

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION)	
AGAINST DISCRIMINATION and)	
ELENA BOROSKY AND BIANCA WALLEN,)	
Complainants,)	MCAD Docket Nos. 12-SEM-03385
v.)	12-SEM-03388
PROFESSIONAL FITNESS,)	
Respondents)	

Appearances: Sasha N. Kopf, Esquire for Complainants

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On December 31, 2012, Complainant, Elena Borosky, filed a complaint of discrimination against Respondent, Professional Fitness, alleging that the Regional Manager of Professional Fitness, subjected her to a sexually hostile work environment in violation of M.G.L. c. 151B, § 4(1); that she was constructively discharged as a result of pervasive sexual harassment in violation of M.G.L. c. 151B, §§ 4(1) and (16A); and that she was subjected to retaliation in violation of M.G.L. c. 151B, § 4(4). On the same date, Complainant, Bianca Wallen, filed a complaint of discrimination against Respondent, Professional Fitness, alleging that the Regional Manager of Professional Fitness, subjected her to a sexually hostile work environment in violation of M.G.L. c. 151B, § 4(1).¹

¹ These cases, 12-SEM-03385 and 12-SEM-03388, were consolidated during the investigation stage in October of 2015, as it was determined that the cases involved similar operative facts and the same Respondent and manager.

On July 31, 2015, after an investigation, the Investigating Commissioner found probable cause to credit Complainants' allegations. Efforts to resolve the cases at conciliation failed, the matters were certified for public hearing and a hearing was scheduled for March 27, 2017. Respondent did not appear at the hearing and a default was entered on the record on that date. A default hearing was held pursuant to 804 CMR 1.21 § 8. Having reviewed the record of the proceedings, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

A. Introductory Findings

1. Professional Fitness is a company based out of North Carolina that operates and conducts business in Massachusetts. (Testimony of Ms. Wallen) It is an employer within the meaning of G.L. c. 151B, § 1(5).
2. Professional Fitness rents space at various fitness centers and provides personal training services to clients at these locations. (Testimony of Ms. Wallen, Testimony of Ms. Borosky)
3. Aaron Silver was a Regional Manager for Professional Fitness overseeing employees of the company working in several locations including Reto Fitness in Pittsfield, MA. There was varying testimony about how often Mr. Silver was physically present at the Reto Fitness in Pittsfield, MA location. Ms. Wallen initially testified that she had only met him a handful of times; but she later testified that he came to the location two to three times a week. Ms. Borosky testified that Mr. Silver was at the Pittsfield location a significant amount of time during the month she was being trained. Other than the testimony of Complainants, there was scant evidence regarding Mr. Silver's

employment history, his duties and responsibilities, or whether he was an employee or an independent contractor. (Testimony of Ms. Wallen, Testimony of Ms. Borosky)

4. Bianca Wallen, of Pittsfield Massachusetts, started working for Professional Fitness at the Reto Fitness in Pittsfield, MA location as a part time personal trainer in 2011. (Testimony of Ms. Wallen)
5. Ms. Wallen worked approximately 20 half hour personal training sessions a week for Professional Fitness at a rate of \$25 per half hour sessions. Ms. Wallen was unable to provide any documentation regarding her rate of pay or commission rate. (Testimony of Ms. Wallen)
6. Elena Borosky, of Pittsfield Massachusetts, was hired as the General Manager for Professional Fitness working at Reto Fitness in Pittsfield, MA on or about April 9, 2012. Ms. Borosky testified that the job entailed signing new clients, overseeing the personal trainers on staff for Professional Fitness at that location, assigning trainers to new clients, and scheduling trainers. No written job description for the position was entered into evidence. (Testimony of Ms. Borosky)
7. Ms. Wallen testified that Professional Fitness had trouble keeping the General Manager position filled. She stated that they “went through General Managers like water.” (Testimony of Ms. Wallen)
8. Ms. Borosky testified that she was paid an hourly wage of \$8 an hour (approximately \$16, 000 a year) plus commissions for each client that she signed up for personal training services. She testified that Mr. Silver advised her during her interview that she should expect to make approximately \$90,000 a year. She signed two clients to contracts for personal training services during the month that she was working at

Professional Fitness, but she was unable to explain how much she would make in commissions for each client. She also was unable to provide any documentation regarding her rate of pay or commission rate. She testified that she was not making nearly as much money as Mr. Silver had advised because she was not earning significant commissions. She testified that this was due to Mr. Silver's inappropriate behavior causing a lack of adequate training on completing client contracts. I credit Ms. Borosky's testimony that she was not earning as much money as Mr. Silver advised her she could make during her interview. I do not credit Ms. Borosky's testimony that Mr. Silver's behavior caused this deficiency. Mr. Silver had been reassigned after a month and was no longer the Regional Manager for her location, so if Ms. Borosky felt that she was not trained properly or completely, she could have advised the new Regional Manager that she needed additional training. She testified that during the one month that she was employed with Professional Fitness she only completed two client service contracts. She could not give basic information or even an estimate regarding the commission rate she would receive when signing a new client up for services. It was clear throughout her testimony that Ms. Borosky was upset about the amount of money she was making in commissions; however, there was no evidence that she would have been making more in commissions irrespective of Mr. Silver's behavior other than the blanket assertions he made during her interview that she could earn \$90,000 a year. Furthermore, Ms. Wallen testified that Professional Fitness was unable to keep a General Manager at this location. She stated that they went through General Managers "like water," implying that the Respondent was unable to retain a person in that position. However, Ms. Wallen did

not testify why she thought General Managers did not stay. (Testimony of Ms. Borosky, Testimony of Ms. Wallen)

9. Walt Bavineau was the Assistant Manager for Professional Fitness at this location and was also a personal trainer. (Testimony of Ms. Borosky)
10. Mr. Silver was Ms. Borosky's direct supervisor and was tasked with training Ms. Borosky. (Testimony of Ms. Borosky)
11. During the training period, Mr. Silver was regularly at the Pittsfield location to facilitate Ms. Borosky's training. (Testimony of Ms. Borosky, Testimony of Ms. Wallen)
12. Ms. Borosky left her position with Professional Fitness at the beginning of May of 2012. (Testimony of Ms. Borosky)
13. Ms. Borosky testified that she did not obtain subsequent employment until July of 2012, at which time she started working at PacSun making \$35,000 a year. She stayed in this position for approximately a year at which time she started working at Ann Taylor where she made \$50,000 a year. At the time of the hearing, she was working at Bath and Body Works making \$50,000 a year. (Testimony of Ms. Borosky)

B. Sexual Harassment: Hostile Work Environment

14. Ms. Borosky testified that right from the beginning of her employment, Mr. Silver started making comments that made her feel uncomfortable, such as asking why she did not mention that she had a boyfriend during her interview, telling her she had a great body, and telling her that once she starts making more money she is going to want a guy more like him. (Testimony of Ms. Borosky)

15. Ms. Borosky and Ms. Wallen testified that Mr. Silver advised them that they should focus on trying to sign up the male clients, whereas the male trainers were advised to target the female cliental. Ms. Borosky testified that Mr. Silver instructed her to flirt with the male customers to get them interested in signing up for personal training services. He advised her to pretend she was trying to pick someone up in a bar. (Testimony of Ms. Borosky) I credit Ms. Borosky's testimony regarding these comments.
16. Ms. Borosky testified that on the second day of her employment, Mr. Silver told her to go out on the floor and "shake some ass" so that she could drum up some business. She later heard Mr. Silver brag to other trainers who she would be supervising that he told her to shake her ass. (Testimony of Ms. Borosky) I credit Ms. Borosky's testimony regarding these comments.
17. Ms. Borosky and Ms. Wallen testified that Mr. Silver told them they should wear tight fitting clothing and show off their bodies. Mr. Silver encouraged them to go to Dick's sporting goods and get "booty shorts" and "crop tops" to wear instead of the Professional Fitness tee shirts provided to all employees and told them he would pay to have the Professional Fitness logo embroidered on them. (Testimony of Ms. Borosky, Testimony of Ms. Wallen) I credit Ms. Borosky's and Ms. Wallen's testimony regarding this comment.
18. Ms. Borosky testified that Mr. Silver made frequent sexually inappropriate comments to her during her training. That while her training her, Mr. Silver would often make comments about the women he was dating; would show her pictures of women and tell her that he was going to "hook up" with them; would brag that he could get all the

women he wanted; and would comment on the physique of women in the gym. Ms. Borosky testified that she would often have to redirect him back to the task at hand and that due to these interruptions she was not trained properly. Ms. Borosky gave an example of one instance when Mr. Silver showed her a picture of a woman who worked at a casino and he told her that he was going to “hook up” with her after work. When this Commissioner pressed for specific examples of his inappropriate behavior, she reiterated the same incident regarding the picture of the women who worked at the casino, but could not give details of any comments that were explicitly sexual in nature. (Testimony of Ms. Borosky) I do not credit Ms. Borosky’s testimony that he would frequently showed her pictures of women and told her that he was going to “hook up” with them as she was able to recall only one example of him making this kind of statement.

19. Ms. Borosky testified that Mr. Silver would make comments about her body such as, “you have the body for it,” you should “show off your body,” you should “show off all the hard work you have put in,” and you “look so good.” (Testimony of Ms. Borosky) I credit Ms. Borosky’s testimony regarding these comments.

20. Ms. Wallen testified that Mr. Silver would always “look her up and down” ogling her, staring at her breasts and butt, and making statements like “wow, you are fit, aren’t you.” (Testimony of Ms. Wallen) I credit Ms. Wallen’s testimony regarding these comments.

21. Ms. Wallen testified that on one occasion Mr. Silver made a comment that if she spent more time with him she would want to leave her husband for him. On another occasion he said that she should do a training session with him and they could sweat

together. (Testimony of Ms. Wallen) I credit Ms. Wallen's testimony regarding these comments.

22. Ms. Borosky and Ms. Wallen testified that Mr. Silver did not limit this behavior to the work place as he often called and texted their personal cell phones and asked them what they were doing over the weekend. Ms. Borosky stated that she did not answer or respond to these text messages and it would end there. Ms. Wallen stated that when she responded to these text messages he would tell her how many dates he had been on and would brag about all the women that wanted him. Ms. Wallen testified that this created a strain on her relationship with her husband, but gave no further detail. The Complainants stressed the impropriety of Mr. Silver contacting them on their personal cell phones; however, they did not state if there were other means by which Mr. Silver could contact them for work-related issues, such as a work cell phone. Complainants did not testify to any specific or explicit vulgar or sexual language used by Mr. Silver in these text messages. (Testimony Ms. Borosky, Testimony of Ms. Wallen) I credit Ms. Wallen's testimony regarding these comments.

23. Ms. Borosky testified that Mr. Silver's behavior made her feel so uncomfortable that she would call her mother to complain about his behavior and that she would cry uncontrollably. She also testified that Mr. Silver's behavior caused her to have stress and anxiety that produced nausea and headaches. (Testimony of Ms. Borosky) I do not credit Ms. Borosky's testimony regarding the deleterious effects Mr. Silver's behavior had on her. Ms. Borosky was very posed while testifying. She discussed these incidents in a very matter of fact manner, without any emotional affect.

Furthermore, although she stated that Mr. Silver was constantly making inappropriate remarks when this Commissioner pressed her for examples of these comments she reiterated the same example she gave earlier in her testimony about hooking up with a woman that evening and was not able to give specific details of explicit language he used. It is inconsistent that these statements by Mr. Silver had such a profound effect on her to cause her to cry uncontrollably, but that she is hard-pressed to give specific examples of these comments.

24. Ms. Wallen testified that Mr. Silver's behavior created such stress and anxiety that it made her sick to her stomach, and caused her diarrhea and nausea. She also testified that she had to cancel training sessions due to her diarrhea and nausea. (Testimony of Ms. Wallen) I do not credit Ms. Wallen's testimony regarding the deleterious effects Mr. Silver's behavior had on her. Ms. Wallen was very posed while testifying. She discussed Mr. Silver's behavior in a very matter of fact manner, without any emotional affect. The only time Ms. Wallen did show emotional affect was while describing how horrible Professional Fitness was as a company. Ms. Wallen presented as agitated with Professional Fitness' business practices but detached and apathetic in regards Mr. Silver's inappropriate comments.

25. Near the end of April of 2012, Ms. Borosky had a meeting with Mr. Silver and the Assistant Manager, Walt Bavineau. During this meeting Ms. Borosky addressed the topic of Mr. Silver's inappropriate behavior. Ms. Borosky testified that during this meeting, Mr. Bavineau told Mr. Silver that his behavior was inappropriate. She stated that initially Mr. Silver was apologetic, but that in the middle of the meeting he left to make a phone call and when he came back he was angry and started yelling.

Near the end of the meeting he left and made another phone call. When he came back to the meeting, he advised them that he was moving on, stated that he was no longer the area manager, and that this location would be taken over by someone else, then he left. (Testimony of Ms. Borosky)

26. Ms. Wallen testified that she never complained to Mr. Silver about his inappropriate behavior, but that she tried to change her work schedule so that she was not working during the times when Mr. Silver was going to be at the gym. This caused her to lose two clients who could not change their schedules to accommodate her schedule change. The loss of six half hour training sessions amounted to lost income of approximately \$150 a week. (Testimony of Ms. Wallen) I do not credit Ms. Wallen's testimony regarding her changing her schedule to avoid Mr. Silver.
27. Ms. Borosky testified that she tried to contact Professional Fitness to file a complaint but that there was no contact information for the human resources department. (Testimony of Borosky) I do not credit Ms. Borosky's testimony that there was no contact information for the human resources department. Furthermore, Ms. Borosky was hired as the General Manager and as such it was her duty as a supervisor to report any sexual harassment she observed or any sexual harassment that was reported to her by any of the trainers, including Ms. Wallen.
28. Ms. Wallen testified that she was able to contact the human resources department and the Vice President of Professional Fitness, John Poff, to complain about Mr. Silver's behavior about two weeks before Ms. Borosky left. (Testimony of Ms. Wallen)

C. Constructive Termination

29. During the April meeting with Mr. Silver and Mr. Bavineau, at some point during this meeting Silver's demeanor went from apologetic to angry and yelling. At the end of the meeting, he advised them that he was no longer the area manager and that this location would be taken over by someone else. He then abruptly left. (Testimony of Ms. Borosky) I credit Ms. Borosky's testimony regarding this meeting.

30. In the beginning of May of 2012, Ms. Borosky resigned as the General Manager for Professional Fitness at the Reto Fitness facility in Pittsfield, MA. Ms. Borosky testified that she was compelled to resign as a result of Mr. Silver's sexually hostile behavior and that there was nothing she could do to rectify the situation before resorting to resigning. (Testimony of Ms. Borosky) I do not credit Ms. Borosky's testimony that she resigned because of Mr. Silver's behavior or that Ms. Borosky exhausted all reasonable alternatives to rectify the situation prior to leaving her employment. Ms. Borosky testified that Mr. Silver was no longer the Regional Manager for her location at the time that she left; that she did not have any contact with him after the meeting near the end of April of 2012; and she did not testify to any other source of sexual harassment remaining after Mr. Silver was reassigned. Since Mr. Silver was the precipitating cause of this sexual harassment and Ms. Borosky no longer had any contact with Mr. Silver, it is unclear how this situation had not already been rectified prior to her resigning.

D. Retaliation

31. Ms. Borosky alleges that Mr. Silver's behavior at the April 2012 meeting after she complained about his behavior, which included becoming angry and yelling, was

retaliation for her having complained. There was no evidence that Ms. Borosky had any subsequent contact with Mr. Silver. Mr. Silver's angry reaction and his yelling during this meeting was the only evidence of retaliation by Respondent presented at the hearing. (Testimony of Ms. Borosky)

III. CONCLUSIONS OF LAW

A. Sexual Harassment: Hostile Work Environment

M.G.L. c. 151B, §4(1) prohibits workplace discrimination, including sexual harassment. Sexual harassment is also explicitly prohibited by M.G.L. c. 151B, §4(16A). As defined in M.G.L. c. 151B, §1(18), sexual harassment includes "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when ... (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."

To establish a prima facie case for a hostile work environment based on sexual harassment, Complainants must show by a preponderance of the evidence that: (1) they were subjected to gender based unwelcome verbal or physical conduct; (2) the unwelcome verbal or physical conduct was sufficiently severe or pervasive to alter the terms or conditions of their employment and create an abusive working environment; and (3) the harassment was carried out by an owner, manager, or someone in a supervisory position. See College-Town v. MCAD, 400 Mass. 156, 162-163 (1987).

The unwelcome conduct must be both subjectively and objectively offensive. Muzzy v. Cahillane Motors, Inc., 434 Mass 409, 411-412 (2001). This means that not only must the evidence be viewed through the complainants' perspectives but the evidence must be considered from the view of a reasonable person in the plaintiff's position. Id. The conduct must be "so severe or pervasive as to alter the conditions of [the complainant's] employment and create an abusive working environment." Faragher v. Boca Raton, 524 U.S. 775, 786 (1998). The determination whether a particular work environment is hostile requires a factual inquiry into all of the circumstances, including the frequency of the discriminatory conduct, its severity, and whether it is physically threatening or humiliating or merely an offensive utterance. Millett v. Lutco, Inc., 30 MDLR 77 (2008); Candeliere v. Vanson Leathers, Inc., 24 MDLR 228 (2002); See also Faragher v. Boca Raton, 524 U.S. at 787-788. "[C]asual comments or accidental or sporadic conversations are insufficient to constitute a pervasive, hostile environment and only if the demeaning comments are sufficiently continuous and pervasive will they constitute an unlawful discriminatory practice." Candeliere v. Vanson Leathers, Inc., 24 MDLR 228 (2002) (although there was evidence of sexual conduct, the conduct was episodic and relatively mild); See Horzesky v. R&M Construction Co., 15 MDLR 1171 (1993)(casual comments or accidental or sporadic conversations are insufficient to constitute a pervasive, hostile work environment); Prader v. Leading Edge Products, Inc., 39 Mass. App. Ct. 616 (use of garden variety expletives cannot, standing alone, constitute harassment); Clark County School District v. Breeden, 532 U.S. 268, 271 (2001)("simple teasing, off-hand comments, and isolated incidents unless extremely serious will not amount to discriminatory changes in terms and conditions of employment").

Ms. Borosky and Ms. Wallen have established that they were subjected to gender based unwelcome verbal conduct and that this conduct was carried out by someone in a supervisory position. However, it is clear that much of the behavior they complain about was not explicitly sexual or even sexual in nature. Ms. Borosky alleged that Mr. Silver made frequent sexually inappropriate comments to her during her training; however, when pressed, she was only able to give one specific example of this behavior, when Mr. Silver showed her a picture of a woman who worked at a casino and stated that he was going to “hook up” with her. Although some of the comments made by Mr. Silver could be implicitly sexual in nature, neither Complainant made any reference to any specific sexually explicit or vulgar language used by Mr. Silver.

A factual inquiry into all of Mr. Silver’s behavior should include some consideration of the nature of the job and the work being performed. The fact that the Complainants are selling personal training sessions at a gym means they are marketing physical fitness. Part of the essential marketing strategy of such a business would seem to include employing trainers who are physically fit and can demonstrate to potential clients that they have the essential knowledge to assist clients achieve the desired level of physical fitness. Clients buying this product want to see that the trainers are fit and want to believe that they can obtain the same results as the people selling this product. Ms. Wallen admitted during her testimony that being fit is part of the job because people do not want to hire a trainer that is not fit. It was also of note to this Commissioner that Ms. Wallen was extremely muscular and fit and it would not have been unusual for a person to comment on her physique, especially in a fitness club environment. Thus I conclude that Mr. Silver’s comments about Complainants having fit bodies and that they should show off all the hard work they have put in are not necessarily sexual in nature and can be deemed to be related to the requirements of the job and the marketing goals. Mr. Silver’s tactics

of advising Complainants to flirt with the potential clients, telling them they should wear tight fitting clothes, and telling them to “shake some ass,” though arguably part of the Respondent’s marketing strategy, are clearly sexual in nature and certainly could be deemed to be objectively offensive to a reasonable woman. However, I do not believe that this behavior was sufficiently severe or pervasive to create a hostile work environment because the comments were sporadic off hand comments, casual in nature, and I am not persuaded that Complainants were offended by them.

The one-time comment Mr. Silver made to Ms. Wallen that if she spent more time with him she would want to leave her husband for him, and the similar comment he made to Ms. Borosky that once she made more money she would want to break up with her boyfriend and date someone more like him, were casual off- hand comments and I conclude they were not sufficiently severe or pervasive to create a hostile work environment.

Even if all of Complainants’ testimony regarding Mr. Silver’s conduct is credited, I do not conclude that the conduct created a sexually hostile work environment for Complainants. The alleged comments were casual and sporadic and were not sexually explicit or demeaning. They were neither physically threatening nor humiliating and were not sufficiently pervasive to alter Complainants’ working conditions. In addition, I did not credit the Complainants testimony regarding the pervasiveness of Mr. Silver’s comments. When this Commissioner pressed Ms. Borosky for examples of these constant inappropriate comments she reiterated the same example she gave earlier in her testimony about hooking up with a woman that evening and was not able to give specific details of any explicit language he used.

The Complainants claim that during this three week period, Mr. Silver’s actions created a sexually hostile environment that caused Ms. Borosky to cry uncontrollably, caused Ms. Wallen

to change her schedule, and caused both to have nausea; however, I did not credit their testimony regarding the deleterious effects Mr. Silver's behavior had on them. Ms. Wallen and Ms. Borosky were very posed while testifying; they discussed these incidents in a very matter of fact manner, without any emotional affect; and they both became more emotionally charged when testifying about the discrepancies in rate of pay and the horrible business practices of the company than they were regarding the behavior of Mr. Silver.

It is also of note that Ms. Borosky was hired as the General Manager of this location, and as such, was in a supervisory position and was the direct supervisor of Ms. Wallen. Ms. Borosky had a duty to ensure that her employees were not subjected to a sexually harassing work environment, a duty to take immediate remedial action, and a duty to report any sexual harassment to human resources. I do not credit Ms. Borosky testimony that she did not know how to contact human resources to report such conduct directed at both her and her subordinate.

For the reasons set forth above, I find that Complainants, Elena Borosky and Bianca Wallen, have not established that they were subjected to unwelcome verbal or physical conduct of a sexual nature that was sufficiently severe or pervasive to alter the terms or conditions of their employment and create an abusive working environment; therefore Respondent is not in violation of M.G.L. c. 151B, § 4(1).

B. Constructive Discharge

A constructive discharge requires a showing that the conditions under which Complainant worked were so intolerable that a reasonable person would have felt compelled to resign. Johnson v. Daniels Brothers Auto Sales, 18 MDLR 194 (1996). In order to establish a prima facie case of constructive discharge, Complainant, Elena Borosky, must show that her

working conditions were so intolerable due to the sexual harassment she endured that a reasonable person in her position would have been compelled to resign. GTE Products Corp. v. Stewart, 421 Mass. 22, 34 (1995); Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171 (1997). This is an objective standard. April Brown v. Feel Well Reab Clinic, 33 MDLR 93 (2011). Complainant must further establish that she exhausted all reasonable alternatives prior to leaving her employment. See Pio v. Kinney Shoe Corp., 19 MDLR 127, 131 (1997); Robinson v. Haffner's Service Stations, Inc., 23 MDLR 283 (2001).

The evidence presented at this hearing was insufficient to establish that Complaint; Elena Borosky, was subjected to a sexually hostile work environment that would have caused a reasonable person in her position to resign. Even if all allegations are taken at face value, Mr. Silver's comments about women's bodies, statements that he was going to "hook up" with women, and suggestion that she wear tighter fitting clothing to entice more clients, is not enough to satisfy the weighty burden of proving that the conditions of her employment were so intolerable that a reasonable person would have had no choice but to resign. See Rowe v. American Paper Products, Inc., 22 MDLR 279 (2000) (although sexually explicit conversations and a slap on the butt were sufficient to establish a hostile work environment, they were not sufficient to establish constructive discharge). Furthermore, at the time Complainant resigned, Mr. Silver had already been reassigned to another location. Complainant testified that she had no further contact with Mr. Silver after the meeting near the end of April of 2012 when she addressed her displeasure with these comments and was no longer being subjected to his inappropriate behavior. Complainant also did not establish that she exhausted all reasonable alternatives prior to resigning her position as Complainant had not contacted the human resources department or anyone in the corporate office and when she did complain to Mr. Silver

about his behavior, Respondent took immediate steps to ameliorate the conditions of Complainant's employment by reassigning Mr. Silver that same day.

For the reasons set forth above, I find that Complainant, Elena Borosky, has not established that she was subjected to a work environment that was so intolerable that a reasonable person would have no choice but to resign; therefore Respondent is not in violation of M.G.L. c. 151B, § 4(1).

C. Retaliation

Pursuant to M.G.L. c. 151B, § 4(4), it is unlawful "for any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because [s]he has opposed any practices forbidden under this chapter or because [s]he has filed a complaint, testified or assisted in any proceeding under section five." Complainant has alleged that she was retaliated against because she complained to Mr. Silver about his inappropriate behavior.

In order to establish a prima facie case of retaliation, Complainant must show that 1) she engaged in protected activity; 2) Respondent was aware of the protected activity; 3) Respondent subjected her to an adverse action, and 4) 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).

The only evidence presented during the default hearing that Respondent took retaliatory action against claimant was testimony of Ms. Borosky that during the meeting in April of 2012, after Ms. Borosky addressed Mr. Silver's inappropriate behavior, he was initially apologetic but later became angry and was yelling. At the conclusion of this meeting, Mr. Silver was

transferred to a different location and Complainant had no further contact with Mr. Silver. Mr. Silver's yelling during this meeting was the only evidence presented during the default hearing which indicated that Respondent took any retaliatory action. I find that this is insufficient evidence that Respondent took retaliatory action against Complainant.

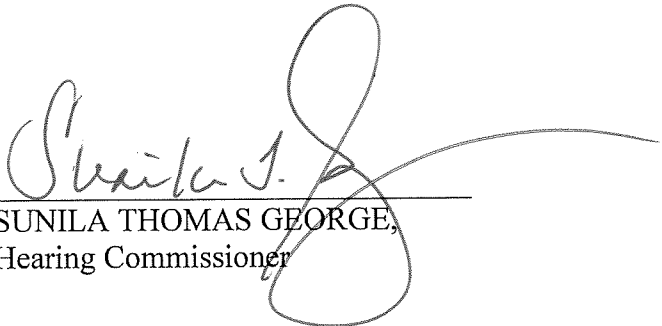
For the reasons set forth above, I find that Complainant, Elena Borosky, has not established that she was subjected to an adverse employment action; therefore Respondent is not in violation of M.G.L. c. 151B, § 4(4).

IV. ORDER

For the reasons set forth above, the Complaints are dismissed.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with 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 11th day of April 2019



SUNILA THOMAS GEORGE,
Hearing Commissioner