

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. &
KAREN DIONNE,
Complainants

v.

DOCKET NO. 08-BEM-00334

CUTTER NORTHERN
REFRACTORIES, INC.
& THOMAS CUTTER,
Respondents

Appearances:

Keith Halpern, Esq. for Karen Dionne
Thomas Cutter, pro se for Respondents

I. PROCEDURAL HISTORY

On or about January 28, 2008, Karen Dionne filed a complaint with this Commission charging Respondents with discrimination on the basis of sexual harassment and for constructive discharge. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on September 13, 2012. After careful consideration of the record in this matter and the post-hearing submission of Complainant, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Cutter Northern Refractories is a company located in Woburn, MA, that produces refractories for furnaces. The Company employs more than 20 people and is an employer within the meaning of Ch. 151B§4(1). Respondent Thomas Cutter is the company's sole owner and shareholder.

2. Complainant Karen Dionne resides in Haverhill, Massachusetts with her husband and two children. In June 2006, Complainant commenced working as an assistant to Respondents' customer service manager, Frank Swadel, under contract to a personnel agency called Express Personnel.

3. After Complainant had worked for Respondents for approximately one month, Thomas Cutter bought out Complainant's contract with Express and she became a permanent employee of Respondents at the rate of \$12 per hour. A few months later, Complainant's rate of pay was increased to \$15 per hour. She continued to perform the same duties and reported to Swadel, working four days per week, from 8:30 or 9:00 a.m. until 3:00 p.m.

4. Several months later, the company's comptroller was terminated and his duties were assigned to Complainant, who became comptroller. Her pay was increased to \$20 per hour.

5. Complainant testified that during the week of July 9, 2007, Cutter approached her about the possibility of a promotion to a managerial position. Complainant was interested in discussing the matter with Cutter and was excited about the prospect of taking on a larger role in the company and receiving a pay increase.

6. On July 16, 2007, Cutter asked Complainant to meet him outside of the office to discuss a promotion and they agreed to meet later that day at "On the Border," a restaurant in Woburn.

7. When Complainant arrived at the restaurant at approximately 4:00 p.m., Cutter was already seated in the bar area drinking a glass of wine. Complainant joined him and for approximately one hour they discussed her potential promotion. Cutter continued to drink and after the first hour or so, he began to discuss personal matters, such as his recent divorce and his sex life. During their conversation, Cutter repeatedly asked Complainant if she was happily

married and if she ever had or considered having an affair. Complainant replied that she was happily married and had no intention of having an affair. Although the conversation turned personal and made Complainant uncomfortable, she stayed and listened to Cutter because she wanted a promotion.

8. Complainant testified that she and Cutter left the restaurant between 7:30 and 8:00 p.m. and walked to their cars, which were parked next to each other. She stated that Cutter grabbed her and tried to kiss her, and that he smelled of alcohol. Complainant testified that she panicked and thought, "This can't be happening." She felt horrified, shocked and that she had done something wrong. She got into her car and drove home. I credit her testimony.

9. Cutter testified that the meeting at On the Border was initiated by Complainant. He stated that after leaving the restaurant, he and Complainant went next door to a Bertucci's Restaurant, where they continued to drink until 10:00 p.m. I do not credit his testimony.

10. The next day, Tuesday, was Complainant's usual day off.

11. On Wednesday, July 18, when Complainant arrived at work, Cutter called her on the telephone and said that he wanted to meet her outside the office in order to continue their discussion. Despite her reluctance to meet Cutter outside the office based on his recent behavior, Complainant agreed because she looked forward to the discussed promotion and she hoped that Cutter's excessive indulgence of alcohol on the evening in question had caused him to forget his offensive conduct. I credit her testimony.

12. Cutter arrived at the office around noon and handed Complainant a note instructing her to meet him in the parking lot of the Spuds restaurant in Woburn. Cutter instructed Complainant to shred the note, which she did. She later retrieved the note from the trash and taped it back together. (Ex.C-1)

13. Complainant arrived at the Spuds parking lot at approximately 1:30 p.m. Shortly thereafter, Cutter pulled up and directed her to get into his car. Complainant was hesitant and told Cutter that she could not leave the area because of her heavy workload. Cutter responded, "Who do you think you work for?" Complainant then got into his car and they drove off.

14. As Cutter drove, he phoned in a lunch order to a restaurant in Charlestown. Complainant had assumed that they would eat at the restaurant; however, when they arrived at the restaurant, Cutter handed Complainant some cash and told her to pick up the order. When she returned to the car, Cutter informed her that they were going to his condo in Charlestown. Complainant protested that she had to get back to work. Cutter told her to call the office and say that something had come up and she would not be returning to the office that day.

15. When they arrived at Cutter's condo, he handed Complainant an envelope containing \$1,000 cash and said that he would give her the same amount every ten weeks as an off the books salary increase. She believed that Cutter expected sex in exchange for the money. She did not have sex with Cutter; nonetheless, she kept the cash payment and she ultimately spent the money.

16. Complainant and Cutter ate their lunch at his condo. Complainant testified that while she sat in Cutter's kitchen, he stood behind her and repeatedly touched and rubbed her shoulders and put his hand on her leg. She repeatedly told Cutter to take her back to Woburn. She also told him that she wanted no more secret payments or meetings outside of work and that she wanted to be treated as a professional. Complainant stated that Cutter finally drove her back to Woburn around 4:00 p.m.

17. I credit Complainant's testimony that she believed Cutter intended the payment to be in exchange for sex. However I find that Complainant never indicated that she was consenting to

a sexual relationship with Cutter and she continued to protest that she did not want such a relationship with him. I find that Complainant believed that it was possible to accept and keep the money Cutter had given her without having to submit to Cutter's advances. According to Cutter, he made the payment in cash because he did not want other employees to find out that Complainant had received a raise. I do not credit Cutter's testimony in this regard

18. Cutter denied touching Complainant and stated that they had returned to the office by 2:00 p.m. I do not credit Cutter's testimony that he did not touch Complainant and believe that he was making sexual overtures to her.

19. Although Complainant did not submit to Cutter's sexual overtures, she felt uncomfortable, embarrassed, and guilty about having gone to his condo, and blamed herself for getting into Cutter's car in the first place. She determined that the next day at work she would put an end to the matter by insisting that Cutter treat her in a professional manner. I credit Complainant's testimony that she had second thoughts about the previous day's events and accepting money from Cutter under the table.

20. On Thursday, July 19, 2007, when Complainant arrived at work, she proceeded to follow her morning routine, including retrieving the daily bank fax from Cutter's office. After performing this task, she noticed an envelope on Cutter's desk with her initials written on it. She stated that Cutter sometimes left mail for her on his desk and she therefore opened the envelope and read its contents.

21. The envelope contained a five-page handwritten note to Complainant from Cutter scribbled on the back of office forms along with a sixth separate page of scribbled and disjointed thoughts written on bright orange paper. In the letter, Cutter professed his love and lust for her using sometimes lurid and inappropriate language, which included comments about her breasts,

and suggested a number of options, one of which included her having an extra-marital affair with him.

22. After reading the letter, Complainant felt disgusted and nauseous and thought she was going to faint. She showed the letter to a co-worker, who advised her to go home because she was so upset. Complainant made a copy of the letter, put the original back in the envelope and returned it to Cutter's desk. At approximately 9:30 a.m., Complainant left the office, went to a firearms store to purchase a can of mace and then went home.

23. When Complainant arrived at work the following day, July 20, 2007, she retrieved her voice mail, which contained numerous voice messages from Cutter on Thursday, inquiring why she wasn't at work. Cutter came to Complainant's office and handed her the letter, told her to read it and to meet him later. Complainant opened the letter, packed up her belongings, went home and never returned to work again. Cutter acknowledged writing the letter, but denied giving it to Complainant and stated that he never intended for her to read it, but I do not credit this testimony.

24. Complainant testified that when Cutter gave her the letter, she felt absolutely devastated and defeated by him. She arrived home in a daze and crying, feeling guilty and embarrassed. When her husband came home from work, she relayed to him everything that had transpired with Cutter over the past few days. I credit her testimony that she was very upset that Cutter had presented her with such an inappropriate letter which declared his sexual obsession with her and which contained an outright proposition and that she felt compelled to leave her employment.

25. During her last two months of work, Complainant was working an average of 35 hours per week and earning about \$750 per week. Approximately one month after leaving her

employment at Cutter Northern, Complainant was hired by Exsos, in Andover, MA where she earned \$673 per week. She worked five days per week, resulting in an increased cost of \$75 per week for an extra day of day care for her children. Complainant's hours at Exsos and her commute were less advantageous and convenient and, because of her experience with Cutter, she was guarded with her male colleagues and second-guessed their motives. Complainant worked at Exsos only a few months and was laid off in November 2007.

26. In December 2007, Complainant was hired as a waitress at a restaurant near her home. She worked evenings and weekends and made approximately \$75 per shift. This was a difficult time for Complainant and her husband. They rarely saw each other because of their conflicting schedules and they had to forego important rituals such as family dinners together and Complainant's tucking in her children at night.

27. After working as a waitress for six months, Complainant tore her ACL and could no longer perform the duties of the job. She had difficulty finding a job that did not involve standing and that paid enough to cover the cost of day care. She remained unemployed for 14 months.

28. In 2008, Complainant's husband's hours of employment were reduced and they were unable to pay their mortgage. This resulted in their home being foreclosed and Complainant and her husband filing for bankruptcy that year. They moved in with her husband's parents, where they continued to reside at the time of the hearing.

29. In 2009, Complainant obtained employment as an assistant at a Woburn day care center. She so enjoyed working with the children that she decided to become a teacher. She currently teaches kindergarten and has nearly completed a master's degree in education.

30. Complainant stated that she was attracted to the teaching profession in part because she felt it was a safe environment where she would not encounter a situation similar to that at Respondent. She stated that the bad experience with Cutter is “always with her” and she is still ashamed and embarrassed by the events that occurred there. I credit her testimony.

31. Complainant testified credibly that she was embarrassed about being unemployed and did not know what to tell people about her situation. For several months after leaving her job at Respondent, she was in a “funk,” unhappy, and unable to enjoy family outings. She preferred to be left alone and was distant and cold to her family. She suffered from insomnia and lost her appetite. She testified that she did not want her husband to touch her.

32. Complainant’s husband testified she was usually outgoing and talkative, but after the experience with Respondents, for a time, she became distant toward him and their friends, frequently stayed in her room crying, interacted much less with him and their children and appeared depressed. He testified that she seemed to go “into a shell and did not come out.” She was no longer affectionate to him when he came home from work and ceased having sexual relations for a number of months. He stated that things began to return to normal after a few months. I credit his testimony.

33. Complainant’s salary at Respondent was approximately \$750 per week. After leaving Respondent, she was unemployed for one month, resulting in lost wages of \$3,225. At Exsos, Complainant earned \$673 per week for three months before she was laid off, \$77 less per week than she earned at Respondents, resulting in lost wages of \$924. Complainant was then unemployed for one month, incurring further lost wages of \$3,225. She next worked as a waitress at \$300 per week for six months at a loss of \$450 per week continuing to incur lost

wages of \$7,740 until she injured her ACL. After her injury, Complainant could no longer perform the duties of a waitress and was unemployed for 14 months, at a loss of \$750 per week continuing to incur lost wages of \$ 45,750 until she began a new career in teaching. I find that Complainant's total lost wages are \$77,403. ($\$3,225 + \$924 + \$3,225 + 7,740 + 45,750 = \$ 77,403$) Complainant received unemployment compensation in 2008 in the amount of \$5,402. This amount subtracted from her lost wages results in back pay damages of \$72,001.

34. During her four months of employment at Exsos, Complainant incurred \$75 per week more in day care expenses than she had paid while employed by Respondent. I find that she is entitled to compensation for this extra expense totaling \$900 ($\$75/\text{wk} \times 12 \text{ wks} = \900)

III. CONCLUSIONS OF LAW

A. Sexual Harassment

Massachusetts General Laws c. 151B, s. 4 (1) prohibits discrimination in the workplace on the basis of sex. Sexual harassment is a form of sex discrimination actionable under G.L. s. 4 (1) and (16). See College-town, Division of Interco, Inc. v. MCAD, 400 Mass.156 (1987). Section 4(16A) of c.151B specifically prohibits sexual harassment in employment. To establish a claim of quid pro quo sexual harassment Complainant must show that Cutter made "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." Complainant alleges that by offering cash and a promotion to Complainant in return for sexual advances, Cutter based an employment decision on the belief that Complainant would submit to his advances. I conclude that his conduct constitutes quid pro quo sexual harassment. I also conclude that Complainant can also demonstrate that she was subjected to a sexually

hostile work environment in that: (1) she 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 her employment and create an abusive work environment; and (5) her employer knew or should have known of the harassment and failed to take prompt and effective remedial action. College-Town, supra., at 162; Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass 673, 678 (1993)

Complainant established that Respondent owner Thomas Cutter subjected her to quid pro quo sexual harassment by offering to promote her and offering her a significant amount of money under the table, with the promise of more, and then subjecting her to unwelcome conduct of a sexual nature, including attempting to kiss her, taking her to lunch at his condo during work hours during which time he rubbed her neck and back and touched her leg, clearly seeking a sexual favors as the quid pro quo for the purported advancement and extra money. He also made a request for sexual favors in a crude and offensive letter proposing an illicit sexual relationship after giving Complainant a substantial amount of money and promising more. I conclude that Cutter's offering Complainant money in exchange for sex and for proposing they enter into an illicit affair constitutes unlawful quid pro quo sexual harassment.

Complainant testified credibly that Cutter engaged in this sexually explicit behavior and that his behavior was unwelcome and not invited. I find that his actions were unwelcome and that Complainant's acceptance of the money Cutter offered to her was not an implicit acceptance of his sexual advances, nor was it an indication that such conduct was welcome.

Cutter's discussion of his sex life and marriage, attempt to kiss Complainant, taking her to his private residence and touching of her body, culminated with his delivery to Complainant of a crude and offensive letter detailing his sexual obsession with her and proposing an affair.

These events caused Complainant to feel extreme discomfort, disgust and revulsion compelling her to resign her position. I conclude that Complainant realized that Cutter was attracted to her and initially believed that she could take advantage of the attraction by accepting the money he was offering her as signifying a promotion, without having to accede to his requests for sexual favors. However, when she discovered the extent of his infatuation with her, bordering on sexual obsession, she realized that his advances were not something to be treated lightly; she became frightened and reasonably believed she had no other option but to resign. While Complainant was not wholly innocent in her dealings with Cutter, as evidenced by her taking and keeping the money he offered, I nonetheless conclude that she resisted and never welcomed Cutter's sexual advances and his crude propositions. Cutter's conduct was unwelcome and constituted unlawful quid pro quo sexual harassment. I conclude that his actions also created a sexually hostile work environment for Complainant.

B. Constructive Discharge

In order to prove constructive discharge, Complainant must show that conditions at her workplace became so intolerable and the threat of physical or psychic harm was so great as to preclude her remaining on the job. Horzesky v. R&M Construction, Co., 15 MDLR 1171 (1993); McKinley v. Boston Harbor Hotel, 14 MDLR 1241 (1992); Brodeur v. Harney's Superstore, 5 MDLR 1335 (1983). Complainant testified credibly and convincingly that when she saw Cutter's letter detailing his sexual obsession with her and proposing a sexual relationship, she realized that his propositions were serious, that she could not continue to work for him under those circumstances and that she had no option but to resign. I conclude that Cutter's quid pro quo proposition was so serious and offensive as to support a claim of constructive discharge. The letter and the options he offered Complainant were sufficiently

offensive as to create a hostile work environment that warranted her leaving. Since Cutter was the company owner and manager, Complainant had no expectation of her situation at work improving and was justified in resigning from her job. Ultimately, both Cutter personally and the employer, Cutter Northern Refractories, are jointly and severally liable for unlawful sexual harassment and constructive discharge.

IV. REMEDY

Upon a finding of unlawful discrimination, the Commission is authorized to grant remedies to effectuate the purposes of G.L. c. 151B. Such remedies may include an award of lost wages and damages for emotional distress.

A. Emotional Distress

The Commission is authorized to award damages for emotional distress damages resulting from unlawful discrimination. Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549 (2004) Bournewood Hosp., Inc. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 303(1976); Buckley Nursing Home, Inc. v. Massachusetts Comm'n Against Discrimination, 20 Mass. App. Court 172(1985). Awards for emotional distress should be fair and reasonable, and proportionate to the distress suffered. Stonehill, supra. at 576. Some of the factors to be considered are; the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has suffered and reasonably expects to suffer and whether the complainant has attempted to mitigate the harm. Id. The Complainant must show a sufficient causal connection between the Respondent's unlawful act and the Complainant's emotional distress. Id. Based on the credible testimony of Complainant and her husband, I conclude that Complainant suffered emotional distress as a result of Respondents' unlawful discrimination.

Complainant testified credibly to feelings of humiliation and embarrassment caused by Cutter's propositions and request for sexual favors. The final straw was Cutter's explicit written proposition to have a sexual affair with him. At that point, Complainant determined she could no longer remain at the job and ended her employment with Respondent. Following her separation from employment, Complainant had feelings of doubt, depression, guilt, loss of interest in sex with her husband and not wanting to be touched for several months. She also suffered from insomnia and loss of appetite. She felt wary around her male co-workers at her subsequent job and stated that to date, the bad experience with Cutter remains with her.

While Cutter's conduct was unwelcome and offensive to Complainant, I conclude that some portion of Complainant's distress resulted from her feelings of guilt and embarrassment about having taken the cash payment from Cutter, believing that she could do so with no repercussions, and having to admit the entire sordid scenario to her husband when it became clear that this was not the case and that Cutter was serious in proposing a sexual liaison. While Complainant's acute distress was of short duration, she was forced for economic reasons to accept subsequent employment working longer hours with lower pay, resulting in less time with her family and having to forfeit cherished rituals such as tucking in her children at night and family dinners. Complainant ultimately changed careers and is very happy in her current position as a teacher. I conclude that Complainant suffered emotional distress as a direct result of Respondents' discriminatory acts and is entitled to damages for the harm she suffered. I conclude that damages in the amount of \$25,000 are appropriate compensation for the emotional distress she suffered.

B. Lost Wages

Complainant seeks compensation for lost wages from the date of her constructive discharge until she began her career in teaching. I concur with Complainant that it is reasonable to award her lost wages up until she changed her career and I conclude that Complainant's period of eligibility for back pay ended when she began a position the education field and no longer sought employment in a business office. I conclude that Complainant's lost wages during that time period are \$77,403. Subtracting from her lost wages the sum of \$5,402 in unemployment compensation, I conclude that she is entitled to an award of lost wages in the amount of \$72,001. (See Finding of Fact #33)

C. Compensatory Damages

I also conclude that Complainant is entitled to compensation for the increased cost of day care during her job at Exsos in the amount of \$900.¹

V. ORDER

For the reasons stated above, it is hereby ORDERED that:

1. Respondents cease and desist from conduct that constitutes quid pro quo or hostile work environment sexual harassment.
2. Respondents pay to Complainant Karen Dionne the sum of \$25,000.00 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.

¹With respect to Complainant's financial woes, while her loss of employment at Respondents contributed in some ways to the family's financial instability, without the benefit of evidence regarding the family's entire economic situation, I decline to attribute the subsequent foreclosure and bankruptcy to Respondents' unlawful conduct, nor does Complainant seek compensation for these unfortunate events.

3. Respondents pay to Complainant Karen Dionne the sum of \$72,001 in 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.

4. Respondents pay to Complainant Karen Dionne the sum of \$900 to compensate her for the increased cost of day care at her subsequent job.

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 6th day of February 2013.

JUDITH E. KAPLAN,
Hearing Officer