

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & THOMAS SOBOCINSKI,
Complainants

v.

DOCKET NO. 05-SEM-00849

UNITED PARCEL SERVICES, INC.,
RUSSELL FORD, RONALD PETRO &
RONALD DRAPER,
Respondents

Appearances:

Jack K. Merrill, Esquire for Thomas Sobocinski
Elizabeth Kowal, Esquire and Hugh F. Murray, III, Esquire for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 18, 2005, Complainant Thomas Sobocinski filed a complaint with this Commission charging Respondents with discrimination on the basis of sexual harassment. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on February 23, 24 and 26, 2009. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Respondent United Parcel Services, Inc., (“UPS”) is a world-wide package delivery business that operates a large warehouse in Shrewsbury, Massachusetts where hundreds of employees handle, sort and deliver packages.

2. Complainant Thomas Sobocinski resides in N. Oxford, MA. Complainant worked briefly for UPS in 1986, then served in the army for four years. After his discharge in 1990, Complainant worked in Respondent's Shrewsbury warehouse in various capacities, including driving a delivery truck. In approximately 2003, Complainant began working in an "unload" position. Depending on the needs of the warehouse on any given day, he also sometimes bid out to other positions such as "small sort" or "bulk." Complainant has been a member of the Teamsters Union since 1986. At the time of the public hearing, he continued to work for UPS.

3. Respondent Russell Ford has worked for UPS since September of 1994. He became a full-time supervisor in November of 2003. In 2004, Ford over saw the unload department, where he supervised other part-time supervisors and hourly employees such as Complainant, with whom he interacted on a daily basis.

4. Respondent Ronald Draper has worked for UPS since June of 1989. He currently works in Respondent's corporate office. In April 2004, Draper was promoted to the position of day sort manager and became Ford's supervisor. In this position, Draper reported to Ron Petro, who was then the Worcester division manager.

5. Respondent Ronald Petro is currently Respondent's East New England Feeder Manager. In April 2004, Petro was promoted to Division Hub Manager and was responsible for overseeing all three shifts at the Shrewsbury operation. Petro supervised Draper and Ford.

6. Mark Murphy was an employee relations manager for Respondent's eastern New England district from March of 2003 until his retirement in April of 2008 and was a liaison between employees and UPS with respect to non-union related matters. Murphy's

duties included investigations of sexual harassment complaints. He reported to Robert Killilea.

7. Complainant testified that beginning in early 2004, Russell Ford regularly made sexually suggestive gestures to no one in particular, such as simulating oral sex, blowing kisses and thrusting his hips back and forth to simulate sexual intercourse. This conduct occurred two or three times per week. I credit this testimony.

8. Complainant testified that in the spring 2004, Ford began directing sexual comments toward him. One morning as Complainant entered the warehouse, Ford cornered him, grabbed his own crotch, told Complainant that Complainant had a “sweet ass” and that he wanted to “stick his dick in his ass.” While he was shocked and surprised and could not believe what Ford had just said, Complainant walked away without responding to this comment. He did not complain at that time because he did not think anyone would believe him and because Respondent was generally not responsive to the complaints of workers. I credit this testimony.

9. In approximately August of 2004, while Complainant was driving a bulk train, Ford stepped in front of him and stated, “I’m not a faggot, but I would let a faggot fuck me in the ass just to see what it feels like it.” Complainant testified that he was surprised and extremely offended by this comment. He could not believe that Ford would make such a remark to another man and believed Ford should have kept such thoughts to himself. I credit his testimony.

10. Complainant testified that several times per week Ford would place a pen in his mouth to simulate oral sex and directed this conduct at Complainant. I credit this testimony.

11. Complainant testified that at a meeting in August of 2004 he complained to Ronald Petro regarding Ford's remark about anal sex with Complainant. Petro responded that Ford's conduct "was not sexual harassment if it was not wanted." Complainant did not understand when Petro meant by this, left the meeting and heard nothing more about whether management acted on his complaint. Petro denied that Complainant ever made any complaint to him about Ford. I credit Complainant's testimony in this regard. I do not credit Petro's testimony that Complainant did not complain to him about Ford.

12. Julie Isaacs¹ (formerly Julie Brown) worked at UPS from 1995 to September 2004. In 2004, Ford was her supervisor. Brown testified that in July of 2004, Ford approached her on the right and ran his left hand down her side and remarked that said she was "firm." She complained to Draper about the incident, and he told her that he would take care of it.² Thereafter, Ford was called into a meeting with Brown, Draper and her union representative and was told not to touch Brown. Ford admitted only that he touched Brown's shoulder and told her to get back to work.

13. Matthew Fitzgerald worked for UPS from 1998 to June of 2007. In 2004 Fitzgerald was a part-time supervisor at Shrewsbury facility. Fitzgerald testified that Ford made offensive comments on a daily basis. He referred to employees as "fag," "gay" or "cocksucker," and routinely made comments to employees such as, "Stop being a faggot and get back to work," or "How do you like sucking cock?" I credit Fitzgerald's testimony.

¹ To avoid confusion, Ms. Isaacs is referred to as Julie Brown in this decision

² Brown filed a sexual harassment complaint with the MCAD that was dismissed for lack of probable cause. Brown has filed a motion to reopen her case based on Fitzgerald's new allegations that he was instructed to find grounds to terminate Brown. That motion is pending before the Investigating Commissioner. Brown's allegations of retaliation are not before me and I make no findings on that issue.

14. Eric St. Onge is a former supervisor at Respondent who was subpoenaed to testify at the public hearing but failed to appear. Portions of his 2008 deposition testimony were admitted into evidence by agreement of the parties. Draper was St. Onge's supervisor. St. Onge described the Shrewsbury facility as a "battlefield" in the relationship between management and the union. (Ex. J-18)

15. St. Onge testified that Draper repeatedly called him a "pussy" and told him to "grow some balls." Ford told him that if he would be "fucked in the ass" if he did not step up his work production and repeatedly called him a "pussy." In addition, Ford once tapped on St. Onge's genitals and St. Onge kicked him away. When St. Onge complained about this incident to Draper, Draper responded that St. Onge had already dealt with it and to let it be. On another occasion Ford touched St. Onge's buttocks, but St. Onge did not complain because Ford was Draper's "right hand man" and it did no good to complain to him about Ford. (Jt. Ex. 18) I credit this testimony as it is consistent with the credible testimony of Complainant and Fitzgerald.

16. Ford testified at the public hearing that he does not recall saying any of the things St. Onge accused him of saying and denied touching St. Onge's genitals. Draper testified that he "does not recall" calling St. Onge a "pussy" or telling him "to grow some balls" and denied St. Onge telling him that Ford touched his genitals. I do not credit the testimony of Ford and Draper regarding conduct toward St. Onge.

17. Ford acknowledged that Draper and Petro cautioned him about using foul language in the workplace. Ford stated that although he used the "f-word" he has never made expressly sexual comments in the workplace and denied making the statements

Complainant attributed to him and denied touching employees in a sexual manner. I do not credit his testimony.

18. Ford testified that he and Complainant have never gotten along because Ford disciplined Complainant's friends for performance issues and constantly instructed Complainant to get back to work because Complainant was talkative and disruptive. Ford testified that Complainant's friends Bob Ryan and Dennis Dostler would lie to a UPS investigator about him because they don't like him and because he has disciplined Dostler for poor performance. I credit Ford's testimony to the extent that he did not get along with Complainant or with Ryan and Dostler; however, I do not believe that their animosity caused them to fabricate incidents about Ford.

19. Draper testified that "salty" language, such as the "f-word" is used by everyone at the Shrewsbury warehouse including himself. I credit this testimony.

Insurance Check

20. In early December of 2004, Complainant received a workers' compensation check for 66¢ from Liberty Mutual, Respondent's workers' compensation administrator. Shortly after Complainant received the check, Ron Draper approached him and explained that the check had been issued in error and that due to certain arrangements between Respondent and Liberty Mutual, the issuance of the erroneous check would result in a charge of \$18,000 to the Shrewsbury day sort center. Draper asked Complainant to return the check so that this charge could be reversed.

21. According to Complainant, after a week had passed Draper became more aggressive and told Complainant to give him the "fucking check." Complainant told Draper that if handing over the check was going to save Draper thousands of dollars,

Complainant wanted a week's paid vacation in exchange for returning the check. Draper rejected Complainant's demand and accused him of extortion.

22. On December 7, 2004 Ford stopped Complainant as he entered the building with a co-worker and again asked him for the check. Complainant responded, "What will you give me for it," and Ford grabbed his own crotch and replied, "My dick." Complainant walked away without responding. He was "not surprised" by Ford's response because he had made similar comments many times before. I credit Complainant's testimony,

23. As the stand-off over the check continued, employees posted mock-ups of the check around the warehouse. Complainant testified that on December 14, 2004, Ford ripped one of the fake checks from the employee bulletin board, crumpled it up, simulated wiping his buttocks with the check and then threw it at Complainant making a comment that Complainant did not recall. Complainant testified that he was offended by Ford's actions. Ford acknowledged only that he crumpled up the check and threw it on the floor in anger. I credit Complainant's version of events. I do not credit Ford's testimony that he merely threw the check on the floor.

24. Complainant was later called into a conference room with Ford, Draper and two other managers who threatened him with insurance fraud and Complainant turned over the check.

25. On December 15, 2004, Draper and Ford each denied Complainant's request for a half day off in order to accompany his wife Alisha to a pre-natal doctor's visit.³ Complainant testified that he had previously received permission from Draper to take two or three hours weekly for this purpose, had provided a schedule of the appointments to

³ Alisha Sobocinski had previously suffered a miscarriage and her pregnancy was considered "high risk."

him and had already taken time the previous week. Draper testified that while he told Complainant that he would try to accommodate his requests for time off, December 15 is a very busy day for UPS and he could not afford to give Complainant time off that day. Ford testified that after he denied Complainant's request for time off, Complainant responded, "I'll fix you." I credit this testimony.

26. Later that same day, Complainant called the UPS hotline number to lodge a complaint concerning the refusal to give him time off, the matter of the insurance check and Ford's inappropriate conduct in the workplace.

27. On December 16, 2004, Mark Murphy traveled to Shrewsbury to investigate Complainant's complaint. (Ex. J-1) Murphy interviewed Ford, Ryan, Dennis Dostler and Complainant. He took written notes of these interviews which he typed up, but did not save the written notes. Murphy also talked with Draper and Petro but took no notes of these conversations.

28. Murphy testified that Ford denied making the comments alleged by Complainant. Murphy warned Ford that Complainant's was the second allegation of sexually offensive conduct against him⁴ and advised Ford to be especially careful in his personal conduct so as not to become a "target." Ford's testimony regarding the interview with Murphy was consistent with Murphy's. He stated Murphy warned to "be careful" of employees with an axe to grind.

29. Murphy stated that at his interview with Complainant, Complainant seemed particularly upset about being denied time off for his wife's doctor's appointment although he was also upset about the insurance check matter, telling Murphy that was the

⁴ Murphy testified that he did not know the name of the second person who had complained about Ford, but it was not Julie Brown, because he was unaware of her complaint at the time.

“last straw.” He also told Murphy that he was uncomfortable about the sexually charged comments by Ford. Murphy testified that he asked Complainant if Ford intended to actually carry out sexual acts or was kidding. I credit Murphy’s testimony.

30. Complainant testified that he met with Draper and Murphy in connection with the complaint. He felt that Draper and Murphy did not take the matter seriously and was concerned when Murphy compared Ford’s comments to a friend passing by and giving him the finger.

31. Murphy testified that in January 2005, he attended a meeting with Mike Killilea and Ford to review Complainant’s internal complaint as well as Respondent’s professional conduct and sexual harassment policies. Murphy testified that requiring Ford to meet with Killilea was considered a disciplinary action against Ford. No other action was taken against Ford and the investigation was closed.

32. Murphy testified that the use of foul language was not uncommon in the trucking industry, and that was why he inquired if Ford’s comments were sexual in nature or whether they were comments made in jest between two consenting parties.

33. Complainant has worked with Ford from time to time since December 2004 and acknowledged that Ford has made no comments of a sexual nature to him since his meeting with Murphy in December 2004. However, in his current position, Ford is his boss and has to deal with him on salary and other issues. He believed that Respondent, at the very least, should have transferred Ford to another position.

34. UPS permits employees to seek voluntary lay off (“VLO”) by calling in to work before the shift begins and requesting that day off. Employees’ requests will be granted or denied depending on Respondent’s expected volume of work for that day.

Complainant testified that after filing his internal complaint, his requests for VLO were always denied. On one occasion, he was playing golf with a co-worker who called the warehouse and was granted a VLO, yet when Complainant called minutes later his request for VLO was denied. Draper and Ford denied instructing anyone to deny Complainant's requests for a VLO. I credit the testimony of Draper and Ford that they did not purposely deny VLOs to Complainant.

35. Complainant also testified that after filing his internal complaint, Draper refused to allow him to take partial days off and required him to take only full days off.⁵ Draper testified that because employees continue to receive full union benefits when they work less than full time, it is not good business practice to allow partial days off. Consistent with this practice when Respondent's volume of work dropped in January, Draper required all employees to take only full days off. While this practice was subject to Draper's discretion, his testimony was consistent with the testimony of Julie Brown, who stated that she was required to take full days off the year before lodging her complaint about Ford.

36. In the first part of 2005, the hours for a day sort shift changed from 8:15 a.m. to 4:15 p.m. to a shift beginning at 1:00 p.m. and ending at 9:00 p.m. Complainant testified that in April 2005, he chose to become a delivery driver because he was unhappy with the change in the warehouse hours and because he wanted to get away from Ford and Draper. However, at his deposition Complainant testified that he was changing jobs solely because of the change in warehouse hours. I find Complainant's deposition testimony more credible. Complainant drove a delivery truck until July 2005, when he

⁵ This is a matter separate and distinct from VLOs

was injured in a motor vehicle accident that kept him out of work for several months and ultimately rendered him unable to drive a commercial vehicle.

37. Complainant testified that when he attempted to return to work inside the warehouse in a bulk⁶ position in 2006, his return was delayed by his supervisors because a physical therapist's note stated he needed more therapy, notwithstanding clearance by his physician to return to work with no restrictions.

38. Complainant testified that after returning to work, Respondent still kept him off the bulk job, which paid 20 cents more per hour, for three weeks in order that he take a "sort test" that others were not required to take. According to Draper, all employees in bulk positions must pass a computerized, 120 question sort test. However, because Draper did not think Complainant could pass the sort test, he directed part-time supervisor Karen Murphy to create a simplified written test solely for Complainant. When asked if bulk position requires employees to be "sort certified," Draper stated, "You get sort pay so you should be sort certified. So, yes, it is required." I do not credit Draper's testimony regarding the sort test. I find it implausible, given the animosity between him and Complainant, that Draper would have created an easier test solely for Complainant's benefit. Instead I find that the sort test was created to purposely delay Complainant's entry into the position. Over a three week period, Complainant lost 20 cents per hour; assuming a 40 hour week, the total lost wages are \$24.00.

⁶ The bulk operation is where heavy, large or unconventionally shaped packages that cannot be placed on conveyer belts are sent to be sorted.

Emotional Distress

39. Complainant testified that his supervisors at UPS made him feel like an insignificant “peon.” Although he enjoys his job, he dislikes his employers and no longer looks forward to work as he used to, and he worries about his job security. Complainant brings a cooler to work and he inspects it at the end of each day to make sure no one has tampered with it. He is afraid to hang up his coat for the same reason. Complainant testified that he more quick to anger and becomes agitated because of the harassment he has experienced on the job and his worry about future repercussions. He testified that he has gotten so angry that he has punched a couple of holes in the wall in his home. Complainant testified that Ford’s sexually inappropriate conduct made him feel uncomfortable and he did not know whether Ford meant to act on his comments. I credit his testimony.

40. Complainant testified that he and his wife are not as close as they used to be and they don’t talk as much as they did before the troubles at his work. His wife does not like to discuss his MCAD case and this has put a wedge between them and they argue more than before. I credit his testimony.

41. Complainant testified that he and his brother are close and used to talk on the telephone daily, but that since the events of 2004, their phone calls are less frequent and they argue more than they did before. I credit his testimony.

42. Complainant testified that he drinks much more than he did before filing his internal complaint and now consumes six to twelve cans of beer every night in order to help him sleep. He testified that he is not the same person he was in 2003. I credit his testimony.

43. Complainant's wife Alisha Sobocinski testified that they have been married for over seven years and have known one another for 17 years. Ms. Sobocinski testified that prior to 2004, Complainant was easy-going, friendly, honest, loving and caring. She stated that they had a great relationship, communicated well, and shared the same interests and passions. However, since 2004, Complainant sleeps poorly, is short-tempered, abrupt and aggressive, and has become more fidgety and more negative. He becomes very nervous when discussing his MCAD case. They seldom discuss his job and he does not look forward to going to work. He becomes upset if she does something that is contrary to his direction and she "walks on eggshells" around him. Ms. Sobocinski stated that prior to the events at UPS, Complainant drank once or twice on the weekend during a football game, but for the past few years he has consumed a six-pack of beer every night. She stated that the events at work have taken a toll on their romantic life and the quality of their relationship has diminished. I credit his testimony,

44. Complainant's brother Roman Sobocinski resides in Worcester, MA. Mr. Sobocinski testified that prior to 2004 he and Complainant were close and talked frequently on the telephone and went on numerous golfing trips and fishing tournaments together. Mr. Sobocinski stated that Complainant was unhappy at work and that Ford's comment that he "wanted to fuck him in the ass" weighed on Complainant and was a major incident for him. After filing his internal complaint, Complainant feared that someone would jump him when he entered the work place, felt he was under a microscope and feared for the loss of his job and pension and was more jittery and anxious. Mr. Sobocinski stated that since Complainant filed his internal complaint in 2004, they have communicated less often than before and last spring Complainant picked

a fight with him over vacuuming the boat they co-owned. Mr. Sobocinski and his son visited Complainant's home every other weekend and during these visits he observed Complainant and his wife sniping at one another. I credit his testimony.

45. Murphy, Ford and Draper all testified that they had not participated in sexual harassment training.

III. CONCLUSIONS OF LAW

A. Hostile Work Environment Sexual Harassment

Massachusetts General Laws, c. 151B, s. 4(16A) prohibits sexual harassment in employment. Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment." M.G.L. c. 151B, s. 1(18); College-Town Division of Interco v. MCAD, 400 Mass 156, 165 (1987).

In this case, Complainant has alleged that Respondents created a hostile work environment within the meaning of section 1(18) (a) as a result of his supervisor's unwelcome and offensive conduct and remarks. In order to establish a case of hostile work environment sexual harassment, Complainant must establish by a preponderance of the evidence that (a) he was subject to gender-based unwelcome verbal or physical sexual conduct; (b) the words or acts were sufficiently severe or pervasive to alter his conditions of employment and create an abusive working environment; and (c) the harassment was

carried out by an employee with a supervisory relationship to Complainant or the employer knew or should have known of the harassment and failed to take prompt remedial action. College-Town, 400 Mass. at 162.

The evidence in this case portrayed a workplace so pervasively hostile that one witness likened the Shrewsbury warehouse to a battlefield. There was evidence that Complainant's complaint was not the only one against Ford for similar behavior. To be sure, the enmity was in part due to conflict between management and hourly employees. Complainant had some disagreements with his supervisors that concerned matters unrelated to Ford's sexually charged comments, such as being denied time off to take his wife to a medical appointment on December 15 and his bizarre demand for a week's paid vacation in exchange for the return of an insurance check issued to him in error. Nevertheless, there was clearly an aspect of hostility created by Ford's crude, sexually offensive, unwelcome and inappropriate conduct directed at Complainant and other employees. Specifically, Ford repeatedly made sexually suggestive gestures such as simulating oral sex, blowing kisses, and thrusting his hips back and forth simulating sexual intercourse, two or three times per week. In addition, on one occasion Ford told Complainant he had a "sweet ass" and that he wanted to "stick his dick in his ass." On another occasion, Ford told Complainant "I'm not a faggot, but I would let a faggot fuck me in the ass just to see what it feels like it."⁷ Complainant found this conduct shocking, offensive and hostile. Complainant testified credibly that Ford's comments and sexual conduct were unwelcome. There is no doubt that Ford's conduct was unwelcome and was

⁷Another incident where Ford pretended to wipe his buttocks with a crumpled up check, while offensive and crude, was not sexual in nature, but nonetheless contributed to the hostile atmosphere.

sufficiently pervasive and continuous as to create a hostile work environment for Complainant.

An employer is vicariously liable for the sexual harassment of employees by managers and persons with supervisory authority, regardless of whether the employer knows of the conduct. Since Ford was a supervisory employee, UPS is liable for his sexual harassment. Moreover, Complainant testified credibly that he informed Ron Draper about Ford's conduct and Draper brushed off his complaint. Thus I conclude that UPS is liable both for Ford's unwelcome conduct and for failing to take prompt, effective and reasonable remedial action to stop the harassment once Draper was made aware of the conduct.

B. Retaliation

Massachusetts General Laws c. 151B, s. 4(4) makes it unlawful for an employer to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under c. 151B or because he has filed a complaint, testified, or assisted in any proceeding alleging a violation of c. 151B.

Retaliation is a separate claim of discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), quoting, Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard

College, 432 Mass 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000); Yeskevicz v. New Tech Precision, Inc., 23 MDLR 75, 80-81 (2001).

In order to establish a prima facie case of unlawful retaliation, Complainant must prove that: (1) he engaged in protected activity; (2) Respondent was aware he had engaged in protected activity; (3) Respondent subjected him to an adverse employment action; and, (4) a casual connection existed between the protected activity, known by the retaliator, and the adverse employment action. Morris v. Boston Edison Co., 942 F. Supp. 65, 68-69 (D. Mass. 1996); Ruffino, 908 F. Supp. at 1044; Kelly, 22 MDLR at 215; Langford v. Massachusetts Department of Employment and Training, 17 MDLR 1043, 1059 (1995).

Complainant engaged in protected activity by making an internal complaint to Respondent's hotline in December 2004. He claimed that his supervisors began denying him partial days off in retaliation for filing his internal complaint. However, Draper testified credibly that the practice of denying partial days off was a business decision that pre-dated Complainant's complaint and could therefore not be in retaliation for his having engaged in protected activity. In addition, there was insufficient evidence to conclude that the denial of unspecified voluntary days off to Complainant was retaliatory.

Complainant also alleges that in 2006, Draper retaliated against him by requiring him to take a "sort test" created solely for him before he could begin working a position in bulk. This caused a three week delay in Complainant's start date at that position and caused Complainant to lose a pay differential. Draper claimed that he directed a supervisor to design a test for Complainant because he did not believe Complainant was capable of passing the standard sort test. I did not credit Draper's testimony in this

regard. I find it implausible, given the long-standing hostility between Complainant and Draper, that Draper would create a test for Complainant out of concern for him. I conclude that forcing Complainant to take a sort test constituted unlawful retaliation and caused the delay in the start of a sort job and a delay in a pay differential.

C. Investigation

After Complainant filed an internal complaint regarding the harassment and other matters, Respondent should have conducted a prompt, neutral investigation into the allegations. See, Massachusetts Commission Against Discrimination, Sexual Harassment in the Workplace Guidelines, § VI., para. B (2003). While the investigation Respondent did was prompt, it was hardly neutral. Respondent's human resources representative, Mark Murphy, traveled to the Shrewsbury site the day after receiving Complainant's complaint. Murphy indicated in his testimony that he was aware of another complaint of sexual harassment against Ford, but he could not remember the employee's name. In his interview with Complainant Murphy asked him whether he thought Ford intended to have sexual relations with him or whether Ford was kidding. Incredibly, both in that interview and at the public hearing, Murphy asserted that Ford's conduct, while inappropriate, was not sexual harassment unless Complainant believed that Ford intended to act on his statements; put another way, it was sexual harassment only if Complainant believed that Ford intended to sodomize him.

Murphy's testimony revealed a surprising lack of understanding of what constitutes sexual harassment under Massachusetts law. Contrary to his beliefs, it has long been recognized that harassing conduct need not be motivated by sexual desire in order to constitute sexual harassment. MCAD Sexual Harassment Guidelines; (§II., D)

:Melnychenko & others v. 84 Lumber Company, 424 Mass. 285(1997) (hostile work environment found where sex harasser's actions were not true romantic overtures to the plaintiffs and were not inspired by lust or sexual desire, but all of his physical touchings and sexual innuendos were unwelcome and had the effect of unreasonably interfering with the plaintiffs' work performance by creating an intimidating, hostile, humiliating and sexually offensive work environment). Witnesses also testified that managers at the Shrewsbury facility did not regularly undergo sexual harassment training. Considering these factors, as well as the deposition testimony of St. Onge and the testimony of Julie Brown regarding the sexually charged work environment in Shrewsbury, I conclude that Respondent's workforce would benefit from sexual harassment training.

D. Individual Liability for Sexual Harassment

1. Russell Ford

Complainant named Ford as an individual in his complaint of discrimination. Since the individuals named in this complaint are not the employer and thus not covered by G.L. c. 151B s.4 (1), individual liability must be predicated upon alternative sections of the statute which prohibit any person from retaliating, aiding and abetting discrimination, or threatening, intimidating, coercing or interfering with an individual's rights. See Hudson v. Pembroke/ Hanover Elks Lodge, et al. MDLR (2002) (Full Commission found individual liable for retaliation.) Pursuant to G.L. c. 151B, s. 4(4A), it is unlawful for "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..." Among the rights protected by G.L. c. 151B is the right to a workplace free of sexual harassment, which includes a hostile work environment. The Commission has long

recognized and Courts have imposed individual liability under G.L. c. 151B. Beaupre v. Cliff Smith & Associates, 50 Mass.App.Ct. 480, 491 (2000), Erewa v. Reis, 20 MDLR 36, 38 (1998) See, e.g., Riggs v. Town of Oak Bluffs, 23 MDLR 306, 311 (2001)

The imposition of individual liability for prohibited hostile work environment sexual harassment is consistent with the expressed provisions of G.L. c. 151B, s. 9, which provides in pertinent part: "the provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof..." See Bournewood Hospital v. MCAD, 358 N.E.2d 235, 242-243 (1976) (this provision mandates the liberal construction of the statute to accomplish its remedial purposes).

In addition, G.L. c. 151B, s. 4(5) provides that it is unlawful for "any person, whether an employer or employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under [G.L. c. 151B] or to attempt to do so." As described above, Ford was the perpetrator of numerous sexually offensive comments to Complainant, over a period of several months, engaging in conduct that was intentional and made with the intent to abuse and harass Complainant. His behavior was sufficiently severe and pervasive so as to alter the conditions of Complainant's work environment. Given these circumstances, I find that Ford "interfered" with Complainant's right to and exercise and enjoyment of, a workplace free of sexual harassment, in violation of G.L. c. 151B sec.4 (4A) and I find him individually liable for that conduct.

2. Ronald Petro & Ronald Draper

Ronald Petro was a manager who exercised supervisory authority over Complainant and other employees. As such, he had a duty to act to ensure that the unlawful harassment ceased. However, when Complainant protested to him about Ford's

behavior, he shrugged off the behavior and his failure to do so was in deliberate disregard of Complainant's rights. School Committee of Norton v. Massachusetts Commission Against Discrimination & another, 63 Mass App. Ct. 639(2005) Given these circumstances, I conclude that Petro "interfered" with the exercise and enjoyment of Complainant's right to be free of sexual harassment in the workplace and he is individually liable for his failure to report the conduct or to take any steps to remedy such conduct in violation of G.L. c. 151B, s.4 (4A). Accordingly, Petro is individually liable for violation of G.L. c. 151B, s.4 (4A).

Ronald Draper was also a manager who exercised supervisory authority over Complainant. I found that Draper retaliated against Complainant by requiring him to take a "sort test" designed specifically for him that caused a delay in the start of a higher paying position for Complainant. Given these circumstances, I conclude that Draper "interfered" with the exercise and enjoyment of Complainant's right to be free of unlawful retaliation in the workplace and he is individually liable for his retaliatory conduct in violation of G.L. c. 151B, s.4 (4A). Norton v. Massachusetts Commission Against Discrimination & another, supra. Accordingly, Petro is individually liable for violation of G.L. c. 151B, s.4 (4A).

IV. REMEDY

Massachusetts General Laws c. 151B, paragraph 5 authorizes the Commission to grant remedies to make Complainant whole, including back pay and emotional distress damages. College-Town v. MCAD, 440 Mass 156, 168-169 (1987); Buckley Nursing Home v. MCAD, 20 Mass. App Ct. 182, 181-182 (1985).

A. Emotional Distress

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, et al., 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

Based on Complainant’s credible testimony, and that of his wife and brother, I am persuaded that he suffered emotional distress as a result of Respondent’s unlawful conduct. Complainant testified that the experience of being sexually harassed and retaliated against by Respondents make it very difficult for him to go to work, have caused him insomnia and made him hyper-vigilant. His emotional distress has resulted in strained relationships with his wife and his brother, and has led to his excessive consumption of alcohol on a daily basis. After Complainant complained about the harassment, Respondent engaged in retaliatory conduct by requiring him to take a bogus sort test that delayed his job start by three weeks. While I conclude that a portion Complainant’s emotional distress and his physical manifestations (increased drinking, difficulty sleeping, and strained relationships) resulted from Ford’s sexual harassment

and from retaliation by Draper, and is directly related to the events of 2004, there were other workplace issues and disputes that were unrelated to the allegations of sexual harassment or retaliation for protected activity that contributed to Complainant's distress. I conclude that some portion of his considerable distress was directly attributable to Respondents' unlawful activity, and that the unlawful activity contributed significantly to the hostile work environment. Therefore I find he is entitled to an award of emotional distress damages in the amount of \$50,000.00.

B. Lost Wages

I found that Complainant's sort position was delayed for three weeks because of unlawful retaliation. As a result, over a three week period, Complainant lost 20 cents per hour; assuming a 40 hour week, therefore he is entitled to lost wages in the amount of \$24.00.

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1. Respondents immediately cease and desist from discriminating on the basis of sexual harassment and retaliation.
2. Respondents pay to Complainant the amount of \$50,000.00 in damages for emotional distress 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 or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this order.

3. Respondents UPS and Ronald Draper pay to Complainant the sum of \$24.00 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 or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this order.

4. Respondent UPS shall conduct an initial training on unlawful discrimination, harassment and retaliation for all managers and supervisors employed by UPS at any and all of its facilities in the Commonwealth of Massachusetts. With respect to such training:

a. Each training session for managers and supervisors must be at least six (6) hours in length. All managers and supervisors, employed in the Commonwealth of Massachusetts shall be required to attend the initial training. No more than 25 persons may attend each training session. UPS shall repeat this training, once each calendar year for the next five years, for all new supervisors and managers who were hired or promoted after the date of the initial training session.

b. Within 30 days of the receipt of this decision, UPS shall select a trainer to conduct the initial training sessions. The trainer must be selected from the list of trainers who have completed the Commission-certified discrimination prevention-training program, available from the Commission's Director of Training. Within one week of UPS's selection of a trainer, a copy of this decision must be forwarded to the trainer for his or her review.

c. At least one month prior to the training date, UPS must submit a draft training agenda to the Commission's Director of Training for approval; and, provide the Director of Training with one-month's advance notice of the training date(s) and location(s). If the

Commission decides to send a representative to observe the training sessions, UPS will provide the Commission representative with unfettered access to the training sessions.

d. Within one month after the completion of the training, UPS must submit documentation of compliance to the Commission's Director of Training, signed by the trainer, identifying the training topic, the names of persons required to attend the training as identified in paragraph (a) above, the names of the persons who attended each training session, and the date and time of each training session.

e. In the event that UPS is sold, materially changed, or taken over by new management, any and all successor purchasers, assignors, managers, or operators of UPS (hereinafter referred to as the "new owners") shall be responsible for fulfilling the training requirements specified in this decision if any of the following shall apply:

i. The majority of the managers and supervisors employed by UPS as of the date of this decision continue to work for the new owners as of the succession date;

ii. The majority of UPS' governing board (e.g., board of directors, trustees) as of the date of this decision continues to serve on the new owner's board as of the succession date;

iii. The new owners are relatives of UPS, or previously employed by UPS as a manager or supervisor; or,

iv. UPS continues to retain an interest in the successor entity.

For purposes of enforcement, the Commission shall retain jurisdiction over these training requirements.

This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of

this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this the 30th day of November, 2009.

JUDITH E. KAPLAN,
Hearing Officer