18. During the period relevant to this complaint, the Commercial Division's sexual harassment policy and procedures for reporting and investigating sexual harassment complaints were set out in its memorandum, dated January 1, 1997. The sexual harassment policy authorized employees to file a complaint with their supervisor or Ms. Keyes as Flatley's human resources contact. The policy also provided that Flatley would discipline employees who filed "frivolous or vindictive claims without merit." (Joint Exhibit No. 3).

19. On February 21, 1997, Complainant signed a form acknowledging that he had received a copy of the Commercial Division's sexual harassment policy, dated January 1, 1997. (Respondent's Exhibit No. 1). Complainant received and read Flatley's sexual harassment policy. (Joint Exhibit No. 3).

Harassment Allegations

20. In early January 1996, Complainant visited a bar near a ski resort in Vermont with two friends. While at the bar, Complainant talked with two sisters whom he had met the prior weekend: Susan and Carol Murphy. Complainant testified that after his friends left the bar, he went into the men's bathroom where two unknown men attempted to look at his penis while he urinated. Upon returning to the bar, Complainant saw the two men talking to Carol Murphy who then resumed drinking with Complainant and her sister. Complainant did not hear what the two men discussed with Carol Murphy.

21. Complainant testified that after talking with these two men, Carol Murphy's demeanor changed and she became rude. She also began to talk about phallic symbols and kept telling her sister that she was eating a "unique and tasty treat." Complainant testified that the Murphy sisters referred to him as a "eunuch" making a pun on the word, "unique." Complainant believed that they were referring to the size of his penis. Complainant understood "eunuch" to mean a castrated man or one who could not perform sexual acts. Complainant testified that the Murphy sisters' actions and comments made him feel "horrible." I do not credit Complainant's testimony.

22. About one or two weeks after the Vermont incident, Complainant testified that Kevin Murphy, his co-worker, remarked to him while eating Christmas candy, "Boy, this is an unique and tasty treat." Complainant believed that Mr. Murphy used the term, "unique," to mean "eunuch" in the same manner as the Murphy sisters. Complainant testified that he had a "positive" working relationship with Mr. Murphy prior to this incident.

23. Complainant believed Carol and Susan Murphy were related to Mr. Murphy because they told him that they lived in South Boston and Cambridge. Complainant produced no evidence that Kevin Murphy was related to or knew the Murphy sisters or that Mr. Murphy discussed Complainant with them at anytime during 1996.

24. Kevin Murphy did not recall making a statement to Complainant in January 1996 that a piece of candy was "a unique and tasty treat." He denied using the term, "unique" or "eunuch" in reference to Complainant. He also denied that he had relatives named Susan or Carol Murphy. I credit Mr. Murphy's testimony.

25. Complainant testified that sometime between February 1996 and April 1997, Ms. Sanchez told him "some of the girls in the Hotel Division thought [he] was cute." Complainant also testified that Ms. Sanchez told him that one female employee thought "[he] was adorable" and jokingly said that "[he] should be a stripper." I credit Complainant's testimony.

26. Complainant testified that, in July and August 1997, Ms. Flatley walked by his cubicle at least twice a day, flirted with him, "leered at him, laughed, kind of giggled and moved on." Complainant testified that Ms. Flatley walked up right behind him on one occasion and stopped within a couple of feet. Based on her actions, Complainant felt that Ms. Flatley intended to "grab his behind." I do not credit Complainant's testimony.

27. Complainant testified that Ms. Flatley's actions made him feel uncomfortable. Although Complainant testified that he wanted to keep his working relationship with Ms. Flatley "professional," Complainant felt like he had to feign interest in Ms. Flatley's flirtations because she was the "owner's" niece.

28. Ms. Flatley denied that she flirted with Complainant, leered, laughed or giggled at him in July or August 1997. Ms. Flatley also denied that she walked up closely behind Complainant and attempted to grab his buttocks. Ms. Flatley denied ever meeting or talking to Complainant except when she was introduced to him on her first day of work at Respondent Flatley. I credit Ms. Flatley's testimony.

29. Complainant testified that, in July or August 1997, Mr.

Murphy told a co-worker while walking past Complainant's cubicle, "I wonder what he [referring to Complainant] would look like in a Speedo bathing suit," and they both laughed. Complainant testified that he felt "horrible." Complainant testified that he believed Mr. Murphy's comment to be a demeaning reference to his genitals based on his earlier reference to "eunuch."

30. Mr. Murphy denied making any comments of a sexual nature about Complainant, including any comments about how Complainant would look in a Speedo bathing suit. Mr. Murphy also denied that he heard any Flatley employees, including Ms. Flatley, make sexual comments about Complainant. I credit Mr. Murphy's testimony.

31. In July or August 1997, Complainant testified that Mr. Carey referred to him as a "little guy" while they were discussing how Complainant played beach volleyball. On the same day, John Caulfield, a CAM manager for Respondent Flatley also referred to Complainant as "little guy" and asked him whether he played volleyball in a Speedo bathing suit. Complainant testified that Messrs. Carey and Caulfield smirked and snickered while making these comments.

32. Mr. Carey denied that he referred to Complainant as a "little guy" or that he made any comments about Complainant's body parts. Mr. Carey also denied ever hearing any derogatory comments about Complainant or his body parts while employed at Flatley. I credit Mr. Carey's testimony.

33. Mr. Caulfield denied that he made a comment to Complainant about "little men with little parts" or asked him whether he

played volleyball on the beach in a Speedo bathing suit. Mr. Caulfield also denied that he commented on or overheard other Respondent Flatley employees refer to Complainant's body parts or sexual prowess. I credit Mr. Caulfield's testimony.

34. Complainant testified that, sometime in November 1997, Jim Reiffarth, then a building or property manager, teased him and snickered when he said, "I hope you are big enough." Complainant understood this comment to mean that Mr. Reiffarth hoped that Complainant's "genitalia were big enough" if he wanted to date. Complainant testified that he felt "bad, horrible, and wanted to punch" Mr. Reiffarth but he did not say anything to him. I do not credit Complainant's testimony.

35. In late 1997, Flatley required all employees to sign a written notice as part of their open enrollment materials to acknowledge their receipt of information related to its sexual harassment policy. On December 8, 1997, Complainant refused to sign the written acknowledgement that he had read Flatley's sexual harassment policy. (Joint Exhibit No. 12).

36. Complainant told Ms. Keyes that he refused to sign the policy because he had experienced sexual harassment in Flatley's workplace and felt that Flatley was trying to protect itself from future liability. Complainant believed that he would waive a potential sexual harassment claim against Flatley if he signed the document acknowledging receipt of the sexual harassment policy.

37. Ms. Keyes asked Complainant if he wanted to talk to her about the workplace harassment he allegedly experienced. Complainant declined and told Ms. Keyes that he did not want to file a

formal sexual harassment complaint. Complainant testified that he did not want to talk to a "female" management employee about his "private parts." Complainant also felt that no one at Respondent Flatley would believe him. Complainant did not tell Ms. Keyes or Ms. Ryan his concerns about an investigation into his sexual harassment allegations.

38. Shortly after December 8, 1997, Ms. Keyes told Ms. Ryan that Complainant refused to sign the notice acknowledging receipt of Flatley's sexual harassment policy and his reasons for not signing. Ms. Ryan did not discuss Complainant's refusal to sign with him. Ms. Ryan testified that she did not know of any other Flatley employees who had refused to sign the acknowledgement in December 1997.

39. Complainant testified that, on December 22, 1997, an unidentified female left a message on his home answering machine that said, "bite me." Complainant believed that it sounded like Ms. Sanchez's voice.

40. Ms. Sanchez vigorously denied calling Complainant at his home and leaving a message, "bite me." I credit Ms. Sanchez's testimony.

41. Complainant testified that Ms. Flatley repeatedly walked by his work cubicle between January 5-7, 1998 and laughed at him while making eye contact. On January 7 or 8, 1998, Complainant testified that, while he was at the copier near Ms. Sanchez's office, Ms. Flatley said "loser" while coughing, made eye contact with him and giggled with Ms. Sanchez. Complainant testified that these incidents made him feel very uncomfortable. I do not credit Complainant's testimony.

42. Complainant testified that, on the same day, Ms. Flatley walked by Complainant's cubicle, whispered to Ms. McDougall and said, "tinky dinky" and "teeny weeny." Complainant testified that Ms. Flatley and Ms. McDougall laughed and giggled. Complainant believed Ms. Flatley's comment referred to his genitals. Complainant also testified that he "felt real bad and horrible" based on these remarks because he felt like he could not do his job without being subjected to sexual harassment. I do not credit Complainant's testimony.

43. Complainant testified that Mr. Murphy overheard Ms. Flatley's comment. Complainant also testified that Mr. Murphy said, "I guess that means I'm out of the dog house," referring to himself.

44. Complainant testified that, on January 15, 1998, Ms. Flatley again walked by his cubicle and called him "tinky dinky" and "loser."

45. Complainant testified that the alleged harassment by Ms. Flatley, Ms. McDougall, Ms. Sanchez and Mr. Murphy "really bothered" him but that he did not leave Respondent Flatley because he liked his job, found it interesting and thought that it had potential for advancement. Complainant also testified that he was upset, felt "horrible," was unable to sleep at night, withdrew and became more introverted because of the sexual harassment he experienced during the latter part of 1997 and early 1998.

46. Ms. Flatley denied using the term, "tinky dinky" or "teeny weeny" when referring to Complainant or anyone else. She also denied ever hearing anyone else at Flatley using these terms

when referring to Complainant. I credit Ms. Flatley's testimony.

47. Ms. Sanchez denied leering at Complainant or hearing Ms. Flatley call Complainant a "loser." Ms. Sanchez denied ever hearing any comments about Complainant's body parts while he was employed at Flatley. She also denied hearing any Flatley employee use the term "tinky dinky" or "teeny-weeny" in reference to Complainant, his sexual prowess or penis size. I credit Ms. Sanchez's testimony.

48. Ms. Flatley and Mr. Carey denied having any interaction with Complainant. Mr. Caulfield testified that he had infrequent contact with Complainant in the course of performing his job duties. Ms. McDougall testified that she had very limited interaction with Complainant during the time period relevant to this complaint.

49. Ms. McDougall testified that she never heard Ms. Flatley use the terms, "loser," "tinky winky" or "teeny-weeny" in reference to Complainant. I credit Ms. McDougall's testimony.

Flatley's Investigation

50. Sometime during the morning of January 8, 1998, Complainant met with Ms. Ryan and told her for the first time that Ms. Sanchez, Mr. Murphy and Ms. Flatley had allegedly harassed him. (Joint Stipulation No. 7). After Ms. Keyes joined the meeting, Complainant told them about the Vermont incident involving the Murphy sisters, Ms. Flatley's alleged reference to him as a "loser," the "bite me" telephone message on December 22, 1997 and alleged harassment regarding his sexual prowess and penis

size.

51. During the meeting, Complainant played a copy of the "bite me" telephone message for Ms. Ryan and Ms. Keyes. They testified that they did not recognize the female voice as that of Ms. Sanchez or Ms. Flatley. I credit their testimony.

52. Ms. Ryan testified that Complainant initially told them that he did not want them to interview Ms. Sanchez, Mr. Murphy and Ms. Flatley but merely wanted them to observe the work environment. Ms. Ryan also testified that she offered Complainant the opportunity to move to a different work cubicle but he declined. Ms. Ryan agreed not to conduct an investigation but asked Complainant to submit a written complaint. (Joint Exhibit No. 4A).

53. Complainant submitted a written sexual harassment complaint during a second meeting with Ms. Ryan and Ms. Keyes in the afternoon on January 8, 1998. (Joint Exhibit No. 4B). During this meeting, Complainant gave them additional information about the incident with the Murphy sisters. Ms. Ryan told Complainant that, contrary to her earlier statement, Flatley would immediately conduct an investigation and that it would be as confidential as possible. Ms. Ryan again offered to relocate Complainant's workstation but he declined. (Joint Exhibit No. 4C).

54. Sometime in January 1998, Ms. Keyes or Ms. Ryan told Mr. Murphy, Ms. Flatley, Mr. Carey and Mr. Caulfield that Complainant had filed an internal sexual harassment complaint.

55. On January 12, 1998, Ms. Ryan and Keyes engaged Louis A.

Cassis, Esq., outside counsel, to conduct an independent investigation into Complainant's allegations. On January 13, 1998, Attorney Cassis interviewed Complainant, Ms. Sanchez, Ms. Flatley and Mr. Murphy as part of his investigation.² (Respondent's Exhibit Nos. 3, 6 and 7). During his interview, Complainant told Attorney Cassis that no one at Flatley had seen his "body parts."

56. After reading Complainant's tape-recorded statement, Ms. Ryan and Ms. Keyes interviewed additional Flatley employees whom Complainant identified in his interview, including Elise S. Johns, a staff accountant, who worked in the cubicle directly opposite Complainant during the time period relevant to this complaint. On January 22, 1998, Ms. Johns gave Ms. Ryan a memorandum in which she stated that she "had never seen or heard anyone make any sexual gestures or sexual remarks" to Complainant. (Respondent's Exhibit No. 8).

57. Complainant testified that his co-workers laughed and snickered at him beginning shortly after he made his sexual harassment complaint on January 8, 1998. Complainant believed that they were joking about the fact that he had filed a sexual harassment complaint in which he reported being harassed for having small genitals. Complainant did not recall any specific comments by his coworkers after January 8, 1998 that related to Flatley's ongoing investigation into his internal sexual harassment complaint.

58. On January 16, 1998, Mr. Caulfield and Mr. Carey gave

²Attorney Cassis provided tape-recorded interviews of Complainant, Ms. Sanchez and Mr. Murphy from which Respondent Flatley prepared unsworn, written statements. (Respondent's Exhibit Nos. 3, 6 and 7). Attorney Cassis did not provide a tape-recording of Ms. Flatley's interview because he ran out of audiotapes during her interview.

separate memoranda to Ms. Ryan and Ms. Keyes regarding their knowledge of Complainant's sexual harassment allegations. (Respondent's Exhibit Nos. 2 and 4).

59. On January 19, 1998, Ms. McDougall gave a memorandum to Ms. Keyes regarding her knowledge of Complainant's sexual harassment allegations. In her memorandum, Ms. McDougall stated, in part, that she never heard Ms. Flatley or any other Respondent Flatley employee use the phrase "loser" toward Complainant or make any negative references to his last name. (Respondent's Exhibit No. 5).

60. Ms. Keyes testified that she was unable to corroborate any of Complainant's allegations based on statements by current or former Flatley employees. On January 21, 1998, Ms. Keyes told Complainant that Flatley had determined, based on its investigation, that his sexual harassment allegations were unsubstantiated.

61. Ms. Keyes met with Mr. Vatalaro³ who decided to terminate Complainant. Ms. Keyes also testified that she concurred in Mr. Vatalaro's termination decision.

62. On January 21, 1998, Ms. Keyes gave a termination letter to Complainant. The letter stated, in part, that Flatley terminated Complainant based on its determination that his sexual harassment allegations were "frivolous, vindictive and wholly without any good faith or reasonable basis." (Joint Exhibit No. 2).

³Mr. Vatalaro did not testify at the public hearing.

63. Complainant did not work for Flatley after January 22, 1998. (Joint Stipulation No. 5).

64. When he was terminated on January 21, 1998, Complainant's annual salary was \$35,000. (Joint Stipulation No. 4). Complainant received raises in or about March of each year. Complainant testified that he also expected to receive a \$3,000 raise in March 1998.

65. Complainant testified that he felt "horrible" and "bad" when he was terminated because he really liked his job and felt there was plenty of opportunity for him at Flatley.

66. After his termination from Flatley, Complainant received \$8,376.00 in unemployment insurance benefits in 1998. (Complainant's Exhibit No. 2).

67. In 1998, Complainant held temporary jobs while seeking a permanent position by responding to newspaper advertisements, sending out resumes and contacting recruiting agencies. After his termination from Flatley, Complainant received wages in 1998 in the amount of \$14,522.76 calculated as follows:

- a. Hines Company--\$8,370.47;
- b. BJ's, Inc.--\$265.65;
- c. Winter Wyman Temporary Accounting Solutions, Inc.--\$2,502.00;
- d. Philip Environmental Services, Inc.--\$3,384.64.

(Complainant's Exhibit No. 2).

68. On or about May 17, 1999, Complainant began working at BTR North America, Inc. at an annual pay rate of \$45,000.00. Prior to his employment at BTR North America, Complainant's earnings

in 1999 were \$11,641.25, calculated as follows:

- a. Strategic Placement--\$5,937.75;
- b. Winter Wyman Temporary Accounting Solutions, Inc.--\$1,647.00;
- c. StaffPlus, Inc.--\$4,056.50.

69. Complainant also received \$853.00 in unemployment insurance benefits in 1999. (Complainant's Exhibit No. 3).

70. Complainant incurred unreimbursed medical expenses in the amount of \$261.69 for medical treatment he received while he had no health insurance after his termination from Flatley. (Complainant's Exhibit No. 1).

III. CONCLUSIONS OF LAW

A. Hostile Work Environment Claim

General Laws, Chapter 151B, §§4(1) and (16A), prohibit workplace discrimination in employment, including sexual and gender-based harassment. Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 677 (1993); Doucimo v. S & S Corporation, 22 MDLR 82 (2000). Chapter 151B defines sexual harassment to include "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." Chapter 151B, §1(18)(b); College-Town Division of Interco v.

Massachusetts Commission Against Discrimination, 400 Mass. 156, 165 (1987). See also Massachusetts Commission Against Discrimination Sexual Harassment in the Workplace Guidelines (hereafter: MCAD Guidelines), pages 4-6 (October 2, 2002). Chapter 151B also prohibits sexual harassment by an employee who is of the same sex as the victim. See Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1988); Melynchenko v. 84 Lumber Co., 424 Mass. 285, 286 (1997).

Proof of a hostile work environment sexual harassment claim requires a showing that unwelcome sexual conduct created an impediment to Complainant's full participation in Flatley's workplace, altered the terms and conditions of his employment or unreasonably interfered with his work performance. Collegetown, 400 Mass. at 162. To establish liability for hostile work environment sexual harassment, Complainant must prove by credible evidence that: (1) he was subjected to unwelcome verbal or physical conduct of a sexual nature; (2) the unwelcome verbal or physical conduct was sufficiently severe or pervasive to alter his terms or conditions of employment at Flatley and create an abusive working environment; (3) the unwelcome conduct was subjectively and objectively offensive; (4) the harassment was carried out by a Flatley employee with a supervisory relationship to Complainant or that knew or should have known of the unwelcome sexual harassment and failed to take prompt remedial action. Kelley v. Plymouth County Sheriff's Department, et. al., 22 MDLR 208 (2000); Beldo v. University of Massachusetts, 20 MDLR 111 (1998). In addition, Complainant must show that the "conduct [did in fact] affect and interfere with [his] work environment." Couture v. Central Oil Co., 12 MDLR 1401 (1990).

Workplace sexual harassment is actionable if it is "so 'severe or pervasive' as to alter the conditions of [the victim's] employment and create an abusive working environment." Faragher v. Boca Raton, 524 U.S. 775, 786 (1998), quoting Meritor Savings Bank v. Vinson, 477 U.S. 57, 67 (1986). The unwelcome conduct must be both objectively and subjectively offensive from the perspective of a reasonable person in Complainant's position. Muzzy v. Cahillane Motors, Inc., 434 Mass. 409 (2001); College-Town, 400 Mass. at 162; Ramsdell, 415 Mass. at 678. Complainant is not required, however, to show that the offensive conduct was sexually motivated. Melynchenko v. 84 Lumber Co., supra. (finding individual liable under Chapter 151B for vulgar joking despite fact that his conduct was not sexually motivated). There is also no quantitative or numerosity requirement on the number of incidents sufficient to constitute unlawful workplace harassment. Gnerre v. Massachusetts Commission Against Discrimination, 402 Mass. 502, 507-508.

A hostile work environment occurs when the unwelcome or offensive conduct is so pervasive that it creates a barrier to Complainant's full and untrammelled participation in Flatley's workplace. See Ramsdell 415 Mass. at 678; CollegeTown, 400 Mass. at 162; Waite v. Associated Heating Oil, 17 MDLR 1412 (1995). The determination of whether a particular work environment is hostile requires a factual inquiry into all the circumstances, including the frequency of discriminatory conduct, its severity and whether it was physically threatening or humiliating or merely an offensive utterance. See Faragher v. Boca Raton, 524 U.S. at 787-788. The Commission has consistently held that sex-based or sexually demeaning comments

must be continuous or pervasive to constitute a hostile work environment. Kelley v. Plymouth County Sheriff's Department, et. al., supra. (a one-time use of use of sexually charged language in the complainant's presence did not establish a violation under G.L. c. 151B).

Isolated or occasional comments or incidents, unless extremely serious, are not sufficient to alter the terms and conditions of employment. Candeliere and Massachusetts Commission Against Discrimination v. Vanson Leathers, Inc., 24 MDLR 228 (2002); Pio v. Kinney Shoe Corp., 19 MDLR 127, 131 (1997). See also Clark County School District v. Breeden, 532 U.S. 268, 271 (2001) ("simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment"); Prader v. Leading Edge Products, Inc., 39 Mass. App. Ct. 616, 619-20 (1996) (use of garden variety expletive cannot, standing alone, constitute harassment). However, a single episode of harassment may constitute actionable sex discrimination if its effect on an employee is profound. Gnerre v. Massachusetts Commission Against Discrimination, supra. at 506-507 (1988); Morehouse v. Berkshire Gas Co., 989 F. Supp. 54, 62 (D.Mass. 1997).

Complainant contends that the Respondents subjected him to sexual harassment during 1996-1997 that included the following unwelcome actions or conduct: "1) suggestion of lack of sexual prowess, experience and penis size; 2) unwanted leering and derogatory comments; 3) unwanted telephone messages on home answering machine. 'Bite Me;' 4) being referred to as a loser by members of management." (Joint Exhibit 4B). As discussed below,

Complainant has not persuaded me that these acts occurred or were related to his employment at Flatley during 1997-1998.

I do not credit Complainant's testimony that Mr. Murphy referred to him as a "eunuch" in January or February 1996. Even if I believed that Mr. Murphy referred to holiday candy on one occasion in 1996 as a "unique and tasty treat," I reject Complainant's contention that such comment had a sexual connotation or was based on his gender. I also find that Complainant's version or account of the incident involving the Murphy sisters in January 1996 is not believable and completely unrelated to his employment at Flatley. In addition, Complainant failed to establish a credible link between the Murphy sisters' remarks and Mr. Murphy's alleged identical comment. He produced no evidence that Mr. Murphy was related to the Murphy sisters or that he knew about Complainant's purported interaction with the Murphy sisters in January 1996, including their alleged reference to a "unique and tasty treat."⁴ Finally, Complainant did not prove that his comment, if made, precipitated deterioration in his working relationship with Mr. Murphy. See e.g., Massachusetts Commission Against Discrimination & Fallon v. City of Malden & Schwartz, 25 MDLR 167 (2003); Sanderson v. Town of Wellfleet, 16 MDLR 1341, 1359 (1994).

⁴Given my findings, I am not required to address Respondents' contention that Complainant's allegation regarding Mr. Murphy's offensive statement in 1996 is time-barred because it fell outside of the six-month limitations period immediately preceding the filing of Complainant's charge on January 30, 1998. See General Laws, Chapter 151B, §5; Cuddyer v. Stop and Shop Supermarket Co., 434 Mass. 521 (2001)(in instances where a continuing violation is comprised of a series of related actions or an ongoing pattern of discrimination, conduct occurring prior to the six-month limitations period is actionable if there is a discreet violation within the six-month limitations period that is substantially related to and directly arose out of the earlier untimely conduct). Even if Mr. Murphy's alleged statement in 1996 is untimely, I have considered it as background information related to the underlying timely sexual harassment allegations.

I credit Complainant's testimony that someone called him on December 22, 1997 and left a telephone message, "bite me." Complainant failed, however, to produce any credible evidence that Ms. Sanchez or any other Flatley employee, including Ms. Flatley, left this message. I credit Ms. Sanchez's denial regarding the December 22, 1997 telephone message. I also credit the testimony of Ms. Ryan and Ms. Keyes that they did not recognize the voice message as that of Ms. Sanchez or Ms. Flatley.⁵

Having weighed the demeanor and credibility of all witnesses who testified in this matter, I reject Complainant's allegations that Ms. Flatley, Ms. Sanchez or Messrs. Carey, Cauffield and Murphy subjected Complainant to sexually harassing comments or actions during 1997 and early 1998. These witnesses vigorously and credibly denied each of Complainant's allegations. In addition, no Flatley employee corroborated any part of Complainant's allegations even though it was highly unlikely that some, if not all, of the incidents or actions cited by Complainant in 1997 and 1998 could have taken place without being heard or observed by other Flatley employees. Massachusetts Commission Against Discrimination and Guazzaloca v. C.F. Motorfreight and Nobles, 25 MDLR 200 (2003). Accordingly, I conclude that Complainant has not established a

⁵Given my finding, I have not addressed whether the "bite me" statement is actionable as unlawful sexual harassment even though it took place outside of the workplace. See e.g., Sanderson v. Town of Wellfleet, 16 MDLR 1341 (1994)(the employer was not liable for conduct that occurred on a business related trip that was not sponsored by the employer but by a professional association); Johnson v. Boston Edison, 19 MDLR 162 (1997)(non-workplace obscene telephone calls will not support a hostile work environment claim without accompanying workplace conduct).

prima facie claim of hostile work environment sexual harassment.⁶

B. Retaliation Claim

Massachusetts General Laws, Chapter 151B, §4, paragraph four, prohibits an employer from retaliating against an employee who has participated in protected activity. This provision makes it unlawful “[f]or any person, employer . . . to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.” See Kelley v. Plymouth County Sheriff’s Department, et. al., 22 MDLR 208, 215 (2000), citing Bain v. Springfield, 424 Mass. 758, 765 (1997); MCAD Guidelines at IX. In addition, Chapter 151B, §4, paragraph 4(A) makes it unlawful “[f]or any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter, or to coerce, intimidate, threaten or interfere with such other person for having aided or encouraged any other person in the exercise or enjoyment of any such right granted or protected by this chapter.” Retaliation is a separate and independent claim of discrimination, “motivated, at least in part, by a distinct intent to punish or rid the workplace of someone who complains about an unlawful [employment] practice.” See Pontremoli v. Spaulding Rehabilitation Hospital, 51 Mass. App. Ct. 622, 625 (2001); Abramian v. President & Fellows of Harvard, 432 Mass. 107, 121 (2000); Fountas v. Medford Public Schools, 22 MDLR 264

⁶Given my findings and conclusions, I do not have to address whether Respondents Kevin Murphy and Jennifer Flatley are individually liable for the alleged sexual harassment. See Beaupre v. Cliff Smith & Associates, 50 Mass. App. Ct. 480 (2000); Woodason v. Norton School Committee, et. al., 25 MDLR 64 (Full Commission decision).

(2000), citing Ruffino v. State Street Bank and Trust Company, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In the absence of direct evidence of a retaliatory motive, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973), and adopted by the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976).⁷ See Weber v. Community Teamwork, Inc., 434 Mass. 761 (2001); Lipchitz v. Raytheon Company, 434 Mass. 493 (2001)(G.L. Chapter 151B sets out four elements: membership in a protected class, harm, discriminatory animus and causation); Abramian v. President & Fellows of Harvard College, supra.; Yeskevic v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001). To prove a retaliation claim, Complainant must show by credible evidence that he participated in protected activity, he suffered an adverse employment action and a causal connection existed between the protected conduct and the adverse employment action(s) taken by Flatley. Pontremoli, supra. at 625, quoting from Lewis v. Gillette Co., 22 F.3d 22, 24 (1st Cir. 1994)("plaintiff must establish the basic fact that he was subjected to an adverse employment action because of his protected activity").

To establish a prima facie case of unlawful retaliation, Complainant must show by credible evidence that: (1) he participated in protected activity; (2) Flatley knew about Complainant's participation in protected activity prior to

⁷ Complainant may prove unlawful discrimination by either direct evidence or, indirectly, by circumstantial evidence such as evidence that the reasons articulated by the employer for its actions are false. See Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665-667 (2000)(direct evidence is evidence that "if believed, results in an inescapable, or least highly probable, inference that a forbidden bias was present in the workplace"); Price Waterhouse v. Hopkins, 490 U. S. 228, 247 (1989); Johansen v. NCR Contem, Inc., 30 Mass. App. Ct. 294, 301-302 (1991).

terminating Complainant; (3) Flatley terminated Complainant after he participated in protected activity; (4) a causal connection exists or can be inferred between Complainant's participation in protected activity and his termination. See Hudson v. Pembroke/Hanover Elks Lodge, et. al., 22 MDLR 45 (2000) citing Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995). To qualify for protection under Chapter 151B, the manner in which an employee "opposes" an allegedly discriminatory act or practice must also be reasonable. MCAD Guidelines at IX; Hochstadt v. Worcester Foundation for Experimental Biology, 425 F.Supp. 318 (D. Mass. 1976); Rollins v. Florida Department of Law Enforcement, 868 F.2d 397 (11th Cir. 1989).

Since a link between protected 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 an inference reasonable." See Ritchie v. Department of State Police, ____ Mass. App. Ct. ____ (2004) ("close temporal proximity between the protected activity and the adverse employment action permits an inference of the casual nexus necessary for a finding of retaliation"); Kealy v. City of Lowell, Department of Public Schools, 21 MDLR 19 (1998), citing Cimino v. BLH Electronics, Inc., 5 MDLR 1263, 1287 (1983) (finding retaliation where the discharge occurred within 15 months after the protected activity); Salvanelli v. Ares-Serono, Inc., 17 MDLR 1138, 1144-1145 (1995) (termination taken within six weeks of participation in protected activity); Hochstadt, supra.

The Commission and courts broadly interpret Chapter 151B's anti-retaliation provision to apply to instances where an

employee participates in a variety of pre-charge and non-charge conduct. See Ritchie v. Department of State Police, *supra*. While Chapter 151B, §4(4) specifies that filing a formal complaint is protected activity, the Commission and courts have concluded that other conduct also qualifies including instances where a complainant has orally "opposed" an unlawful employment practice or action under G.L. c. 151B (the "opposition" clause).⁸ MCAD Guidelines at IX.A.

The statutory protection against retaliation extends to "informal voicing of complaints" that allege discrimination or oppose a practice using procedures "undertaken internally within a company or organization." See Auborg v. American Drug Stores, 21 MDLR 238, 242 (1999)(liability for unlawful retaliation when an employee complained about discrimination but did not file a formal discrimination charge); Morris v. Boston Edison Co., 942 F.Supp. 65, 69 (D.Mass. 1996); Proudy v. Trustees of Deerfield Academy, 19 MDLR 83, 88 (1997); Sumner v. United States Postal Service, 899 F.2d 203, 209 (2nd Cir. 1990). To constitute protected activity, the internal complaint must be sufficient to put an employer on notice of possible unlawful conduct. See Massachusetts Commission Against Discrimination and Josey v. Crystal Transport, Inc., 26 MDLR 10 (2004); Massachusetts Commission Against Discrimination and Donovan-Rizzo v. Delta Air Lines, 25 MDLR 284 (2003)(during a meeting with management, the complainant placed Delta on notice that her supervisor was harassing her based on her handicap); Rosman v. Schepps, 24 MDLR 350 (2002)(general gripes with no specific references to discriminatory acts do not constitute protected activity);

⁸The anti-retaliation provision also applies to instances where an employee participates in an employment discrimination proceeding under G.L. c. 151B (the "participation" clause). Participation includes a formal action such as filing a discrimination complaint, submitting an affidavit or testifying in a Commission hearing. See MCAD Guidelines at IX.A.

Russell v. Hill Educational Centers, Inc., 23 MDLR 91, 95 (2001)(merely informing her supervisor that a co-worker made the complainant feel uncomfortable by being rude and asking her for a date did not place the employer on notice of possible unlawful conduct).

Once Complainant establishes a prima facie case of retaliation, the burden of production shifts to Flatley to articulate and produce credible evidence of a legitimate non-discriminatory reason(s) for its termination of Complainant on January 21, 1998. See Weber v. Community Teamwork, Inc., 434 Mass. 761, 768-769 (2002); Abramian, 432 Mass. at 116-118. If Flatley meets its burden of production, Complainant must then show by a preponderance of evidence that Flatley's proffered reason(s) is not, in fact, the real reason for his termination but is a pretext for unlawful retaliation. Abramian, 432 Mass. at 107; Mole v. University of Massachusetts, 58 App. Ct. 29 (2003). Complainant may meet this burden with circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse employment decision is false." Lipchitz, supra. at 504. Complainant retains the ultimate burden of proving by a preponderance of the evidence that Flatley's decision to terminate him was motivated by a discriminatory animus based on his participation in protected activity. Abramian, 432 Mass. at 117.

There is no dispute that Flatley terminated Complainant on January 21, 1998 based on its finding, after an investigation, that his sexual harassment complainant was "frivolous, vindictive and utterly without any good faith basis." (Joint Exhibit No. 2). Flatley contends that Complainant is not protected by Chapter 151B's anti-retaliation provisions because

his sexual harassment claim was frivolous or was made in bad faith as shown by the absence of any corroborating evidence or witnesses. Flatley asserts therefore that Complainant's termination on January 21, 1998 was proper and not discriminatory because it furthered Flatley's legitimate policy of disciplining employees who filed frivolous or vindictive sexual harassment complaints.⁹

As discussed above, the first element of Complainant's prima facie case based on unlawful retaliation requires him to establish by credible evidence that he participated in a protected activity within the meaning of Chapter 151B, i.e., that he "opposed" an unlawful employment practice when he filed an informal sexual harassment complaint with Flatley. To satisfy this element, Complainant is not required to ultimately prove his allegation that Flatley employees sexually harassed him during the relevant time period. Under Commission guidelines and decisions, Complainant may prevail on his retaliation claim even though he has failed to prove his underlying claim of sexual harassment, as discussed above. Abramian v. President & Fellows of Harvard College, supra.; Bain v. Springfield, 424 Mass. 758, 765 (1997); Massachusetts Commission Against Discrimination, Neumann and Patryn v. Red Rocks Pizza and Rizos, 25 MDLR 261 (2003); Commission Guidelines, Section IX.A. (2002)(a complainant "need not prevail on sexual harassment claim to prove a retaliation claim"). However, Complainant must prove that he "reasonably and in good faith" believed that [Flatley was] engaged in unlawful

⁹ The timing of Complainant's termination within two weeks after he reported the alleged sexual harassment permits a reasonable inference that Flatley was motivated by a retaliatory animus. See Massachusetts Commission Against Discrimination & Apsey v. GKA Inc. 25MDLR 56 (March 22, 2004); Mindel v. Chelsea Clock Co., 23 MDLR 133 (2001); Ruffino, supra.

discrimination and that [he] acted reasonably in response to [his] belief.”¹⁰ See also Bigge, 894 F.2d at 1502 (plaintiff presented considerable evidence which, if believed, would support a finding that he held a reasonable belief that the employer engaged in or was engaged in unlawful or discriminatory practices—evidence that the employer had a policy against hiring black persons for managerial or secretarial positions); Trent v. Valley Electric Association, Inc., 41 F.3d 524, 527 (9th Cir. 1994)(the record supported a finding that plaintiff showed that the plaintiff had a reasonable belief that it was unlawful under Title VII for her to be subjected to a series of sexually offensive remarks at a seminar her employer required her to attend); Commission Guidelines, at 14 (2002); Santiago v. Trel Lloyd and Lupi’s Enterprises, Inc., 66 F. Supp. 2d 282, 286 (U.S. Dist. Ct. Puerto Rico 1999).

Based on the above findings of fact, I do not find that Complainant reasonably and in good faith believed that Flatley employees sexually harassed him in 1996-1998. See Abramian, 432 Mass. at 121; Massachusetts Commission Against Discrimination and Guazzaloca, supra.; Massachusetts Commission Against Discrimination and Donovan-Rizzo v. Delta Air Lines, supra.; Grassinger v. Welty, et. al., 818 F.Supp. 862 (U.S. Dist. Ct. W.Pa. 1992)(no reasonable belief that the employer discriminated against the plaintiff merely because it dismissed his sexual harassment claim); Little v. United Technologies, 103 F.3d 956, 960 (11th Cir. 1997)(plaintiff’s belief that his co-worker’s one-time racially derogatory comment violated Title VII was

¹⁰ This standard is especially applicable in sexual harassment cases where there is often no eyewitness to the alleged harassment. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002, Section V.C.e.iii, Effective Investigative Process—Reaching a Determination (June 18, 1999)(“the fact that there are no eyewitnesses to the alleged harassment by no means necessarily defeats the complainant’s credibility, since harassment often occurs behind closed doors”).

implausible where he never raised his concern to a manager for 8 months). Based on the totality of the evidence in the hearing record, I do not believe any part of Complainant's sexual harassment allegations and I find that they are entirely fabricated. In addition, Complainant presented no credible independent evidence or witness testimony to corroborate any of his allegations although it is unlikely, based on his allegations, that other Flatley employees would not have seen or overheard some of the alleged incidents of harassment.

I have not concluded that Complainant's "opposition" lost its character as protected conduct merely because Flatley's investigation did not find sufficient evidence to corroborate his allegation that Flatley employees sexually harassed him in 1996-1998. See Josey and Massachusetts Commission Against Discrimination v. Crystal Transport, Inc., supra. (although the Commission dismissed the complaint for lack of probable cause, the retaliation charge does not lack the element of reasonableness that is a necessary prerequisite for protected activity). To permit Flatley to terminate Complainant merely because he failed to "substantiate" or "corroborate" his sexual harassment claim is contrary to one of the underlying purposes of Chapter 151B which is to ensure effective enforcement of anti-discrimination laws through the willingness of individuals to "oppose" unlawful employment practices. See Guazzaloca, supra; MCAD Guidelines, page 28; Monteiro v. Poole Silver Co., 615 F.2d 4, 6-8 (1st Cir. 1980)(the plaintiff's discrimination allegations were unfounded and were made in bad faith as a "smokescreen" to challenge to his supervisor's legitimate criticism about his work). To the contrary, my findings in this case are based on my determination that Complainant entirely fabricated his sexual harassment allegations and they have no

basis in fact. My finding is also consistent with the Commission's policy that vindicates the right of Flatley to take appropriate disciplinary action against an employee like Complainant who makes a false or bad faith claim of sexual harassment. See MCAD Guidelines, IX, page 28.

I find, therefore, that Complainant did not prove, by any credible evidence, that he subjectively believed that Flatley employees sexually harassed him in 1996 through 1998 and that his belief was objectively reasonable based on the evidence offered in this case. Accordingly, I find that Complainant's internal sexual harassment complaint was insufficient, under these facts, to constitute protected "opposition to . . . [Flatley] practices forbidden" under Chapter 151B. Consequently, I conclude that Complainant has failed to establish that Flatley engaged in unlawful retaliation in violation of G.L. c. 151B, §4, when it terminated him on January 21, 1998 because of his false complaint.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law, I hereby order that the complaint in this matter be dismissed. This decision constitutes the final order of the Hearing Officer. Any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten (10) days of receipt of this order and a Petition of Review with the Full Commission within thirty (30) days of receipt of this Order.

SO ORDERED this 7th day of July 2004.

KENNETH B. GROOMS

Hearing Officer