THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

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MCAD & NYDIA FEBO,
Complainants

v. DOCKET NO. 99-SEM-0782

CONNECTICUT CAR RENTAL GROUP, d/b/a/ THRIFTY CAR RENTAL, and WENDELL JORDAN ,
Respondents

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Appearances: Bruce E. Hopper, Esquire for the Complainant

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about December 10, 1999, Complainant Nydia Febo filed a complaint with this Commission charging all of the above named Respondents with discrimination on the basis of sex and sexual harassment. The Investigating Commissioner issued a probable cause determination. The matter was certified for public hearing and a public hearing was held before Commissioner Martin Ebel on August 21, 2007. Respondents did not appear and were defaulted at the hearing.

Commissioner Ebel entered a default on the record and the hearing proceeded as a default hearing. The notice of Hearing and Entry of Default sent by certified mail to Respondent Wendell Jordan and to the owners of Connecticut Car Rental were returned to the Commission as undeliverable.

Prior to rendering a decision in this matter, Commissioner Ebel, left the employ of the Commission and, pursuant to 804 CMR 1.21, I was appointed as successor hearing

officer to render proposed findings of facts, conclusions of law and an order. However, since Respondents did not appear at the public hearing, the record reflects no disputed issues of fact that require determinations regarding credibility[1] and it contains sufficient evidence from which I may render a decision as substitute hearing officer.

II. FINDINGS OF FACT

1. Complainant Nydia Febo testified that in June of 1999 she applied for a job at Connecticut Car Rental, Inc., d/b/a Thrifty Car Rental, which operated the Thrifty Car Rental office located at the Worcester airport (see Finding no. 14, below) At the time, Complainant was 22 years old, and had completed an associate's degree in human services from Quinsigamond College in 1998. (Ex. 1) Wendell Jordan was the Regional Manager for Respondent Connecticut Car Rental Inc., d/b/a Thrifty Rental Car. Jordan hired Complainant and was her supervisor. Complainant began her employment on June 6, 1999. She was scheduled to work full time at the rate of $7.50 per hour.

2. Complainant testified that on June 4, 1999, two days before she was to begin her employment, Jordan drove her to a building in Natick, Massachusetts for her to take a required drug screening test. During the car ride, Jordan offered to massage Complainant's feet and he touched her leg. Complainant told Jordan to take his hand off her leg. As he drove, Jordan talked on the telephone to Lisa Cardona and Complainant heard Jordan tell Cardona that he was taking Complainant to a hotel to have sexual relations with her. Complainant testified that she was made to feel very uncomfortable by this conversation and because she could not leave the car. She described Jordan's

[1] Appointing a substitute hearing officer to issue a decision based on the record in the event the original hearing officer is unable to do so, under G. L. c. 30A, Section 11 (7), and MCAD rule Section 1.15(6), "is only acceptable and reasonable where the credibility of witnesses is not at issue. Salem v. Massachusetts Commn. Against Discrimination, 404 Mass. 170 at 174-175.

behavior as flirtatious and perverted. Complainant can be heard to be crying in the digital recording of the proceedings as she testified about this incident.

3. Complainant testified that when she had completed the drug screening, Jordan walked her back to the car that she was to take back to Worcester. Jordan put his arm around her, put his face close to her and tried to kiss her. She pushed him away and told him to stop and got into the car, whereupon, Jordan introduced her to another man and again tried to kiss her. She told him to stop, while he and the other man laughed and she then drove away. Complainant can be heard crying as she described this incident.

4. Complainant testified that on another occasion when she and Jordan were at the airport walking to the door leading to the rental car area, he put his arm around her and she pushed him away. According to Complainant, another employee named Mark witnessed this incident.

5. Complainant testified that on another occasion, Complainant and Jordan were alone at the Worcester office, and while speaking on the phone with an employee named Melanie Collins, Jordan approached Complainant and put his face near hers. Complainant backed away from Jordan and tried to grab the telephone so that Collins could hear what was happening. Jordan then came toward her again, and she yelled "Stop it!" loudly so that Collins could hear her. According to Complainant Jordan became angry and gave her a dirty look, but backed off. Complainant testified that this incident made her uncomfortable and angry.

6. According to Complainant, Jordan told her she was pretty and made similar comments about her looks. She testified that Jordan also made similar sexual advances to another employee.

7. Complainant testified that she asked Jordan's assistant, Doris Thomas, if Jordan acted in a sexually inappropriate way with her and Doris said that he did not. Complainant testified that she did not tell Thomas about Jordan's offensive conduct towards her because Thomas, the only other supervisor on the job site, was friends with Jordan even before they worked at Thrifty.

8. During Complainant's tenure at Thrifty, she had a second job at the Gap store located in the Greendale Mall and she testified that although she needed both jobs in order to help her mother pay bills, she quit the job at Thrifty after only one and a half weeks because she could not tolerate Jordan's conduct. She testified that his advances made her uncomfortable, anxious and sick to her stomach and she feared they would escalate. At the time Complainant did not have a car or a cell phone and she felt stuck every time she came to work because she had no means to get away from Jordan.

9. According to a document entitled Internal Investigation Report, (Ex. 6), at the request of Respondent Connecticut Car Company, attorney Evan Fray-Witzer conducted an investigation into the allegations of Complainant and another employee, Lisa Cardona regarding sexual harassment by Wendell Jordan. In connection with the investigation, Fray-Witzer interviewed Complainant. His report indicates that Complainant told him that Jordan grabbed her buttocks, tried to kiss her and made numerous inappropriate comments to her and that on each occasion, Jordan was aware that she was upset and his conduct was unwelcome. (Ex. 6)

10. Fray-Witzer's report indicates that Complainant's co-worker Lisa Cardona told him that Jordan touched her buttocks, breast and genitalia on numerous occasions. She also told him that Jordon pressed her up against a wall, kissed her, forcing his tongue

into her mouth and made numerous inappropriate comments to her. Cardona did not report these incidents to her employer but eventually told her boyfriend who accompanied her to the workplace and engaged in a confrontation with Jordan which resulted in a call to the Worcester Airport Police. Cardona called the Connecticut Car Company and reported that she was frightened of Jordan, and thereafter, she did not return to work. (Ex. 6) A third former employee was interviewed by Fray-Witzer and reported similar conduct by Jordan. (Ex. 6)

11. Fray-Witzer wrote an Internal Investigation Report to Connecticut Car Company on August 17, 1999. His investigation concluded that it was more likely than not that Jordan had engaged in inappropriate conduct and he recommended that Connecticut Car Company fire Jordan and adopt a stronger sexual harassment policy. (Ex.6)

12. Complainant testified that Jordan's conduct toward her and Lisa Cardona resulted in criminal complaints being brought against him. On July 1, 1999, Jordan was charged with four counts of indecent assault and battery on a person 14 years of age or over and on September 27, 1999, he plead guilty to two counts of indecent assault and battery and was sentenced to supervised probation and ordered to stay away from Lisa Cardona and Complainant. (Ex. 3)

13. In an affidavit dated July 10, 2000, Stanton Revzon, then President of Connecticut Car Rental, Inc., which operated the Thrifty Car Rental franchise at the Worcester airport at all times relevant to this matter, averred that Connecticut Car Rental, Inc. had ceased to exist and no longer operated the Thrifty Rent a Car franchise at the Worcester Airport. (Ex 4) In the affidavit, Revzon stated that he first became aware of

accusations against Jordan on June 16, 1999. He then met with Jordan and Operations Manager David Spengler. Spengler instructed Jordan to restrict his duties to the Framingham office where there were no female employees. Revzon then retained Fray-Witzer to conduct the independent investigation and at the conclusion of Fray-Witzer's investigation, Revzon terminated Jordan's employment for misconduct (Ex. 4; Ex. 8) Revzon died on September 3, 2006 (Ex. 5)[2]

14. Complainant began working at ADT home security in November 1999. There is no evidence about her subsequent earnings.

15. Complainant testified that since leaving her employment she has had very bad feeling towards Thrifty and avoids going near the Worcester airport because she becomes upset just being near the location. She did not tell her boyfriend or father about Jordan's conduct because she was afraid they would confront Jordan physically. She discussed it only with Lisa Cardona because Jordan was treating Cardona in a similar manner. Complainant testified that the incidents at Thrifty have left her anxious, and that she has continued to suffer from anxiety that is sometimes so bad it causes her to vomit. She suffered from insomnia for months after the incidents with Jordan and gets occasional migraine headaches to this day. She stated that she moved and changed her telephone because she feared Jordan and that she never wanted to see him again. According to

[2] The hearing file contains a letter to the Commission dated July 24, 2007 from then current licensee of the Worcester Thrifty Rental Car advising the Commission that it took over the license on February 28, 2000, after the events in question and is not liable for the actions of the previous licensee, Connecticut Car Company. The file also contains a letter to the Commission dated August 3, 2007 from Dollar Thrifty Automotive Group advising the Commission that Thrifty Rent-A-Car System and its parent corporation Dollar Thrifty Automotive Group formerly licensed Connecticut Car Rental, Inc; however, under their contract, the licensee was solely responsible for the conduct of its employees. These letters were presumably written in response to the Commission sending notice of the public hearing to the parent corporation and the successor licensee. There is no evidence that these entities were ever previously on notice of the Complainant's MCAD complaint and they were never made parties to this matter.

Complainant, she has occasionally taken the medication Celexa as well as another medication for anxiety. Complainant's testimony is unrebutted.

III. CONCLUSIONS OF LAW

A. Sexual Harassment

"Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when ...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." G.L. c. 151B, § 1(18); College-Town Division of Interco v. MCAD, 400 Mass. 156, 165 (1987). *See* Massachusetts Commission Against Discrimination, Sexual Harassment in the Workplace Guidelines (2002) at II(C). In determining whether speech or conduct creates a hostile work environment, the standard is whether a reasonable person in the complainant's position would interpret the behavior "as offensive and an interference with full participation in the workplace." Baldelli v. Town of Southborough Police Dept., 17 MDLR 1541, 1547 (1995); Harris v. International Paper Co., 765 F.Supp. at 1512-16 and notes 11 and 12; *See* Gnerre v. Massachusetts Commission Against Discrimination, 402 Mass. 502, 507 (1988)(sexual harassment in housing).

In this case Jordan's conduct toward Complainant in the workplace was clearly of a sexual nature. Complainant stated that Jordan grabbed her buttocks, touched her leg, proposed to get a hotel room with her for the purpose of sexual relations, attempted to kiss her several times and made remarks about her looks. Complainant made it very clear that Jordan's conduct was unwelcome by pushing Jordan away and rejecting his advances verbally as well as physically. She stated that she quit the job at Thrifty after only ten

days because she could no longer tolerate Jordan's conduct, which made her anxious, and sick. She feared that his advances would escalate. In addition she filed a police report and Jordan was criminally prosecuted for his conduct toward Complainant and her co-worker Lisa Cardoza. Attorney Fray-Witzer's investigative report corroborates the allegations of the Complainant regarding repeated inappropriate and offensive sexual advances by Jordan to Complainant and another employee.

I conclude that Jordan's conduct was sufficiently severe and pervasive to create an intimidating, hostile, humiliating and sexually offensive work environment for Complainant. It interfered with Complainant's work performance and altered the conditions of her employment such that she could no longer perform her job. Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 678-679 (1993). Because Jordan was a supervisory employee, Respondent Connecticut Car Company is vicariously liable for his conduct. College-Town, supra at 167. For the reasons stated above, I conclude that Connecticut Car Company is vicariously liable for the sexually hostile work environment to which Jordan subjected Complainant in violation of M.G.L.c.151B§4(16).

B. Individual Liability

Complainant's claim against Respondent Jordan is against him in his individual capacity. In determining if individual liability attaches in this matter, the Commission must first determine if Jordan's conduct rises to the level of sexual harassment proscribed by M.G.L. c. 151B, §4. Pursuant to Massachusetts General Law Chapter 151B, §4(4A), it is unlawful "[f]or any person to coerce, intimidate, threaten, or interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter." The right to work in an environment free from unlawful sexual harassment is

"unquestionably among the rights encompassed by the [151B]." Thomas O'Connor Constructors, Inc. v. MCAD, 72 Mass.App.Ct. 549, 557 (2008). See, Fluet v. Harvard University, 23 MDLR 145, 165-166 (2001); Berardi v. Medical Weight Loss Center, Inc., 23 MDLR 5, 11-12 (2001); Erewa v. Reis, 20 MDLR 36, 40 (1998). Moreover, the Commission has long recognized and imposed individual liability against the perpetrator of sexual harassment pursuant to G.L. c. 151B. Rushford v. Bravo's Pizzeria and Restaurant, et al., 23 MDLR 171, 174 (2001) citing Beaupre v. Cliff Smith & Associates, 50 Mass. App. Ct. 480, 491 (2000). As stated above, Jordan's conduct was sufficiently egregious to create an intimidating, hostile, humiliating and sexually offensive work environment for Complainant, and his behavior interfered with Complainant's work performance and altered the conditions of her employment such that she could no longer remain on the job. I conclude that Jordan's actions render him individually liable for sexual harassment and for interfering with Complainant's exercise and enjoyment of her rights under G.L. c. 151B.

C. Constructive Discharge

Complainant alleges that the hostile work environment to which she was subjected, made her work situation intolerable and caused her to resign. A constructive discharge occurs when an "employer's conduct effectively forces an employee to resign." GTE Products Corporation v. Stewart, 421 Mass. 22, 33-34 (1995). A constructive discharge can occur when the employer "materially breaches [an] employee's contract of employment in some manner short of termination" or makes "working conditions so intolerable that the employee feels compelled to quit." Constructive discharge occurs where, "based on an objective assessment of the conditions under which the employee

has asserted [s]he was expected to work, it could be found that they were so difficult as to be intolerable." GTE Products Co. v. Stewart, at 34 (1995). McKinley v. Boston Harbor Hotel 14 MDLR 1226, 1240 (1992). The standard for constructive discharge "is, and should be, a strict one," and requires that an employee must demonstrate that "the threat of physical or psychic harm was so great as to preclude ever returning to work." She must also show that she exhausted all possibilities to continue working and that resignation proved to be the final and only alternative. Id. at 1241.

Complainant was upset and afraid of Jordan, who engaged in sexually offensive comments and physical conduct, including touching Complainant's leg and buttocks. She felt she had nowhere to turn because the only other manager at her work site was a personal friend of Jordan. Thus, I conclude that Complainant's objective working environment was so intolerable so as to compel her to leave her employment and that she has established a claim of constructive discharge in this matter. See Eggert v. Cabot Corp., 21 MDLR 131 (1999).

IV. REMEDY

Pursuant to M.G.L.c.151B § 5, the Commission is authorized to grant remedies to make the Complainant whole. This includes an award of damages to Complainant for, emotional distress and other compensatory damages suffered as a direct and probable consequence of unlawful sexual harassment by Respondent. 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).[3]

[3] Complainant did not seek damages for lost wages.

The Commission is authorized to award damages for emotional distress 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). Emotional distress damages 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 Respondents' unlawful act and the Complainant's emotional distress. Id. I conclude that Complainant suffered emotional distress as a result of Respondents' unlawful discrimination against her. She was upset, anxious and frightened by Jordan's conduct and remained fearful that he might make further unwelcome sexual overtures toward her. She felt trapped at her work location with no way to escape. After leaving the job, Complainant suffered from insomnia, anxiety, migraine headaches, nausea and vomiting as the result of Jordan's conduct. She cannot go near her former place of employment because of the memories of Jordan's conduct and she changed her address and telephone number because of her fear of Jordan. I conclude that an award of $30,000.00 is appropriate to compensate her for her emotional distress.

V. ORDER

Respondents Connecticut Car Rental Group[4] and Wendell Jordan are hereby Ordered to:

(1) Immediately cease and desist discriminating on the basis of gender and sexual harassment.

(2) Pay to the Complainant Nydia Febo the sum of $30,000.00 in damages for emotional distress within 60 days of receipt of this decision, with interest thereon from the date the complaint was filed until such time as payment is made.

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 10th day of September, 2010.

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JUDITH E. KAPLAN,
Hearing Officer

[4] Regrettably, since Connecticut Car Rental Group no longer exists as a corporate entity and its President is deceased, Complainant may ultimately have recourse against Jordan only, since there appears to be no successor liability or corporate liability elsewhere.