

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION, and
LUVINA M. HERNANDEZ,

Complainants

v.

DOCKET NO. 14-BEM-00526

BEAUTIFUL ROSE CORPORATION
d/b/a STREGA WATERFRONT RESTAURANT,
THE VARANO GROUP, and SALVATORE FIRICANO

Respondents

Appearances: Megan E. Barriger, Elizabeth M. Reilly, Felicia H. Ellsworth, Laura Maslow-Armand, Sophia L. Hall, Esqs., for Complainant
Eric R. LeBlanc, Craig D. Levey, and Sarah E.A. Sousa, Esqs., for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 7, 2014, Complainant Luvina Hernandez filed a charge of discrimination with the Commission alleging sexual harassment and retaliation against her former employer, Strega Waterfront Restaurant in violation of G.L. c. 151B ss. 4(16A) and (4). The Investigating Commissioner found probable cause to credit the allegations of the Complaint. Complainant alleged specifically that she was subjected to sexual innuendo, and inappropriate comments, questions, and advances from her supervisor, Salvatore Firicano. She further alleged that she

was terminated from her employment for rejecting Mr. Firicano's advances.¹ Efforts at conciliation were unsuccessful. Upon Complainant's Motion for Leave to File an Amended Complaint, the Varano Group and Salvatore Firicano were added as party-Respondents on January 9, 2017. The matter was certified to a public hearing on March 9, 2017. A hearing was held before me on July 17 and 18, 2017. The following individuals testified at the hearing: Ms. Hernandez, Noe Murcia, Veronica Gonzalez, Mr. Firicano, Joel Portillo, Mario Orlando, and Victor Marin. Based on the testimony and other evidence in the record, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Luvina Hernandez, is a Spanish-speaking, 24 year old immigrant from El Salvador, who came to the United States in 2011. Upon arriving in the United States, Complainant lived with her sister and brother-in-law, Joel Portillo and shared a bedroom with her brother. (Tr. 26) In lieu of paying rent, Complainant took care of her sister and Mr. Portillo's child for five months, until Complainant began to work in a restaurant. (Tr. 26-27)

2. Strega Waterfront is a restaurant in Boston's Seaport District operated by the Varano Group. Salvatore Firicano serves as the Executive Chef at Strega Waterfront and manages the kitchen there and at two other restaurants. He also serves as the Vice President of the Varano Group. (Tr. 118) Mr. Firicano is an Italian immigrant whose native language is Italian. He testified that he speaks an Italian-Spanish hybrid when working in the kitchen at Strega Waterfront in attempt to communicate with the many Spanish-speaking kitchen workers. Portillo and other long-time kitchen staff would frequently assist him by acting as translators for the newer Spanish-speaking staff. (Tr. 116-117, 127, 138, 173, 174-176, 190)

¹ The complaint did not allege that Complainant's hours were reduced in retaliation for her refusing to engage in sexual banter or for rejecting Mr. Firicano's advances.

3. Prior to her employment at Strega, Complainant began work at another restaurant five months after she arrived in the U.S., and was no longer available to care for her sister and Portillo's son. (Tr. 26-27) She testified that her sister and Portillo were upset about this. (Tr. 27) Portillo testified that his wife was so upset that they offered to pay Complainant to continue baby-sitting their son, but she declined. (Tr. 187) Around that time, Complainant had begun dating Noe Murcia, also an immigrant from El Salvador. She claimed that Portillo locked her out of the house late one night and that Murcia offered to let her stay with him. (Tr. 27-28) She moved in with Murcia and has been living with him since 2011. They have a three year old son together. (Tr. 28-29; 101-102) Portillo denied locking Complainant out of his house, and testified that she made the decision to go live with Murcia. (Tr. 159) Regardless of what occurred, there was a rift in Complainant's relationship with her sister and brother-in-law.

4. In 2013, Complainant learned of a job opportunity at Strega from her brother-in-law, Portillo. (Tr. 29-30) Portillo testified that Complainant asked him for help finding a job and he assisted her in securing the position by recommending her for hire to Mr. Firicano. (Tr. 159-160) Pursuant to Firicano's practice of allowing long-time employees to recommend relatives for hire, he agreed to hire Complainant. (Tr. 29, 118-119, 160-161) Complainant began working at Strega Waterfront restaurant on October 1, 2013 in a dessert-line position. (Ex. 3; Tr. 30) The position required her to fill the dessert order tickets that the wait-staff submitted. (Tr. 31) She was hired to work a shift from 4:00 pm until closing,² except for Mondays and Wednesdays and was paid \$9.00 per hour. (Tr. 31; Ex. 4)

5. As the kitchen manager at Strega Waterfront, Firicano was Complainant's supervisor. (Tr. 33; Joint Memo at 5) In Firicano's absence, Complainant's brother-in-law, Portillo, who was Firicano's right-hand man and second in command, served as supervisor of the kitchen.

² Closing time varied from 11p.m. to 12:00 a.m. depending on the night and how busy the restaurant was.

(Tr. 47) Since Complainant speaks only a bit of English, she and Firicano had difficulty communicating and Firicano often used the assistance of other kitchen staff, including Portillo, to translate, particularly when discussing work related topics . (Tr. 25, 127, 138, 192, 202)

6. Complainant met Mr. Firicano on her first day of work. She alleges that starting with her first day, Firicano made intrusive inquiries of a personal and sexual nature and repeatedly made unwelcome and inappropriate comments about her body. In their first interaction, Firicano asked her how old she was, if she was married, if she had children, or if she had a boyfriend. (Tr. 35) Complainant testified that she was upset by these inappropriate personal questions from her supervisor and understood Firicano to be asking about her sexual history. (Tr. 35-36, 43) She refused to answer and asked why he was asking her these questions. (Tr. 36-37)

7. Complainant testified that Firicano would come over to her work station and ask if her breasts were “real or...had been operated on.” She testified that this happened many times and she did not respond. (Tr. 37-38) According to Complainant he also asked her if she was a virgin, which made her extremely uncomfortable, and commented that he liked Salvadoran women “because they were very good at having children.” Complainant testified that she understood this to mean that Firicano was propositioning her and she found it offensive. (Tr. 40-43) She stated that he frequently stopped by her dessert station and put his hand on her shoulder asking if she wanted to go with him to a casino, stating that this occurred “almost always.” (Tr. 38) On several occasions Firicano asked Complainant to give him a massage, but she declined and never touched him. (Tr. 40) I credit Complainant’s testimony that these incidents occurred, however I question whether she exaggerated the frequency with which they occurred. A number of the kitchen staff who worked in close proximity to Complainant testified they never witnessed

Firicano speaking directly to Complainant, and they did not overhear inappropriate comments or witness inappropriate touching by him. (Tr. 186-187, 192, 193, 202)

8. Firicano denied each and every one of Complainant's allegations and stated that he rarely spoke directly to Complainant because of the language barrier. (Tr. 136, 137, 138,127)

Firicano also testified that he "always joked around with the kitchen staff to make them feel good," and joked with all the staff about going to the casino to have some fun. (Tr. 134)

Complainant testified that she observed Firicano joking with another female employee asking her similarly inappropriate questions about her personal life and her breasts, but that this employee responded by joking and laughing and she always greeted Firicano with a hug. (Tr. 44-46) I find Firicano did speak to Complainant about personal matters and did make inappropriately intrusive and offensive sexual comments to Complainant that made her uncomfortable.

9. Complainant testified that she did not confront Firicano directly about his offensive conduct, even though it made her uncomfortable because she needed that job and the money and understood that Firicano had the authority to fire her. (Tr. 37-38, 52) She stated that she discussed Firicano's conduct with her brother-in-law Portillo, who she described as Firicano's "right-hand man," and he advised her to leave the job or not to bother with Firicano because he was like that to everyone. (Tr. 47-48, 52) She also stated she told one of the chefs named Miguel about Firicano's conduct and he advised her not "pay any attention to [Firicano]." (Tr. 48-49) Complainant was friendly with the bathroom attendant, who she spoke to both inside and outside of work and told her about Firicano's conduct. (Tr.49, 50, 69-70)

10. Complainant worked a full 40-hour workweek for her first two weeks and 37.6 hours her third week. (Ex. 3) On her fourth week Complainant worked less than a full work-week and presented a doctor's note excusing her from work due to severe cramps. Thereafter, her pay

stubs show that she worked approximately 30-33 hours most weeks with exceptions for four weeks in November and January when she worked well under 30 hours. (Ex. 3) According to Firicano and Portillo, they did not decrease Complainant's hours, but she was often absent from work, sometimes missing one to two times per week. (Tr. 56, 130) Complainant testified at first that she "called in sick many times," and then stated she did so only four times. (Tr. 56, 70) She testified that she more often called Firicano if she was not coming to work, but I do not credit this testimony. (Tr. 70-71) According to Firicano, and Portillo she would always call Portillo to tell him she was sick or could not come to work. (Tr. 138-139, 166-167, 186) Portillo testified that Firicano did not instruct him to cut Complainant's hours. (Tr. 185-186) Firicano testified that Complainant worked fewer hours because she was calling in sick. (Tr. 138) I credit this testimony.

11. Respondent's payroll records demonstrate that Complainant worked over 30 hours per week fairly consistently, with five exceptions, including her final week of employment which was cut short. Two of her shortest work weeks were in January 2014.³ (Exs. 3 & 4) Complainant discovered she was pregnant in January 2014. She was experiencing nausea and reported to her doctors that she was vomiting every morning within the first few months of her pregnancy. She also reported that she was excited about her pregnancy. (Ex. 5 at HERN-0072)

12. Firicano and Portillo asserted that Complainant shirked her responsibilities, leaving the dessert station to talk to other employees, particularly the bathroom attendant with whom she was friendly, or to drink coffee at the coffee station. As a result, sometimes other kitchen and wait staff had to assume her dessert station responsibilities. Firicano and others testified that Complainant would sometimes disappear when the restaurant was busy and Firicano had to instruct Portillo to remind Complainant to remain at her station. (Tr. 126-127, 139, 165-166,

³ Complainant did not allege in her complaint that her hours were cut as a result of any sexual harassment.

191-192, 200-201) I credit their testimony that Complainant was not always attentive to her duties and sometimes left her station to chat with co-workers. There is nothing in writing documenting Respondents' displeasure with Complainant's attendance or performance.

Firicano testified he did not make such records stating "we don't write anything down." (Tr. 125-126)

13. In February of 2014, Portillo complained to Firicano that Complainant had told her sister (his wife) that he was having a sexual relationship with a female co-worker at the restaurant. Portillo testified that this was untrue and he was angry at Complainant for causing trouble with his wife.⁴ (Tr. 167-169) Firicano testified that because Complainant was causing trouble for Portillo at home, Portillo wanted to fire her, but he told Portillo what was happening at home was his business, and they needed Complainant at the restaurant. (Tr. 143-144) Portillo confirmed that he told Firicano about the problems Complainant caused him with his wife, that his wife was very angry at him, and that he wanted Complainant suspended. (Tr. 167-168)

14. Around the same time, a female bartender accused Complainant and the bathroom attendant of stealing a personal item from her purse. (Tr. 182-184) Portillo testified Firicano also expressed concern about Complainant's attendance and not doing her job, and they discussed Portillo's personal problem with Complainant. (Tr. 168, 182-185) Firicano made the decision to suspend both the Complainant and the bathroom attendant. (Tr. 139-140) Both Firicano and Portillo testified that Portillo informed Complainant that she and her co-worker were suspended.⁵ (Tr. 139-140, 168, 184-186) Upon hearing this, Complainant went to the ladies room, gathered her belongings and upon exiting told Firicano, "Take your job and stick it

⁴ Complainant denied that she told her sister Portillo was having a sexual relationship with a co-worker (Tr. 82) but I do not believe Portillo fabricated this story.

⁵ Portillo testified the suspension was for two weeks. Firicano testified the suspension was for four days until the following Tuesday.

up your ass. I don't need your job." (Tr. 140) Portillo observed Complainant speaking to Firicano but did not overhear their exchange. Firicano told Portillo that Complainant told him to, "stick [the job] in your ass." (Tr. 168-169) I credit the Firicano's testimony that Complainant made this statement. Firicano had no further contact with Complainant about her returning to work. (Tr. 140) I credit the testimony of Portillo and Firicano that Complainant's attendance and performance issues, coupled with Portillo's concerns about her spreading lies and the accusation of theft were all discussed as reasons for the suspension.

15. Complainant testified that on a Thursday in February 2014, she returned to work after a scheduled day off and was called into a private meeting room with Firicano another manager and the bathroom attendant. According to Complainant, Firicano accused her, and the bathroom attendant, with whom she was friendly, of stealing an item from one of the female bar-tenders, called her a thief and fired her. (Tr. 58-60) Complainant denied that she had stolen the item and testified that the item was found in the purse of the co-worker who allegedly engaged in sexual banter with Mr. Firicano.⁶ (Tr. 60-61) I credit Complainant's testimony that Firicano spoke with her about the alleged theft. I do not believe that Complainant was told she was fired.

16. Portillo testified that he heard rumors about an item stolen from the bathroom. Firicano told him the women who worked in the bar accused Complainant and the bathroom attendant of having stolen the item, but he never heard Firicano call Complainant a thief. (Tr. 182-184) Portillo and Firicano also discussed the personal problems Complainant was causing him. (Tr. 184) I credit Firicano's and Portillo's testimony that Complainant was suspended. However, I find that by her reaction to the suspension, Complainant effectively terminated her employment.

⁶ In her complaint to the Commission, Complainant referred to rumors that Firicano was in sexual relationship with this employee, but the issue was not raised at the hearing. This same employee was also purportedly the subject of Portillo's affections. Complainant argues that this employee's positive response to Firicano's advances was the reason she was not charged with theft, despite Complainant's allegations that the stolen item was found in her purse.

17. Complainant did not look for jobs after leaving Strega because she was pregnant and thought no one would hire her. She stayed at home throughout her pregnancy. She did not work again until some two years after she left her employment at Strega and testified that this was because of her pregnancy and subsequent health issues. (Tr. 66-67,83)

18. Complainant testified that she was upset and depressed by Firicano's harassment and her employment ending. She asserts she her employment was terminated for her not being receptive to Firicano's sexual comments and advances. She testified that she cried frequently during her entire pregnancy, had difficulty sleeping, and lost interest in activities she used to enjoy, like singing and going out with friends. (Tr. 65-66, 91) Complainant's boyfriend Murcia testified that she had difficulty eating and sleeping, cried a lot and was very sad and depressed. (Tr. 106, 112-113) Complainant asserted that events at Respondent created tension in her relationship with Murcia, largely because he wanted her to quit the job to avoid Firicano's harassment. She claimed she did not want to leave the job because she knew she was pregnant and would have difficulty finding a job elsewhere. (Tr. 64, 67) This sentiment is inconsistent with departing comments to Firicano as she walked out of Strega.⁷ Complainant stated that she currently has no relationship with her sister and Portillo, and blamed her relationship problems with her sister on what occurred at Strega. (Tr. 29, 64-65) Her medical records indicate that she was excited and happy about her planned pregnancy, but that in the early months of her pregnancy she experienced significant bouts of vomiting and nausea that affected her ability to eat. (Ex. 5 at HERN-0078) I credit Complainant's and others' testimony that she was offended and upset about Firicano's offensive conduct towards her, but was also depressed about being accused of theft and purportedly being terminated from her employment.

⁷ Complainant's close friend testified that after the termination Complainant was very depressed because she was out of work and was accused of robbery. She was most upset and offended at being accused of theft. (Tr. 208, 210, 212)

III. CONCLUSIONS OF LAW

A. Sexual Harassment

Massachusetts General Laws c. 151B, s. 4(16A) prohibits sexual harassment in employment. The definition of sexual harassment includes both “quid pro quo” and hostile work environment harassment. G.L. c. 151B, s. 1(18)⁸ Complainant has claimed both. She asserts that Firicano’s inappropriate and offensive sexual comments and propositions created a sexually hostile work environment for her, and that her rejection of his advances and refusal to engage in sexual joking with him resulted in her hours being reduced and eventually her termination.

To prevail on a claim of a sexually hostile work environment, Complainant must establish that she was subjected to conduct that was both "subjectively offensive" and "sufficiently severe and pervasive to interfere with a reasonable person's work performance." Dahms v. Cognex Corp., 455 Mass. 190, 205 (2009), *quoting* Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, 411, 412 n.2 (2001). See also College-Town Div. of Interco. v. MCAD, 400 Mass. 156, 162 (1987). A sexually hostile or offensive work environment is one that is "pervaded by harassment or abuse," resulting in "intimidation, humiliation, and stigmatization" that poses a “formidable barrier” to Complainant’s “full participation” in the workplace. Id. at 62.

Complainant has produced sufficient evidence that she was subjected to a sexually hostile work environment by Firicano. She testified credibly that Firicano repeatedly made offensive comments to her of a sexual nature that were unwelcome and that made her feel uncomfortable

⁸ Quid pro quo harassment occurs when an employee’s submission to or rejection of [sexual] advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions, and “hostile work environment” where sexual “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, s. 1(18)

and intimidated because he was her boss and had the power to fire her. These included asking about her virginity, her breasts, and other questions of an intrusive personal nature, asking her to go to a casino with him, saying he liked Salvadoran women because they were good for child bearing, touching her shoulder and asking for a massage. These comments were sufficiently pervasive as to create a sexually hostile work environment for Complainant, a young woman from another country whose English was extremely limited. Complainant also witnessed Firicano behave in a similar manner to other female employees. I conclude that Complainant found Firicano's behavior intimidating and it interfered with her ability to do her job as demonstrated by her being sufficiently upset to report the conduct to her brother-in-law, Portillo, and other co-workers, and her discussing her distress about the conduct with her boyfriend and a close friend.

While some of Firicano's inquiries could be dismissed as innocuous questions that one might ask a new employee, others were of a much more intrusive and sexual nature. I did not find credible Firicano's assertions that he never spoke to Complainant directly and never made any of the alleged comments or inquiries, including those that might be characterized as non-sexual and merely friendly in nature, such as asking if one has children. He testified that he joked with all the employees about going to a casino and stated they were like a family. Given the casual and informal work atmosphere Firicano described, it would not have been unusual for him to ask some innocent questions about a new employee's life outside of work, but he denied even those. Notwithstanding the informal work atmosphere, even if Firicano was joking, some of the conduct he directed at Complainant was demeaning and humiliating, including sexually intrusive inquiries and comments focused on her body. She did not respond positively and the conduct caused her to feel uncomfortable, intimidated, and humiliated.

Complainant has produced credible evidence that she was subjected to sexually demeaning conduct that was both subjectively and objectively offensive. Such conduct could be expected to interfere with a reasonable person's work performance, thus resulting in a "formidable barrier" to her full participation in the workplace. See Gyulakian v. Lexis of Watertown, Inc., 475 Mass. 290, 296 (2016) [citations omitted] I conclude that Firicano's behavior created a sexually hostile work environment for Complainant and caused her emotional upset. Since Firicano was the manager in charge of the restaurant, Complainant's boss, and a Vice President of the ownership entity, there is no requirement that Complainant report the behavior to anyone else in management and Respondents are vicariously liable for Firicano's conduct. See College-Town at 162.

To establish a claim of quid pro quo sexual harassment, Complainant must demonstrate that: (i) the harasser made unwelcome sexual advances or sexual requests, or otherwise engaged in conduct of a sexual nature; (ii) Complainant rejected these advances; and (iii) the terms or conditions of her employment were adversely affected as a result.

With respect to the claim of quid pro quo sexual harassment, Complainant asserts that her hours were reduced because she did not submit to advances by Firicano and did not react positively to his comments. While Complainant did not testify that Firicano asked her directly for sexual favors or that he propositioned her for sex, his comments could be interpreted as indirect requests for sexual favors. However, there is insufficient evidence that the terms and conditions of Complainant's employment were dependent upon her acceptance of, or positive response to, Firicano's behavior. Moreover, his invitation to go to the casino was one that he made to all employees and I do not believe he singled out Complainant with this request.

While Complainant's hours fluctuated after her first month of employment, both Portillo and Firicano testified credibly that this was not directed by them. They both testified that Complainant would frequently call in sick to work. Complainant's medical records suggest that she became pregnant in early 2014 and was experiencing nausea and vomiting around the time of her shortest work weeks. Complainant admitted that she called in sick many times and then corrected herself to say she was out sick only four times. I did not find her testimony on this issue to be credible. I credit Firicano and Portillo's testimony that they did not alter or reduce Complainant's hours and that the fluctuation in her hours was largely under her control.

Complainant's charge that her employment was terminated for rejecting sexual advances or not engaging in sexual banter with Firicano is also not persuasive. Rather, the evidence suggests that a number of factors contributed to Complainant's separation from Respondent including problems with her attendance, excessive socializing and failure to stay focused on the job, spreading rumors about her brother-in-law, and last but not least, being accused by a co-worker of stealing a personal item.⁹ While it is apparent that Firicano and Portillo were willing to overlook Complainant's attendance problems, excessive chatting, and not being at her station when needed, the two incidents that precipitated the decision to suspend her caused more significant disruption in the workplace. Her actions involving Portillo, who was Firicano's right-hand man, angered Portillo so much that he told Firicano he wanted her fired. The suspicion by a co-worker that Complainant had stolen from her, even if unfounded, was causing dissention and disruption in the workplace. The latter two incidents came to a head in February of 2014 and were likely the final straw for Firicano. I conclude that these events ultimately motivated the decision to suspend both Complainant and the bathroom attendant with whom she

⁹ I make no finding about Complainant's involvement in the theft of a co-worker's item. There is no evidence about whether the co-worker who made the accusation bore Complainant any ill will. There is also no evidence that the accusation against Complainant was related to Firicano's sexually inappropriate behavior.

was friendly. The fact that a number of restaurant employees were angry at, or distrusted Complainant, is a legitimate justification for the decision to suspend her. One can draw the reasonable inference that Firicano decided to suspend Complainant because she was causing disruption in the workplace and to provide a cooling-off period for the potential disruption to subside and for tempers to calm. There is no evidence that Firicano sought to punish Complainant for rejection of alleged sexual advances or for refusing to engage in sexual banter with him. Given the evidence, I conclude that Complainant has failed to prove a claim of quid pro quo sexual harassment.

B. Retaliation/Termination

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B. Complainant claims that her hours were reduced by Respondent and that she was terminated from her employment in retaliation for her having opposed or reported Firicano's sexual harassment. To establish a claim of retaliation, Complainant must establish that (1) she engaged in protected conduct, (2) she suffered some adverse action, and (3) a causal connection existed between the protected conduct and the adverse action. Mole v. Univ of Mass., 442 Mass. 582, 591-592 (2004). 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).

As preliminary matter, I have concluded that the reduction in Complainant's hours was not directed by Respondents and that her employment was not terminated, but rather suspended by Firicano. Complainant made the decision not to return to work, essentially communicating

this to Firicano by her departing comment to him about what he could do with the job. To the extent Complainant would allege that she was constructively discharged due to hostile work environment harassment, I am not persuaded that this was the case.

A constructive discharge occurs when the employee's working conditions are so intolerable, that a reasonable employee would be compelled to resign. *GTE Products Corp. v. Stewart*, 421 Mass. 22, 33-34 (1995) The Commission has recognized the high standard of proof necessary to establish a constructive discharge. Proof of constructive discharge requires a showing that the employer deliberately made the employee's working conditions so intolerable that the employee was forced into an involuntary resignation. *Mills & Ronan v. A.E. Sales, Inc.*, 35 MDLR 163, 172 (2103)

The evidence does not support a conclusion that the Complainant's employment situation was so intolerable due to sexual harassment that a reasonable person in her position would have been compelled to resign. Rather, I conclude that Complainant made the decision not to return to work largely because she was offended at being called a thief, and possibly because she was not feeling well due to her pregnancy. Complainant's close friend testified that being labeled a thief is what bothered her the most.

Firicano's suspension of Complainant was an adverse action. However, the evidence does not support a conclusion that Firicano was motivated by retaliation or a desire to punish Complainant for her having rejected sexual advances or for refusing to engage in sexual banter with him. Even if Complainant's resistance to Firicano's behavior can be deemed protected activity, the evidence does not establish a causal link between her resistance to his behavior and her suspension. The factors motivating his decision to suspend Complainant were numerous. He considered her attendance, performance, and the accusations of co-workers that

she was spreading rumors and stealing. (see discussion infra.) It is clear that the latter were causing disruption in the workplace. These were legitimate and non-discriminatory reasons.

I have also concluded that Complainant's hours were not cut at Firicano's direction, and that her reduced schedule was largely due to her calling in to work sick. Complainant did not testify that she called in sick as a result of being distressed by Firicano's behavior. She merely testified that she called in sick a lot and then changed her testimony to say it was only four times in five months. She did not state the reason for her being out sick.

Finally, the period of time from when Complainant claimed to have initially rebuffed Firicano's advances and the date of her suspension, some seven months later, further supports the conclusion that the suspension was unrelated to any protected activity. According to Complainant, Firicano initiated his inappropriate proposals as soon as she started working for Respondents and she immediately told him she was not interested and refused to answer his questions. The fact that she was not suspended until some seven months later, and that she was not the only employee suspended¹⁰, tends to refute that the suspension was related to any protected activity. For these reasons, Complainant's claims of retaliation must fail.

IV. REMEDY

Upon a finding that Respondents have committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. G.L. c. 151B §5. This includes damages for lost wages and benefits if warranted and emotional distress. See Stonehill College v. MCAD, 441 Mass 549 (2004). Since I have concluded that Complainant's employment was not terminated and she was not constructively discharged, she is not eligible to receive an award for back pay. Furthermore, there is no evidence that she took

¹⁰ There is no evidence that the bathroom attendant's suspension was the result of protected activity and no evidence about whether or not she returned to work.

steps to mitigate her damages by seeking other work, and she remained unemployed for some two years following her separation from Strega.

Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in awarding such damages are the nature and character of the alleged harm, the severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. *Id.* at 576. Such awards must rest on substantial evidence that the distress is causally connected to the act of discrimination or retaliation. See DeRoche v. MCAD, 447 Mass 1, 8 (2006) (where evidence that emotional distress was caused by employee's termination and not subsequent acts of retaliation, court found no causal connection between the latter acts and employee's emotional distress)

Complainant testified that she suffered emotional distress as a result of Firicano's harassment. I credit her testimony that Firicano's sexual comments and questions, particularly intrusive questions about her virginity and her body made her feel humiliated and embarrassed. Complainant did not speak English as a first language and was upset and likely confused by Firicano's overtures. She found his conduct intimidating because he was the boss. There is no evidence that she participated in the sexual banter or encouraged it in any way. She discussed his inappropriate conduct with Portillo, her boyfriend and other co-workers, because she found it disturbing. Complainant's boyfriend and another close friend testified that she cried, had difficulty sleeping, lost interest in activities, and that her relationships were strained.

However, Complainant also testified that her separation from Respondent caused her great emotional upset and her close friend testified that she was most upset at having been labeled a thief. I believe that Complainant was justifiably offended at being accused of theft. However, I do not conclude that this accusation was related to, or motivated by, her rejection of

Firicano's sexual conduct. Since I have concluded that Complainant's suspension from Respondent was not motivated by discrimination or retaliation, Respondent is not liable for emotional distress she suffered resulting from the separation.

Emotional distress arising from circumstances other than the actions of Respondents is also not compensable. Stonehill College, 441 Mass. at 576. Complainant's mercurial relationship with her brother-in-law and sister, and the ailments caused by her pregnancy were clearly factors contributing to the state of her emotional well-being during the time period at issue. Complainant claimed she cried at night during her entire pregnancy, but her medical records make no mention of her suffering from emotional distress. In response to questions from her doctor about depression, she did not relay that she suffered depression related to her employment. Notwithstanding, I am persuaded that Complainant suffered emotional upset from Firicano's offensive conduct and conclude that she is entitled to an award of damages in the amount of \$20,000 for emotional distress.

V. ORDER

In light of the foregoing Findings of Fact and Conclusions of Law, Respondents are hereby Ordered:

- (1) To cease and desists from actions that create a sexually hostile work environment in the workplace;
- (2) To conduct training of the restaurant's managers and supervisors with respect to conduct in the workplace that may constitute sexual harassment and to advise the Commission when such training has been completed;
- (3) To implement a formal sexual harassment policy that includes the designation of a sexual harassment officer as part of its employment handbook.

(4) To pay Complainant, Luvina Hernandez, the sum of \$20,000 in damages for emotional distress, with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or 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 pursuant to 804 CMR 1.23. 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. Pursuant to § 5 of c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this ^{28th} day of September, 2017.



Eugenia M. Guastaferrri
Hearing Officer