THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & TIM BARNES,
Complainants

v.

SLEEK, INC., BURLINGTON MEDSPA, LLC,
SLEEK MEDSPA, SLEEK MEDSPA
NEWTON, LLC, SLEEK INTERNATIONAL 06-BEM-01275
FRANCHISE GROUP, LLC; SLEEK TECHNOLOGIES, INC.,
BOCA SLEEK MEDSPA, LLC, SLEEK REALTY, INC.,[1]
ANDREW RUDNICK, CATHERINE RUDNICK,
LEAH LEAHY & NORM VALINE,
Respondents

Appearances:
Simone Liebman, Esquire, Commission Counsel
John S. Day, Esquire, for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 17, 2006, Complainant Tim Barnes filed a complaint with this Commission charging all of the above named Respondents with discrimination on the basis of sexual harassment, gender and retaliation in violation of M.G.L. c. 151B §§4(1), 4(16A), 4(4), 4(4A). The Investigating Commissioner issued a probable cause finding on July 16, 2009. The probable cause finding was accompanied by an Order and Entry of Default dated June 30, 2008, noting that as a result of Respondents' failure to submit a position statement, certain sanctions were imposed prohibiting Respondents from

[1] The relationship of the named business entities to one another is not entirely clear from the record, however Respondent Andrew Rudnick is a principal or officer in all these businesses. They all relate to a chain of spas, which appear to be owned by Rudnick. Complainant worked at Burlington Medspa LLC, whose parent corporation is Sleek, Inc. Respondent did not seek dismissal of any of the other named entities.

introducing any and all evidence at the public hearing, presenting any and all defenses at the public hearing and barring them from opposing designated claims or supporting designated defenses at the public hearing. Attempts to conciliate the matter failed and the case was certified for public hearing. On May 12, 2010, Respondent Cheryl Michaels was dismissed as a party to this matter. A public hearing was held before me on November 5 and November 19, 2010. None of the individuals named as Respondents appeared at the public hearing. Attorney John S. Day appeared on behalf of all the Respondents and was permitted to cross-examine Complainant's witnesses. 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. Complainant Tim Barnes resides in Milford, Massachusetts with his wife Lynn and their two children.

2. Respondent, Sleek, Inc. is a Massachusetts corporation with a principal office at 925 South Federal Hwy, Suite 550, Boca Raton, FL. Its corporate officer and director is Andrew Rudnick. Sleek, Inc. merged with Sleek Realty, Inc. on March 3, 2010. (Stipulated Fact #4) (Ex. C-5) Respondent Catherine Rudnick was President, Treasurer, Secretary and Director of Sleek, Inc. as of March 14, 2006. In June 2006, she had a residence at 45 Yorkshire Road, Dover, MA (Stipulated Facts #10) (Ex. C-5)

3. Respondent Sleek, Inc. is the parent company to a chain of medical spas which provide a variety of services, including liposuction, "Brazilian Butt" lifts, facelifts, laser hair removal and breast implants. In 2005, businesses named Sleek Medspa operated at locations in Burlington and Natick, Massachusetts. Businesses operating under the name

Sleek Medspa are currently open at locations in Boston, Braintree, Burlington, and Natick, Massachusetts. (Stipulated Facts #2)

4. Respondent, Sleek Medspa Newton, LLC is a Massachusetts limited liability corporation registered and doing business in Massachusetts. Its Manager is Sleek, Inc. and its signatory is Andrew Rudnick. On March 21, 2007, Sleek Medspa Newton changed its name to Sleek Medspa Natick LLC. (Stipulated Facts #3)

5. Respondent Burlington Sleek Medspa, LLC is a limited liability company with its principal office at 925 South Federal Hwy, Suite 550, Boca Raton, FL 33432. Its manager and signatory is Sleek, Inc. In August 2004, Burlington Sleek Medspa LLC had a principal office at 23 Central Street, Wellesley, MA 02482 and Andrew J. Rudnick was listed as Real Property, 23 Central Street, Wellesley MA 02482 (Stipulated Facts #7) (Ex. C-7)

6. Respondent Boca Sleek Medspa, LLC was a limited liability company that listed Sleek Realty, Inc. and Sleek, Inc. as its Managers and SOC signatories. The agent for service of process is Andrew Rudnick. This company was dissolved by court order on 4/30/2009. (Stipulated Facts #9)

7. Respondent Sleek International Franchise Group, LLC is a Massachusetts limited liability company with a principal office at 23 Central Street, Wellesley, MA 02482. Andrew Rudnick and Sleek, Inc. are its manager and SOC signatories. (Stipulated Facts #6)

8. Respondent Sleek Realty, Inc. is a Massachusetts corporation with a principal office at 228 Newbury Street, Boston, Massachusetts. Its corporate officer and director is Andrew J. Rudnick. In the Articles of Incorporation, Andrew J. Rudnick, 45 Yorkshire

Road, Dover, MA 02030, is listed as the sole corporate officer and the principal office is 23 Central Street, #3, Wellesley, MA 02482 (Stipulated Facts #5) (Ex. C-6)

9. Respondent Sleek Technologies, Inc. is a Massachusetts Corporation. (Stipulated Facts #8)

10. Respondent Andrew J. Rudnick is the Chief Executive Officer of Sleek Medspa and is the sole corporate officer of Sleek, Incorporated. The facts as stipulated show that Rudnick in involved as a principal, officer or manager of all of the named associated corporations and LLCs. As of June 2006, Rudnick's principal residence was at 45 Yorkshire Road, Dover, MA. (Stipulated Facts #10)

11. At all relevant times, Leah Leahy was the Area Manager for the businesses known as Sleek Medspa. (Stipulated Facts #12)

12. In April or May 2005, Complainant, his wife and young son moved from Raymond, NH to Milford, Massachusetts in order to be close to his wife's family. Complainant had worked at Vision Fitness, Inc., a health club, from June 2003 to 2005.

13. In June of 2005, Complainant began to seek positions in Massachusetts, via websites such as CareerBuilder and Monster.com. He submitted an on-line application for the position of general manager of the business advertised as Sleek Medspa, a company whose primary business is laser hair removal. In 2005, stores operating under the name Sleek Medspa were located on Newbury Street in Boston, and in Natick, Newton, Burlington and other locations. Prior to applying for the position of General Manager of Sleek Medspa, Complainant had nine years of experience working as a general manager, national sales manager and managing director for several companies, including several women's health clubs, such as Vision Fitness, Inc.

14. Sleek Medspa's Chief Operating Officer, Norman Valine emailed Complainant to express an interest in interviewing him for the position. In a subsequent hour-long telephone conversation, Complainant and Valine discussed the General Manager position. Complainant understood the responsibilities to include marketing, budgeting and overall profit and loss of the operation, as well as the hiring and scheduling of staff. He understood that he would be training and coaching sales staff, and thus would not be involved in making sales but would be responsible for the overall sales of the location he managed. Complainant testified that he and Valine talked extensively about Complainant's experience working in the fitness industry in an all female environment. According to Complainant, Valine told him this experience was important because the Sleek Medspa workplace was primarily a female environment. I credit his testimony.

15. After speaking with Valine, Complainant interviewed with Leah Leahy, then an area manager, at a coffee shop near Respondent's Newbury Street location. Leahy explained the job duties of general manager and they discussed the similarities between the fitness industry and the laser hair removal industry and why Complainant would be a good fit. Leahy explained to Complainant that the general manager is responsible for the overall profit and loss of the location managed, but not for individual sales.

16. After the conversation with Leahy, Complainant received an email from Valine setting forth the compensation for the General Manager position. The email stated that Complainant would receive a base salary of $50,000 plus commissions of $400 per month if sales reached $40,000 in a given month and $800 per month if sales reached $60,000, plus potential bonuses of $5,000 annually. The email stated the general

manager's potential earnings as $75,000 to $90,000 per year with benefits that included health insurance. (Ex. C-1)

17. Complainant testified that in one of his telephone conversations with Valine and Leahy, Valine indicated that owner Andrew Rudnick was concerned about having a male employee working in the spa environment, but that Valine and Leahy reassured Rudnick that Complainant could do the job. Complainant testified that this conversation took place sometime between June 29, 2005 and July 18, 2005. I credit his testimony.

18. On or about June 29, 2005, Valine and Leahy offered Complainant a position as General Manager of the Burlington Sleek Medspa Center, which was located in a shopping mall in Burlington, Massachusetts, beginning July 18, 2005. Complainant was very excited about the offer and its earnings potential. (Testimony of Lynne Barnes)

19. On July 18, 2005, Complainant met Leahy at either the Newton or Natick Sleek Medspa for training, which consisted of reading the training manual and discussing the daily activities and the environment with Leahy and the location's manager.

20. On July 19 or 20, 2005, Complainant reported to work at Burlington Sleek Medspa, and began shadowing Cheryl Michaels, then general manager at Burlington. Complainant understood that Michaels was to train him for an unspecified period and Michaels would subsequently become general manager at the Newbury Street location, while Complainant would remain as general manager of the Burlington location. Complainant testified that he considered Michaels to be his supervisor during this period of training. I credit his testimony.

21. Six to ten employees worked at the Burlington location at any given time, including two to three sales staff as well as two or three aestheticians. Complainant was

the only male employee. The most common procedure performed at the Burlington location was laser hair removal from the genital area.

22. Complainant testified that the aestheticians who performed hair removal procedures made numerous comments about their clients in his presence that he found inappropriate. On one occasion, an aesthetician told co-workers in Complainant's presence that a male client had an erection during the procedure and she zapped him in the scrotum with a laser. The other aestheticians laughed and joked about the incident.

23. On another occasion, in the presence of Complainant and co-workers, an aesthetician remarked about a female client, "That was the hairiest beaver I have ever seen," and the others laughed. On another occasion, an aesthetician remarked, "That was the hairiest ass I've ever seen in my life."

24. According to Complainant, aestheticians made similar comments regarding their clients several times a day. Complainant did not recall whether Cheryl Michaels was present when these comments were made, but he did not ask the employees to refrain from such comments and he did not complain to Michaels about them, because he was new, had not yet assumed managerial functions, and did not feel it was his place.

25. On July 26, 2005, Complainant was handing out flyers at the mall entrance to Medspa. It had been a slow sales day, and when a sale was finally made, Michaels turned in excitement to the store's continually operating web camera, lifted her shirt and said into the camera, "Andrew, I hope you're watching this." Complainant presumed she was referring to the company's owner, Andrew Rudnick. Upon observing Michael's antics, one aesthetician screamed and others laughed. Complainant testified that from his vantage point he could see Michaels' entire back. Complainant said he was "shocked,"

by this incident, felt "extremely uncomfortable," and "could not believe what had happened." He testified that Michaels' conduct was the "last straw," and that he found the workplace atmosphere "unprofessional" and "way too sexual." I credit his testimony that he believed the conduct of the employees was unprofessional and inappropriate, and that he was offended by it.

26. That evening, Complainant spoke with his wife about the conduct of Michaels and the aestheticians during the past week. He said he felt uneasy, angry and had a sinking feeling, because he did not want to work in that type of environment. He was concerned about how such behavior would affect his future at Sleek Medspa and did not know how to handle the situation. Complainant and his wife decided that he should telephone his wife's uncle, Edward Seksay, an attorney for a bank who had advised employers and employees about sexual harassment law.

27. That same evening, Complainant called Seksay and described the conduct at the Burlington Medspa. They discussed whether the aestheticians' comments and Michaels' "flashing" the camera created a sexually hostile work environment for Complainant and what he should do about it. When Complainant voiced concern about appearing overly sensitive and jeopardizing his job, he was advised that reporting a hostile work environment is a protected act, and that his employer should not retaliate against him. Seksay also advised Complainant to report the incidents to a manager senior to Michaels. (Testimony of Complainant; testimony of Seksay)

28. Sometime later that evening, Complainant telephoned Leah Leahy and told her about the comments made during the week and Michaels' "flashing" the camera. He told Leahy that he felt uncomfortable and could not work in such an environment.

Leahy told him she was sorry he had been put in that situation, that she would deal with the matter immediately, and that they would be in touch the next day.

29. The following day, July 27, 2005, some two hours after Complainant reported to the work at the Burlington location, Leahy and Valine arrived, called him into an office and terminated his employment. According to Complainant, Leahy told him, "We thought you would be better at sales," and when he asked Leahy if that was the real reason, she responded it was. Leahy and Valine then gave him a check for the time he worked, based on an annual salary of $50,000.

30. Complainant testified that he believed his termination was in direct retaliation for his complaints to Leahy the previous evening and was not based on poor sales because he was still shadowing Michaels and had not yet assumed the responsibilities of general manager.

31. Complainant began looking for work the day after his termination. He called contacts, searched the web, submitted at least 12 job applications per week and applied to numerous sports clubs. He was ineligible to collect unemployment compensation because of his recent move from New Hampshire.

32. On or about December 15, 2005, Complainant was hired as a personal training manager at Bally's gym in Lowell, Massachusetts, at a salary of $400.00 per week. Complainant worked at this position until mid-February 2006. He made a total of $3,200.00 at this position ($400.00 per week x 8 weeks)[2]

33. In late February 2006, Complainant was hired as Wellness Director for the Hockomock Area YMCA in North Attleboro, Massachusetts at an annual salary of $44,500.00. In theWellness Director position he made a total of $55,625.00 ($44,500.00

[2] Complainant's wages at his subsequent positions are estimates because he did not provide W-2s

from late February 2006 to late February 2007 plus $11,125.00 from March through May 2007) In June 2007, Complainant was promoted to the position of Senior Program Director at a salary of $52,000.00 per year. He worked in this position until September 2008.

34. On October 1, 2008, Complainant began working as General Manager of the Boston Sports Club in Westborough, at a salary of $55,000.00, plus commissions and bonuses. In his first year of employment, Complainant received commissions totaling $6,000.00 to $10,000.00. Complainant was laid off from Boston Sports Club around December 22, 2009.

35. At the time of the public hearing, Complainant was working as an independent contractor for Auto Advisors, earning between $150.00 and $200.00 per week and was continuing to look for full time work.

36. Complainant testified that when he was terminated he was shocked, upset, angry and agitated. He testified that he understood immediately that he had been fired for complaining about an overly sexualized and inappropriate work environment, and this "weighed hard on him" and "hurt him more than anything else." At the public hearing, Complainant cried as he described his feelings on the day of his termination and he was in obvious distress.

37. Complainant testified that after his termination he had a "sinking feeling" and wondered how anyone could treat another person that way. He worried about how to provide for his family with no income and his inability to support his family adversely affected his self-esteem. His termination scuttled his plan to be the family's primary breadwinner so that his wife could stay at home with their child. He testified that he is

upset and frustrated that Respondents have never taken responsibility for their actions and is surprised at the heavy toll that the matter has taken on him.

38. Complainant, who had been physically active before working for Respondent, became sedentary throughout 2005. He testified that on a typical day he would watch television and eat until three or four in the morning and that he slept only four hours per night. He testified that he continued in this pattern for about nine months, and became short-tempered and angry, took his frustrations out on his family, and struggled to be patient with his son. Complainant was visibly upset when testifying about his emotional distress. Complainant's wife testified that he ate a lot during this time and stayed up late at night refusing to come to bed. Complainant gained 25 pounds between July 2005 and December 2005. His wife stated that by the end of the year he had become a "different person"

39. Complainant's wife testified credibly that Complainant also stopped communicating with her and began pulling away from their family. She observed that he was depressed, anxious, short-tempered, disconnected from his family and a "shell of himself." They began seeing a marriage counselor in August or September of 2005 and continued in counseling for several months. Complainant concurred that his mood affected his marriage and testified that he is "surprised he is still married."

40. Complainant testified that after his termination he came close to declaring bankruptcy and had to borrow approximately $15,000.00 from his father-in-law, which was very difficult emotionally and embarrassing and humiliating because his father-in-law is of a generation that does not believe in borrowing money for anything. Complainant testified that he and his wife finally paid off the debts incurred as a result of

his precipitous termination in early 2009 when he was promoted at a subsequent job. They were finally able to stop depleting any savings and to begin paying down their debt.

41. On January 8, 2001, the Massachusetts Commission Against Discrimination, Kenneth Grooms, Hearing Officer, held Medical Weight Loss Center and Andrew J. Rudnick liable for gender discrimination, sexual orientation discrimination and retaliatory termination. Massachusetts Commission Against Discrimination and Joanne Berardi v. Medical Weight Loss Center, Inc. and Andrew J. Rudnick, 23 MDLR 5 (2001) Grooms found that Rudnick, who was named as an individual and owner and sole shareholder of Medical Weight Loss Center, Inc., created a hostile work environment based on gender and sexual orientation and retaliatory termination and held Rudnick individually liable. On March 19, 2003, the Full Commission affirmed the decision of the hearing officer.

42. In 1997, Robyn Saltzberg filed an MCAD case against Medical Weight Loss Center, Inc. and Andrew Rudnick for sexual harassment in violation of G.L.c.151B, sec. 4(16A). She removed the matter to court and a jury found the Andrew Rudnick had subjected Ms. Saltzberg to a sexually hostile work environment. The judgment on jury verdict for plaintiff was entered on April 15, 1999. The matter was appealed to the Massachusetts Appeals Court and affirmed. Saltzberg v. Medical Weight Loss Center, Inc. and Rudnick, 59 Mass. App. Ct. 1110(2003) (unpublished decision)

III. CONCLUSIONS OF LAW

A. Sexual Harassment

M.G.L. c. 151B, § 4(16A) prohibits sexual harassment in employment. Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances,

requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment. See, College-town Division of Interco. v. MCAD, 400 Mass. 156, 165 (1987). To state a claim of sexual harassment amounting to a hostile work environment, complainant must show that: (1) he was subjected to sexually demeaning conduct; (2) the conduct was unwelcome; (3) the conduct was subjectively and objectively offensive; (4) the conduct was sufficiently severe or pervasive as to alter the conditions of his employment and create an abusive work environment; and (5) his employer knew or should have known of the harassment and failed to take prompt and effective remedial action. College-Town v. MCAD, 400 Mass. 156, 162 (1987); Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass 673, 678 (1993); see Messina v. Araserve, Inc., 906 F. Supp. 34, 37 (D. Mass. 1995).

Complainant alleges that he was subjected to a hostile work environment when the employees of the Burlington Medspa engaged in unwelcome conduct of a sexual nature. The conduct included several inappropriate comments by aestheticians about their clients' genital areas and the General Manager "flashing" a camera in the spa where Complainant was in training for a manager's position. I credit Complainant's testimony that this conduct occurred and that it was unwelcome. College-Town, supra, at 162.

The three comments that Complainant recalled specifically were that a male client had gotten an erection during a hair removal procedure and was zapped in the scrotum with a laser, and two grossly inappropriate comments about other clients' private parts.

All of the aestheticians laughed and joked about these comments and other similar remarks that were sexually demeaning and offensive to Complainant. That Complainant's training supervisor, Cheryl Michaels felt comfortable "flashing" a camera in the store, and exposing her breasts or bra while addressing Andrew Rudnick by name as she did so, clearly suggests that she and Rudnick condoned this inappropriate sexual behavior and the generally sexualized work environment that the employees found funny and acceptable. As a brand new employee, Complainant felt vulnerable and was worried about raising the issue with higher management, not only because he had just begun his employment, but also because it was clear to him that the training manager and higher management clearly condoned such an inappropriately sexualized environment. I conclude that not only was Complainant offended by such conduct, but that any reasonable employee in his circumstances would also have been. I believe that Complainant's ability to do his job as manager was effectively compromised by the nature of the employees' conduct and the fact the management condoned such conduct, and that, as a result, he was subjected to a sexually hostile work environment in violation of M.G.L.c.151B §4(16A).

B. Retaliation

Complainant has alleged that Respondents terminated his employment in retaliation for having made an internal complaint of sexual harassment to his supervisor. In order to establish a prima facie case of retaliation, Complainant must show that he engaged in a protected activity, that Respondent was aware of the protected activity, that Respondent subjected him to an adverse action, and that a causal connection existed between the protected activity and the adverse action. Mole v. University of

Massachusetts, 58 Mass.App.Ct. 29, 41(2003). In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part 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). Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass 493, 504 (2001); see, Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of retaliatory animus. Id.; Abramian, 432 Mass at 117.

Under M. G. L. c. 151B, s. 4 (4), a plaintiff has engaged in protected activity if "he has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." While proximity in time is a factor, "…the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison Co., 423 Mass. 652, 662 n.11 (1996), citing Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). That Respondent knew of a discrimination claim and thereafter took some adverse action

against the complainant does not, by itself, establish causation, however, timing may be a significant factor in establishing causation. In this case, Complainant made an internal complaint to a regional manager regarding the sexually charged atmosphere in his workplace. The fact that Complainant's termination occurred less than 24 hours after his complaint of discrimination is a factor of significance sufficient to establish causation between Complainant's complaint of a hostile work environment and the termination of his employment. Thus, I conclude that Complainant has established a prima facie case of unlawful retaliation in violation of M.G.L.c.151B §4(4).

Because Respondents were precluded from testifying about the reason for Complainant's termination, there is no evidence in the record of any non-discriminatory reason that would have justified Complainant's termination. Therefore, I conclude that Complainant has established a credible and unrebutted prima facie case of unlawful retaliation by Respondents.

C. Individual Liability

Complainant named Andrew Rudnick, Catherine Rudnick, Leah Leahy and Norman Valine as individuals in his complaint of discrimination. Since these individuals are not the employer as contemplated by G.L. c. 151B §4 (1), individual liability must be predicated upon alternative sections of the statute. Liability has been imposed against individuals for engaging in unlawful retaliation under G.L. c. 151 B, §4(4) which specifically provides that it shall be unlawful "for any person ... 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 Hudson v. Pembroke/ Hanover Elks Lodge, et al. 24 MDLR 19 (2002) (Full Commission found individual liable for retaliation.)

With respect to Leah Leahy and Norman Valine, the evidence of record establishes the requisite intent required in order to find them individually liable for unlawful retaliation as they were management level employees who actually terminated Complainant's employment and having done so the very next day after his complaint of a sexually hostile work environment, establishes that they harbored retaliatory motive against Complainant in violation of c. 151B, §4(4). I conclude that Leah Leahy and Norman Valine are individually liable for unlawful retaliation in this matter.

The evidence with respect to Andrew Rudnick, the owner and principal of these companies, establishes that he had expressed concern to Leahy and Valine about Complainant's working in an all female environment, yet approved Complainant's hiring. Absent any evidence to the contrary, I draw the reasonable inference that, as principal and owner of the Medspa centers, Rudnick would have been consulted and involved in the decision to terminate a general manager, just as he was in the decision to hire Complainant. I also draw the inference that Leahy and Valine reported Complainant's concerns to Rudnick and consulted with him regarding what action to take, and that he approved Complainant's termination. It is also clear from the conduct of the employees at Medspa Burlington, and Rudnick's concern about hiring a male to be the manager at the Burlington Medspa, that Rudnick was aware of, and condoned, the sexually inappropriate work environment. I therefore conclude that Andrew Rudnick is individually liable for sexual harassment and unlawful retaliation in this matter.

Complainant has presented no evidence that Catherine Rudnick was involved in the decision to terminate his employment, that she knew about it, or that she was involved in the hiring and firing of employees. I conclude that there is insufficient evidence to find her personally liable for unlawful discrimination or retaliation.

IV. REMEDY

Pursuant to M.G.L. c.151B § 5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of his unlawful treatment by Respondents. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

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 the credible testimony of Complainant and his wife Lynne, I am persuaded that he suffered severe emotional distress as a result of Respondents' unlawful actions, but particularly from his retaliatory termination. Complainant was shocked, upset, and angry by his termination. He testified that he knew immediately that his termination was in retaliation for having complained about a sexually hostile work environment and this weighed heavily on him and "hurt him more than anything else." At the public hearing, Complainant cried as he described his feelings about his termination and was in obvious distress when he recalled the circumstances of his termination.

Complainant testified that after his termination he had a "sinking feeling" and could not understand how anyone could treat another person as badly as Respondents had treated him. He testified that he is frustrated that Respondents have taken no responsibility for their actions and stated that their actions have taken a heavy toll on him. After his termination, he worried about providing financially for his family and this adversely affected his self-esteem and frustrated his plan to be the family's primary breadwinner. Complainant testified that after his termination he was on the verge of bankruptcy and had to borrow approximately $15,000 from his father-in-law, which was very embarrassing and humiliating for him and which he did with great reluctance because his father-in-law is of a generation that does not borrow money. It took Complainant and his and his wife several years to pay down their debt and they finally became solvent again in early 2009.

Complainant had been physically active before working for Respondent, but became sedentary for the remainder of 2005. He testified that on a typical day he would

stay up eating and watching television until three or four in the morning and would only sleep four hours per night. Within six months, he had gained 25 pounds. He testified credibly that this depression and withdrawal continued for about nine months. There was additional testimony that Complainant became short-tempered and angry, visited his frustrations on his family, and struggled to be patient with his son. Complainant was visibly upset when testifying about the adverse effects of his termination on his family life.

Complainant's wife Lynne Barnes testified credibly that Complainant ate a lot during this time, stayed up all hours of the night and slept on the couch. She stated that by the end of the year he was a "different person," had stopped communicating with her and began pulling away from their family. She stated that he was depressed, anxious, short-tempered, disconnected from his family and a "shell of himself." Complainant also stated that his mood affected his marriage and given the repercussions he is "surprised he is still married." Their marriage suffered to the extent that they sought marital counseling for several months. Based on the very credible and compelling testimony of Complainant and his wife, I conclude that Complainant suffered from severe and long-lasting emotional distress as a direct result of Respondent's discriminatory acts but particularly because of his retaliatory termination, and I conclude that an award in the amount of $150,000.00 is appropriate compensation for the emotional distress he suffered.

B. Lost Wages

Complainant was hired by Respondents at a salary of $50,000.00 plus commissions, bonuses and incentives. Given all of the variables involved with future commissions because Complainant was terminated before he actually assumed the

manager's job, it is impossible to determine with certainty what Complainant's income would have been had he not been terminated. Furthermore, because of Respondents' refusal to cooperate with the Commission's proceedings, resulting in sanctions, there is no evidence in the record regarding what the prior managers of the Burlington location earned in Commissions. Complainant should not be disadvantaged by Respondents refusal to respond to the Commission's investigation. Therefore, in addition to the $50,000 base salary, I conclude that Complainant is entitled to the presumption that he would have earned at least the minimum in commissions of $400 per month, for a total annual salary of $54,800. I conclude that Complainant took immediate and effective steps to mitigate his damages and found other work. He is entitled to a period of lost wages beginning on the date of his termination on July 27, 2005 and ending on June 1, 2007 when he became Senior Program Director at the YMCA at an annual salary of $52,000.00 per year, a salary approaching his estimated earnings at Medspa. From the time of his termination until June 1, 2007, Complainant would have earned $100,466.74 ($4,566.67 per month x 22 months). had Respondents not unlawfully terminated him. During the same period, Complainant's actual earnings were $58, 825.00. Thus, I conclude that he is entitled to lost wages totaling $41,641.67. ($100,466.67-58,825.00).

C. Civil Penalty

M.G.L.c.151B §5 states, in part, "if, upon all the evidence at any such hearing, the commission shall find that a respondent has engaged in any such unlawful practice, it may, in addition to any other action which it may take under this section, assess a civil penalty against the respondent: (a) in an amount not to exceed $10,000.00 if the respondent has not been adjudged to have committed any prior discriminatory practice.;

(b) in an amount not to exceed $25,000.00 if the Respondent has been adjudged to have committed any prior discriminatory practice during the 5-year period ending on the date of the filing of the complaint; and (c) in an amount not to exceed $50,000,00 if the respondent has been adjudged to have committed 2 or more discriminatory practices during a seven year period ending on the date of the filing of the complaint.

Notwithstanding the aforesaid provisions, if the acts constituting the discriminatory practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have committed acts constituting discriminatory practice, then the civil penalties set forth in clauses set forth in clauses (b) and (c) may be imposed without regard to the period of time within which any subsequent discriminatory practice occurred."

Having found Andrew Rudnick individually liable for unlawful retaliation in this matter and, given that Rudnick has on two previous occasions been adjudged to have committed acts constituting unlawful discrimination, before this Commission in Massachusetts Commission Against Discrimination and Joanne Berardi v. Medical Weight Loss Center, Inc. and Andrew J. Rudnick, 23 MDLR 5 (2001) and in the Superior Court action reported on appeal in Saltzberg v. Medical Weight Loss Center, Inc. and Rudnick, 59 Mass. App. Ct. 1110(2003) (unpublished decision), I conclude that a civil penalty in the amount of $50,000.00 is warranted against Andrew Rudnick.

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. Catherine Rudnick is dismissed as an individual party Respondent.

2. Respondents immediately cease and desist from engaging in discriminatory practices that create a sexually hostile work environment and from acts of unlawful retaliation.

3. Respondents pay to Complainant the sum of $150,000.00 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.

4. Respondents pay to Complainant the sum of $41,641.67 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.

5. Respondent Andrew Rudnick pay to the Commonwealth of Massachusetts a civil penalty in the amount of $50,000.00

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 15th day of March, 2011

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JUDITH E. KAPLAN,
Hearing Officer