COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and JULIE CAMPBELL,
Complainants

v. Docket No. 10-BEM-00840

NORTH CHELMSFORD IRVING
(IRVING GAS STATION) and
CK SMITH COMPANY, INC./
CKS HOLDINGS, INC.,
Respondents

For Complainant Campbell: William J. Hamilton, Esq.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 26, 2010, Julie Campbell ("Complainant") filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") against Respondents Irving Gas Station and CK Smith Company, Inc. Complainant alleges that she was subjected to sexual harassment by her supervisor at the gas station and that he and his friends retaliated against her for reporting the harassment.

On February 29, 2011, the Commission issued a Probable Cause Finding. The Commission certified the case for public hearing on September 6, 2011. A default hearing was conducted on February 17, 2012 due to Respondents' failure to appear for the hearing. The Complainant testified on her own behalf. She moved that her Requests for Admissions be allowed into evidence because of Respondents' failure to respond to her discovery

requests. The motion was allowed in regard to Requests 1-4. They are incorporated into the decision.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Julie E. Campbell was hired on May 10, 2009 as a clerk/cashier at Irving Gas Station, a self-serve gas station and convenience store at 81 Tyngsboro Rd., North Chelmsford, MA. As a clerk/cashier, Complainant assisted customers, stocked inventory, and helped to clean the store from May through September of 2009. Her hours were 6:00 a.m. to 3:00 p.m.
2. Prior to 2010, Irving Gas Station was owned by Respondent CK Smith Company. The Company's wholesale gasoline division was sold on January 7, 2010, and the assets of its heating oil division and trade name CK Smith were sold on February 1, 2010. After the sale, the corporate name became CKS Holdings, Inc. CKS Holdings has been unable to continue operations and has taken steps to close down its retail gasoline/ convenience store division. Neither CKS Holdings nor any of its subsidiaries has any remaining employees.
3. Complainant asserts, without contradiction, that while she worked at Irving Gas Station, its parent company employed "hundreds" of individuals.
4. While she worked at Irving Gas Station, Complainant was supervised by Sam Gerostergios who assigned Complainant her duties and scheduled her hours.
5. Complainant testified, without contradiction, that within a week of commencing work, she had "problems" with Gerostergios. He said to a customer, "Don't you think she

(Complainant) should go out with me on a date?" According to Complainant, Gerostergios continued to ask her out on dates even though Complainant said that she was in a relationship and that she didn't want to date him. On one occasion, he grabbed her arm and led her to a shed where he again asked her to go out on a date. Gerostergios said that he wanted to marry her and that he could imagine having children with her. I credit Complainant's testimony.

6. Complainant testified, without contradiction, that Gerostergios said, "Well, if you don't want to go out with me, will you at least fuck me?" Complainant states that she was embarrassed and humiliated. On another occasion, Gerostergios asked Complainant to describe her vagina. I credit Complainant's testimony.
7. Complainant asserts, without contradiction, that Gerostergios made unwanted comments of a sexual nature to her for approximately three months. In order to discourage his advances, she tried to stay away from the counter area near his office and tried to remain in front of the security camera while she worked.
8. Complainant testified that she was so upset over Gerostergios's sexually-harassing conduct that she would regularly go to the ladies room and cry. She felt humiliated, powerless, insecure, threatened, and nauseated. She thought of quitting but needed the money and expected that Gerostergios would stop making advances after she refused to date him.
9. According to Complainant, her co-workers became hostile because they viewed her as Gerostergios's "favorite." They accused Complainant of wanting attention.
10. Complainant contacted the HR Department at CK Smith in regard to being sexually harassed. The CK Smith Regional Manager sent someone to investigate. Following the

investigation, Gerostergios was suspended. According to Complainant's credible testimony, Gerostergios continued to hang around the gas station after his suspension and stared at Complainant.

11. Following Gerostergios's suspension, "Missy" became Complainant's supervisor. Complainant testified that the situation was "okay" at first but subsequently became "punitive." As examples of punitive treatment, Complainant described being sent outside in the rain to change prices and being threatened with a "write-up" for having an untucked shirt. Complainant explained that she had difficulty keeping her shirt tucked in because she had lost a significant amount of weight as a result of being harassed at work. According to Complainant, her male co-workers "Nathan" and "Steve" also had untucked shirts at work but were not threatened with write-ups. Other examples of punitive treatment consisted of Missy giving Complainant's morning hours to another associate, assigning Complainant to late-night hours, and assigning Complainant to work on Sundays mornings even though it interfered with her volunteer work. Complainant estimates that Missy reduced her schedule from forty hours per week to between twenty-two and twenty-four hours per week.
12. Complainant testified credibly that she was fired on October 2, 2009 after being falsely accused of lifting her shirt and "flashing" a school bus driver while standing near the cash register at the convenience store counter. Complainant denies that the incident occurred, notes that a surveillance tape from the security camera was never produced, and claims that the bus driver was a friend of Sam and Missy. According to Complainant, Gerostergios was put back to work shortly after her termination.
13. Complainant testified convincingly that she felt angry, depressed, distraught, and helpless

after being sexually harassed and subjected to retaliation.

14. Following her discharge, Complainant was rehired in December of 2009 by Wal-Mart where she had previously worked. She returned to Wal-Mart as a third-shift stocker but was subsequently promoted to a manager. At the time of public hearing, Complainant managed the automotive and sporting goods departments at Wal-Mart.

15. Complainant testified that she began to feel better after she returned to work at Wal-Mart and regained ten pounds.

16. Prior to, during, and after working at the gas station, Complainant attended psychological counseling sessions. Complainant described the counseling sessions that took place during her employment at the gas station as more emotionally fraught than those that occurred before or after she worked at the gas station.

III. CONCLUSIONS OF LAW

A. Sexual Harassment

M.G.L. c. 151B, sec. 4, paragraph 1 prohibits workplace discrimination, including sexual harassment. See Ramsdell v. Western Bus Lines,, Inc., 415 Mass. 673, 676-77 (1993). Chapter 151B, sec. 4, paragraph 16A also prohibits sexual harassment in the workplace. See Doucimo v. S & S Corporation, 22 MDLR 82 (2000). Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (a) submission to or rejection of such advances is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions and (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an

intimidating, hostile, or sexually offensive work environment. M.G. L. c. 151B, sec. 1, para. 18.

In order to establish a "hostile work environment" sexual harassment claim, Complainant must prove by credible evidence that: (1) she was subjected to sexually demeaning conduct; (2) the conduct was unwelcome; (3) the conduct was objectively and subjectively offensive; (4) the conduct was sufficiently severe or pervasive as to alter the conditions of employment and create an abusive work environment; and (5) the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. See College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987); Parent v. Spectro Coating Corp., 22 MDLR 221 (2000); MCAD Sexual Harassment in the Workplace Guidelines, II. C. (2002).

The objective standard of sexually-unwelcome conduct means that the evidence of sexual harassment must be considered from the perspective of a reasonable person in the plaintiff's position. The reasonable woman inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating, whether it unreasonably interfered with the worker's performance, and what psychological harm, if any, resulted. See Scionti v. Eurest Dining Services, 23 MDLR 234, 240 (2001) *citing* Harris v. Forklift Systems, Inc., 510 U.S.17 (1993); Lazure v. Transit Express, Inc., 22 MDLR 16, 18 (2000). The subjective standard of sexual harassment means that an employee must personally experience the behavior to be unwelcome. See Couture v. Central Oil Co.,12 MDLR 1401, 1421 (1990) (characterizing subjective component to sexual harassment as … "in the eye of the beholder."). An employee who does not personally experience the behavior to be intimidating, humiliating or

offensive is not a victim within the meaning of the law, even if other individuals might consider the same behavior to be hostile. See MCAD Sexual Harassment in the Workplace Guidelines, II. C. 3 (2002); Ramsdell v. Western Bus Lines, Inc., 415 Mass. at 678-679.

Applying the aforesaid standards, I conclude that there is sufficient credible evidence to sustain Complainant's allegations of sexual harassment. Complainant's supervisor, Sam Gerostergios, persisted in asking Complainant out on dates even after she said that she was not interested in pursuing a non-working relationship with him. On one occasion, he grabbed her arm and led her to a shed where he again asked her to go out with him. After his requests for dates were rebuffed, Gerostergios's workplace banter became obscene as evidenced by his asking Complainant to "at least F… [him]" and to describe her vagina. Complainant's testimony at the public hearing was heartfelt and believable. Her version of the relevant events stands unrebutted by any contradictory evidence.

Gerostergios's behavior constituted an unceasing barrage of unwelcome commentary and some physical contact that was subjectively and objectively offensive. It was sufficient in scope and severity to alter the conditions of Complainant's employment and create an abusive work environment. Gerostergios functioned as Complainant's supervisor. He assigned her duties and scheduled her hours. Respondents are therefore vicariously liable for his actions. See College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 165-167 (1987); MCAD Sexual Harrassment in the Workplace Guidelines, II. B. (2002).

Based on the foregoing, Complainant has fulfilled her burden of proving sexual harassment by a preponderance of credible evidence.

B. Retaliation

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. Retaliation is a separate claim from 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).

To prove a prima facie case of retaliation, Complainant must demonstrate that he/she: (1) engaged in a protected activity; (2) Respondent was aware of the protected activity; (3) Respondent subjected Complainant to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). Under M.G.L. c. 151B, s. 4(4), an individual engages in protected activity if she "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]."

I conclude that there was protected activity in this case consisting of Complainant's reporting sexual harassment to the HR Department at CK Smith where she spoke to a CK Smith Regional Manager who sent an individual to investigate. See Guazzaloca v. C.F. MotorFreight, 25 MDLR 200 (2003) (protected activity may consist of internal complaints as well as formal charges of discrimination). The proof that such actions took place derives not only from Complainant's credible testimony but the fact that Gerostergios was subsequently suspended.

Following the protected activity cited above, there is evidence of adverse employment action being taken against Complainant. "Missy" -- a friend of Gerostergios -- became Complainant's supervisor and began to treat Complainant in a punitive manner. Examples of punitive treatment consist of Missy: 1) sending Complainant outside in the rain to change prices, 2) threatening to write up Complainant for having an untucked shirt even though male co-workers "Nathan" and "Steve" were permitted to have untucked shirts, 3) giving Complainant's morning hours to another associate, 4) assigning Complainant to work late-night hours, 5) giving Complainant a Sunday morning shift even though it interfered with her volunteer work, 6) reducing Complainant's full-time work schedule to no more than twenty-two to twenty-four hours per week, and 7) firing Complainant based on trumped up charges that she "flashed" a school bus driver.

The sequence of events consisting of Complainant's protected activity and the adverse actions which followed support the conclusion that they were causally-connected. The lack of any evidence that Complainant was a problem employee before she complained about sexual harassment likewise supports a causal connection, as does Complainant's credible denial that she "flashed" a bus driver.

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Mole v. University of Massachusetts, 442 Mass. 582, 591 (2004); Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Since Respondents defaulted at the public hearing, they failed to provide any nondiscriminatory rationale for their treatment of Complainant.

Accordingly, there is sufficient evidence of protected activity, adverse action, and causality to establish a prima facie case. Complainant's evidence, unrebutted by any legitimate, nondiscriminatory reason for Respondents' actions, constitutes a preponderance of credible evidence in support of retaliation.

C. Damages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award: 1) remedies to effectuate the purposes of G.L. c. 151B; 2) damages for lost wages and benefits; and 3) damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988).

Ordinarily, the period of time between Complainant's retaliatory loss of income and the finding of employment elsewhere would give rise to an award of back pay damages. In this case, however, Complainant failed to provide sufficient information to make such a computation possible. Although Complainant asserted that Respondents reduced her hours following the report of sexual harassment to a CK Smith regional manager and ultimately fired her, Complainant failed to provide information about her hourly rate at the gas station, when her hours were first reduced, how many hours she lost weekly prior to her termination, and the amount of wages that she lost following her discharge. Without this information, Complainant's total loss of income cannot be computed.

As far as emotional distress damages are concerned, an award may be based on Complainant's testimony concerning emotional distress provided it is causally-connected to the unlawful act of discrimination. See Stonehill College v. MCAD, 441 Mass. 549, 576

(2004). Factors to be considered are the nature, character, severity, and duration of the harm, and whether Complainant attempted to mitigate the harm. Id.

Complainant testified that the sexually-harassing conduct by Gerostergios caused her to feel angry, depressed, distraught, helpless, disgusted, and humiliated. She was so upset over Gerostergios's sexually-harassing conduct that she regularly went to the ladies room at work to cry. These feelings lasted for approximately five to six months and resulted in her losing a significant amount of weight. Complainant's emotional state had a negative impact on her relationship with her boyfriend. Her emotional distress rendered her psychological counseling sessions unusually fraught during this period. Gradually, Complainant began to feel better as she became busy with her new job at Wal-Mart. She regained approximately ten pounds. I conclude that Complainant is entitled to an award of emotional distress damages in the amount of $20,000.00.

IV. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, Respondents are ordered to pay Complainant, within sixty (60) days of receipt of this decision, the sum of $20,000.00 in emotional distress damages, plus interest at the statutory rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after

the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 3rd day of May, 2012.

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Betty E. Waxman, Esq.,
Hearing Officer