

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & MICHAELA MARTINS,
Complainants,

v.

DOCKET NO. 13-NEM-01503

ISABEL'S PIZZA, INC., D/B/A
PAPA JOHN'S PIZZA,
Respondent

Appearances: Robert M. Novack, Esq. for the Complainant
Howard Wilgoren, Esq. for the Respondent

DECISION OF THE HEARING OFFICER

I. Procedural History

On or about June 12, 2013, Michaela Martins filed a complaint with this Commission charging Respondent with discrimination on the basis of sexual harassment in violation of M.G.L. c. 151B§ 4¶16A. Specifically, Complainant alleges that her manager engaged in unwelcome conduct of a sexual nature, including a sexual assault. She also alleges that she was constructively discharged from her position. 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 January 11, 2017. Complainant appeared and testified at the public hearing. Her claim was initially brought against Jonah Seigel d/b/a Papa John's Pizza, a misnomer which was amended to reflect the actual corporate Respondent, Isabel's Pizza, Inc. which was doing business as Papa John's Pizza. Seigel failed to appear at the public hearing, which was suspended based upon the representation of

Respondent's counsel that Seigel, who resided in Colorado, would be available to testify at a later date. Seigel did not make himself available and the matter was further delayed when Respondent's then counsel was suspended from the bar and ultimately retired. Respondent retained successor counsel who sought to dismiss Seigel individually as a party Respondent, since he had no knowledge of, and took no part in, the supervisor's conduct and thus was not personally liable for the actions of the supervisor. The supervisor was terminated immediately after the sexual assault. While an employer may be found vicariously liable for the unlawful conduct of a supervisor or manager, the employer here is a corporate entity. I determined that the facts do not support "piercing the corporate veil" to render Seigel personally liable. Accordingly, I dismissed the claim against Seigel in his individual capacity and the public hearing was never reconvened. Therefore the claims before me are solely against the corporate Respondent, Isabel's Pizza, Inc. After careful consideration of the entire record in this matter, I make the following findings of fact, conclusions of law and order.

II. Findings of Fact

1. Complainant Michaela Martins is a woman who resides in Fall River, Massachusetts. She is currently employed as a veterinary technician and rehabilitator.
2. At all times relevant to this matter, Respondent Isabel's Pizza, Inc. was a corporation that operated five Papa John's Pizza franchises, two of which were located in Fall River, MA including the restaurant doing business as Papa John's Pizza located at 167 Broadway, Fall River, MA. Jonah Seigel is the sole principal of Isabel's Pizza, Inc.
3. In late January 2012, Complainant, who was then a high school student, began working 25 hours per week at Papa John's Pizza at 167 Broadway, Fall River, MA. She was hired by the

general manager, Drew Carline. Complainant worked from 3 p.m. to 10 p.m. or from 5 p.m. to 10 p.m. and was paid \$8.00 per hour. Her duties included making pizzas, answering the phone and other duties that were assigned to her.

4. Complainant's manager, Thomas Pendergast worked from 3 p.m. to closing. Pendergast was responsible for assigning Complainant's tasks while she was on shift. Complainant and her co-workers were required to provide Respondent with their cell phone numbers for scheduling changes and other work-related matters. Complainant's cell phone number was posted on the schedule.

5. Beginning in June 2012, Pendergast began texting Complainant. Complainant testified that at first the texts were friendly but later they became sexual in nature. His sexually suggestive messages included the following, "You're beautiful, meet me after work;" "When I work with you I want to pull you into the office and want to rip off all your clothes;" "Its crazy and I don't care" These texts made Complainant fearful of Pendergast, but she did not feel she could complain to Carline, whom she believed was friends with Pendergast.

6. Complainant testified that the texts made her very uncomfortable and she tried to discourage Pendergast by texting him, "You're my manager." Pendergast texted back, "ok, let's keep it that way." However, Pendergast began treating Complainant rudely and assigning her extra work, which caused co-workers to ask why he was acting that way toward her.

7. On the evening of Friday, August 17, 2012, Complainant was on duty, along with another employee who was washing dishes and Pendergast. At the end of her shift, at approximately 10:00 p.m. Complainant logged out of work and went into the back office to check her work schedule. Pendergast was present and complimented her on her hair. He then cornered her, put his arms up and blocked the doorway with his body. Complainant tried to push

through him but he backed her up against the wall, rubbed her thigh and buttocks, all the while saying that she “would like it” and said that he would see her when he left work at 1:15 a.m. Complainant broke away, ran to her car and drove home. She was terrified and felt threatened by Pendergast.

8. When Complainant arrived home, she told her parents what had happened. They immediately called the Fall River Police who came and took her statement. She was very distraught and crying at the time. She later filed a report at the police station where Pendergast’s texts were retrieved by the police and the matter was reviewed in more detail.

9. Complainant was scheduled to work the following day, Saturday, August 18, 2012. She and her parents went into the restaurant in order to speak with Carline, who told them that he had fired Pendergast and told Complainant to take the day off.

10. On Sunday, August 19, 2012, Complainant returned to work. Another employee and two delivery drivers were on duty, but there was no manager on that day. One of the drivers told Complainant that Pendergast’s cousins had come into the restaurant earlier and were looking for her. Complainant was frightened and perceived their coming to her workplace looking for her as a threat. The delivery driver walked her to her car at the end of her shift out of concern for her safety. When Complainant arrived home she called Carline and told him about the threat and her concerns for her safety. She stated that Carline “did not say much of anything,” in response to her concerns and did not offer her protection or a transfer to another store. Complainant decided to resign during that phone call because she believed her continued employment at the restaurant posed a real and immediate threat to her safety, given the conduct of Pendergast and his family members, and the store manager’s apparent unwillingness to proactively address her safety concerns.

11. Pendergast was subsequently arrested and charged with indecent assault and battery on a person 14 years or over and accosting/annoying another person. The charges ultimately resulted in a plea deal in Fall River District Court. (Ex. C-6)

12. Complainant was unemployed for approximately three months after the assault. Had she remained employed at Respondent, Complainant would have earned \$2,600.00 for that period of time. ($\$8.00$ per hour x 25 hours per week= $\$200.00$ x 13 weeks= $\$2,600.00$)

13. As a result of Pendergast's conduct, Complainant suffered from constant anxiety. She had difficulty eating and sleeping for several months. She had frequent nightmares that she was being "boxed in" by Pendergast, had difficulty concentrating in school, her grades suffered for a period of time and she nearly lost her standing as a member of the National Honor Society. Complainant still has occasional nightmares about Pendergast. For a long time Complainant did not feel comfortable going to her car alone and still does not feel safe going out alone at night. For a few months following the assault, Complainant did not go out with her friends as she had in the past. Instead her friends came to her house and watched movies. Complainant did not seek counseling because she would rather avoid talking about the incident. She cried and was visibly distraught when describing the conduct of Pendergast and her fears for her safety.

14. I credit Complainant's testimony, which was uncontradicted, in its entirety.

III. CONCLUSIONS OF LAW

A. Sexual Harassment

Hostile work environment 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).

The conduct must also be unwelcome and be both subjectively and objectively offensive. See College-Town supra. at 162; Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass. 673, 678 (1993). The objective standard of sexually unwelcome conduct considers the evidence 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 requires that the employee to whom the conduct is directed personally experiences the behavior to be unwelcome. See Couture v. Central Oil Co., 12 MDLR 1401, 1421 (1990) (characterizing subjective component of sexual harassment as "in the eye of the beholder.")

I conclude that Pendergast's conduct, including sexually suggestive text messages and an egregious sexual assault on Complainant, was sufficiently severe and pervasive to alter the conditions of Complainant's employment and thus created a sexually hostile work environment. Pendergast's conduct created an impediment to Complainant's full and free participation in the workplace and constitutes unlawful sexual harassment within the meaning of c. 151B§4¶16(A). Since Pendergast was Complainant's supervisor, exercised authority over her in the workplace and was responsible for assigning her tasks, the employer, Respondent Isabel's Pizza, Inc. is vicariously liable for his conduct that created a sexually hostile work environment. College-Town, supra. at 165-66.

B. Constructive Discharge

Complainant also alleges that she was constructively discharged. In order to establish a constructive discharge, Complainant must show that she was in effect, fired because the situation at her workplace became 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 that when she learned that Pendergast's cousins had come looking for her, presumably to threaten or intimidate her further, Complainant relayed her fears and concerns to her manager, who did not propose to take affirmative measures in response. She became too frightened to remain working at Respondent's store and felt forced to quit her job when Respondent's general manager did not offer her support or a transfer to another its franchises also located in Fall River. She never returned to work out of concern that her workplace would not be a safe place for her.

Respondent's failure to respond more proactively to a potential threat of workplace violence against one of its employees, who was already the victim of a sexual assault, resulted in Complainant's constructive discharge. Ultimately, I conclude that Respondent's failure to react in any meaningful way to minimize the threat to Complainant renders Respondent liable for Complainant's constructive discharge.

IV. REMEDY

Upon a finding of unlawful discrimination, the Commission is authorized to grant remedies to effectuate the purposes of the statute and to make Complainants whole. Such remedies may include an award of lost wages and damages for emotional distress. G.L.c.151B§5.

A. Emotional Distress

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). 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: "(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the Complainant has suffered and reasonably expects to suffer; and (4) 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.

Complainant testified credibly that she was terrified by Pendergast's sexual assault and immediately told her parents, who contacted the police. As a result of the sexual assault Complainant suffered from constant anxiety. She had difficulty eating and sleeping, and had nightmares and difficulty concentrating. For several months after leaving Respondent's employ she rarely went out alone and continues to be fearful of going out in public alone at night. Based on Complainant's credible testimony, I conclude that she suffered severe emotional distress as a result of being subjected to a hostile work environment that left her feeling threatened and frightened for her safety. I conclude that she is entitled to an award of damages for emotional distress in the amount of \$75,000.00.

B. Lost Wages

Complainant earned \$200.00 per week at Respondent and was unemployed for approximately three months after her separation from Respondent. Since I have concluded that she was constructively discharged, she is entitled to an award of damages for lost wages in the amount of \$2,600.00 ($\$200.00 \text{ per week} \times 13 \text{ weeks} = \$2,600.00$)

V. ORDER

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

1. Respondent cease and desist from permitting, condoning, or failing to effectively remedy acts of sexual harassment by its supervisors, managers and employees and to affirmatively monitor the conduct of its supervisors and managers.
2. Respondent pay to Complainant Michaela Martins the sum of \$75,000.00 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.

3. Respondent pay to Complainant Michaela Martins the sum of \$2,600.00 for lost wages, with interest there on 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.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this ^{19th} day of March 2018.



JUDITH E. KAPLAN,
Hearing Officer