

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

JESSICA TREMBLAY AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 06-BEM-01565

FORTUNATO FOOD COMPANY, INC.,
EXECUTIVE SOLUTIONS & IDEAS, LLC.,
and PHILLIP FERDINAND,

Respondents

Appearances: Ellen C. Shimer-Brenes, Esq., and Taylor Danksewicz, Esq., for
Complainant Tremblay;
Michael A. Noble, Esq., for Respondents Fortunato Food Company, Inc.,
Executive Solutions & Ideas, LLC., and Phillip Ferdinand

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 12, 2006, Jessica Tremblay (“Complainant”) filed a complaint with the
Massachusetts Commission Against Discrimination (“MCAD”) alleging that
Respondents discriminated against her on the basis of sex and subjected her to retaliation
in violation of G.L.c.151B, sec. 4(1) (4) & (16A). The MCAD issued a probable cause
finding on September 28, 2009 and certified the case for public hearing on June 30, 2010.
A public hearing was held on September 14 and 15, 2011. The following individuals

testified: Jessica Tremblay, Phillip Ferdinand, Gordon Resinger, and William Farrell.

The parties submitted eleven (11) joint exhibits. Complainant submitted one (1) additional exhibit and Respondents submitted two (2) additional exhibits.

To the extent the testimony of various witnesses is not in accord with or irrelevant to my findings and conclusions, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I determine the following:

II. EVIDENCE¹

1. Complainant Jessica Tremblay was, at all times relevant to this dispute, a resident of Massachusetts. She was born on 3/26/80. Complainant was raised by her mother and grandfather. Complainant currently resides in New Hampshire.
2. Respondent Philip Ferdinand resides in Chelmsford, Massachusetts.
3. Respondent Fortunato Food Company, Inc. (d/b/a Fortunato's Italian Steakhouse) was a Massachusetts corporation with more than six employees. It was owned by Respondent Philip Ferdinand prior to May of 2005. Joint Exhibit 7, 8, & 9.
4. Respondent Executive Solutions and Ideas, LLC (ESI) was a New Hampshire company owned by Respondent Philip Ferdinand until it closed in August of 2006. Ferdinand's wife was the treasurer. Ferdinand testified that the company had two associates -- Complainant and another individual. According to Ferdinand and the financial records set forth in Joint Exhibits 7, 8, & 9, Fortunato Food Company and ESI were two separate entities even though ESI paid rent to Fortunato Food Company in order to maintain office space at Fortunato's

¹ Evidence is typically presented in the form of Findings of Fact. In this case, however, there are a number of allegations upon which I will not make specific findings. Rulings as to credibility and factual disputes will be made on a composite basis in the Conclusions of Law portion of this decision.

headquarters.

5. Complainant testified about a traumatic childhood involving sexual, drug and alcohol abuse by her caretakers and about her own history of drug and alcohol dependency.

6. Complainant testified that at age fifteen, she tried to commit suicide.

Complainant was admitted to Lowell General Hospital and thereafter transferred to Brookside Hospital. After her release, she attended therapy weekly for over a year.

7. Complainant testified that at age seventeen, she met Respondent Phillip Ferdinand through her then-boyfriend. Complainant attended Respondent Ferdinand's wedding in 2001 or 2002.

8. In October or November of 2003, Respondent Ferdinand hired Complainant to sell beef and chicken products to distributors, grocery stores, and markets in the New England region. Complainant was paid solely on a commission basis by ESI. Joint Exhibits 5 & 6. As documented on Complainant's 1099 forms, she earned approximately \$21,000.00 in 2004 and \$15,000.00 in 2005. Joint Exhibit 5. According to Ferdinand, he gave Complainant directions and assigned her tasks but she set her own hours and was not required to work at a company desk. I find that Complainant was paid as and was, in fact, an independent contractor of ESI.

9. The products which Complainant sold were obtained from an Iowa company, New Millennium Sales Exchange LLC. ("New Millennium"), which marketed beef and chicken products. New Millennium went out of business in 2006. Prior

to 2006, New Millennium sold products nationally through a variety of independent contractors, including Respondent ESI.

10. Complainant testified that she had a desk, computer, and phone at Fortunato Food Company from which she made cold calls and performed tasks associated with the sale of beef and chicken products until the restaurant was sold in May of 2005. After the sale, Complainant worked at her home or at Ferdinand's home office.
11. According to Complainant, she also worked as a waitress and bartender at Fortunato's Italian Steakhouse prior to its being sold. However, Complainant failed to produce any pay stubs or other records of payment, is not listed on Fortunato's payroll at the time she allegedly worked there, and could produce no witnesses to corroborate her claim that she was employed at the restaurant. Joint Exhibits 7 & 8. According to Ferdinand, Complainant visited Fortunato's Italian Steakhouse solely on a social basis. I do not credit Complainant that she was an employee of the restaurant.
12. Complainant was neither hired nor paid by New Millennium Sales Exchange, LLP, but she obtained printed business cards that identified her as "Business Development Sales Manager" for the company. Complainant's Exhibit 1. Gordon Reisinger, President/Manager of New Millennium, testified that he met Complainant on just three occasions. He could not recall authorizing Complainant to use business cards referencing New Millennium but testified that as long as she used the cards to facilitate the sale of New Millennium products, he was not troubled by the fact that the cards overstated her business relationship with his company.

13. Approximately two weeks after Complainant began to work for ESI, she accompanied Ferdinand in his car to a chicken plant in Canada in order to tour the plant and learn about the slaughtering of chickens. Complainant testified that she and Ferdinand stopped on the way home, smoked marijuana, entered a strip club, and drank alcoholic beverages. According to Complainant, Ferdinand ordered a lap dance at the strip club, pushed the lap dancer towards Complainant, kissed Complainant, said he was “getting horny,” took out his penis, pushed Complainant’s head towards it, and asked her to suck his penis, which she did. Complainant testified that when they were back in the car, Ferdinand said, “What happens here, stays here” to which she said “okay.” According to Complainant, she did not quit her job because she was embarrassed to explain to her friends and family what had happened and because she thought it was just a “one time thing.” Ferdinand denied that the incident occurred.
14. Complainant testified that approximately one month later, she and Ferdinand went to a chicken factory in Springfield, MA and after touring the factory, they smoked marijuana in Ferdinand’s car. According to Complainant, they then went to a restaurant, drank wine, and after lunch returned to the car where Complainant gave Ferdinand oral sex at his request. Ferdinand denied that the incident occurred.
15. According to Complainant, the next incident of sexual harassment occurred when she accompanied Ferdinand to Tewksbury, MA to get beef samples. Complainant testified that on the way back, Ferdinand pulled into a back road behind a cemetery, exposed his penis, pushed Complainant’s head towards his penis, and

- asked for oral sex. Complainant states that she complied, after which they returned to Fortunato's Italian Steakhouse. Complainant testified that the sexual activities made her feel "uncomfortable and awkward" as well as "guilty and wrong." Ferdinand denied the alleged incident.
16. Following the alleged Tewksbury incident, Complainant attended a work-related event with Ferdinand in Nantucket, MA. Complainant testified that Ferdinand provided her with Percocet medication to relax her.
 17. Complainant testified that Ferdinand frequently accompanied her to a chicken plant in Springfield, MA, and also traveled with her to other places such as New York and Pennsylvania. On those excursions they picked up samples, met with distributors, and toured plants. Complainant said that the trips involved the use of alcohol, marijuana, pills, oral sex, and, on one occasion, sexual intercourse in the back seat of a car. According to Ferdinand, he only accompanied Complainant to the chicken plant in Springfield when Complainant had cases of product that she couldn't carry. He claims that he was traveling on his own thirty to forty weeks per year.
 18. According to Complainant, on their second trip to Pennsylvania, Ferdinand took her to his family's restaurant, pulled around to the back of the building, took out marijuana, put her hand on his pants, and pushed her head down and/or waited for Complainant to give him oral sex.
 19. Complainant contends that "in the beginning," Ferdinand forced her head down to his lap when he wanted oral sex and told her to stop "complaining" when she expressed reluctance to engage in sexual activity. Complainant acknowledges

that she never reported this activity to the police even though she knew it constituted rape.

20. Complainant testified that she once visited a house owned by Ferdinand's wife in Lowell, MA, which his wife was attempting to sell. According to Complainant, she went to look at the house as a potential buyer but that Ferdinand turned her around on a bannister in the house and had intercourse with her from behind. Complainant asserts that she was alone in the house with Ferdinand and that she was scared. Ferdinand denies the incident.
21. Complainant testified that on another occasion, Ferdinand asked her to come over to his house. At first she declined, but she went after Ferdinand said that they "had to go over some things" and that he would cook dinner.
22. Complainant acknowledged that she occasionally met Ferdinand "socially" at a restaurant in Nashua, New Hampshire. She also acknowledged that she and Ferdinand had sexual relations at her home.
23. Complainant testified that she attempted to quit her job in March of 2004 by giving Ferdinand a doctor's note indicating that she could not drive while taking a prescribed medication (Flexeril). Complainant states that she gave the note to Ferdinand to "try to get away" from him but that he laughed, crumbled up the note, and said he now had a "great reason" to tell his wife why he had to accompany Complainant on work-related trips. Ferdinand denies the allegation.
24. Complainant asserted on direct examination that she also tried to resign by claiming that her 1995 Nissan Maxima was too old, had too many miles, and required too many repairs to use for work-related travel. According to

Complainant, Ferdinand took her to a car dealership in New Hampshire where, after she failed to qualify for a loan or lease, wrote a check for \$6,000.00 to cover the down payment on a new vehicle and told her he would also cover the monthly payments. Complainant asserts that she was disappointed not have an “excuse” to “get away.” According to Ferdinand, he paid for the car with \$3,500.00 that Complainant had already earned in commissions. He testified that he paid for the remainder out of Complainant’s future commissions.

25. Complainant testified that in February of 2005, Ferdinand said that they had to meet distributors in Pennsylvania but instead took her to a resort in the Poconos on Valentine’s Day where they smoked marijuana, had intercourse in a Jacuzzi, had oral sex in the shower, drank alcohol, took Percocets, and snorted cocaine. Ferdinand denies the incident.
26. Complainant testified that in May of 2005, Ferdinand contacted her from a food show in Reno, Nevada, told her that it would be a “good experience” for her to be there, and told her that he had left an envelope with money in her desk drawer to pay for her airplane ticket and travel costs. According to Complainant, Ferdinand and a sales associate from another state -- “Mitch” -- picked her up at the airport and took her to a ranch outside Las Vegas where they stayed one night and then drove to Lake Tahoe for several more days.
27. Complainant asserts that on another occasion, she toured a beef plant in Wisconsin with Ferdinand, Mitch, and Gordon Reisinger. Complainant testified that after dinner, she returned to her hotel room to go to sleep, but Ferdinand asked her to go to Mitch’s hotel room where she, Ferdinand, and Mitch smoked

marijuana, drank alcohol, and she had sex with Mitch after Ferdinand left.

According to Complainant, she had sex with Mitch because she thought that it might encourage Ferdinand to leave her alone. The next day, Ferdinand came to her room to help with her bags. Complainant asserts that he placed some marijuana in his suitcase and was subsequently arrested at the airport whereas she was not arrested and went home on her scheduled flight without him. Ferdinand denies that sexual activity occurred in Las Vegas, asserts that the marijuana found in his suitcase belonged to Complainant, and claims that after he was detained by police, he was let go and returned to Massachusetts on the same flight as Complainant.

28. Complainant claims that Ferdinand purchased her a heart-shaped diamond necklace, gave her spa gift cards, and in the summer of 2005 bought furniture and appliances for her apartment in North Andover, MA. Complainant testified that she did not want to take the necklace but she did and wore it to work as Ferdinand requested. Ferdinand denies that he ever bought Complainant a heart-shaped necklace.

29. Complainant testified that in October of 2005, her car was repossessed because she stopped making payments with the checks that Ferdinand was giving her. Complainant claims that she stopped making payments because she thought if the car were repossessed, she wouldn't have to go to work. According to Complainant, Ferdinand thereafter took her to MacMulkin Chevrolet in Nashua, New Hampshire where he bought her a "Dawooe" vehicle by writing a check for \$6,080.00. Joint Exhibit 3. Complainant signed a promissory note to pay

Ferdinand the sum of \$7,500.00 in principal and interest at a rate of \$250.00 per month. She testified that Ferdinand did not intend for her to pay him back but asked her to sign the note “in case [his] wife found out about it.” Id.

Complainant testified that after she quit, Ferdinand said that he wanted to be paid back.

30. Complainant testified that Ferdinand fantasized about “knocking off” his wife, kidnapping his son, and taking Complainant and his son to Costa Rica.

According to Complainant, she was frightened by Ferdinand’s fantasies.

31. Complainant attempted suicide in November of 2005 after six months of consistent drug usage and an abortion in August of 2005. Complainant attempted to jump off the balcony of a former boyfriend’s home after drinking alcohol, using cocaine, ingesting other drugs, and destroying property. Joint Exhibit 2.

Complainant was hospitalized for a week and thereafter attended weekly counseling sessions. According to Complainant, Ferdinand attempted to contact her by phone while she was in the hospital by identifying himself as her father. Ferdinand denies that he ever called Complainant while she was in the hospital.

32. Following her hospitalization, Complainant got a part-time job in or around January of 2006 at Burton’s Grill in North Andover as a hostess/bartender. She did not return to work for Ferdinand. In or around May of 2006, she was fired after the restaurant manager allegedly received a telephone call from an individual identifying himself as one of Complainant’s prior employers. According to Complainant, the individual identified himself as “Tony” and accused Complainant of using and selling drugs to customers at the restaurant.

- Complainant testified that Ferdinand liked to refer to himself as “Tony” because he identified with Tony Soprano, a television character.
33. On January 12, 2006, Ferdinand wrote to Complainant that she was eighty-nine days in arrears on her promise to pay him monthly installments of \$250.00 for the Dawoee he purchased on her behalf on October 14, 2005. Respondents’ Exhibit 1.
34. On January 18, 2006, Complainant applied for and received an ex parte restraining order against Ferdinand which expired on February 1, 2006. Joint Exhibit 4. A hearing took place on February 1, 2006 which Ferdinand attended but Complainant did not attend. The restraining order was not renewed. Joint Exhibit 4. Complainant testified that she sought the restraining order after her hospitalization because Ferdinand threatened to beat up and castrate her boyfriend and because Ferdinand said he would “sew my loose lips shut” when she threatened to tell his wife about his extra-marital sexual activities.
35. On February 23, 2006, Ferdinand’s attorney wrote Complainant to address the alleged “breach of contract” stemming from Complainant’s failure to pay back the car loan for the Dawoee vehicle. Respondents’ Exhibit 2.
36. Complainant’s psychopharmacology evaluation dated 3/1/06 from The Psychological Center, Inc. states, in partial response to a category entitled “History of Present Illness” that, “Her boss Phil 46 had sexual relationship – bf found out, threatened to call boss’ wife Nov 05, boss threatened her physically.” Joint Exhibit 2.
37. Ferdinand denied that he had any sexual relationship with Complainant. He

claims that he has an anatomical irregularity on an intimate part of his body which Complainant failed to identify at the public hearing.

III. CONCLUSIONS OF LAW

Sexual Harassment

There is no dispute that Complainant was associated with Respondent ESI in some capacity, but ESI cannot be deemed a qualifying “employer” within the meaning of Chapter 151B. The statute, in section 1 (5), excludes “any employer with fewer than six persons in his employee.” Credible evidence was presented by Respondent Philip Ferdinand that ESI’s entire staff consisted of only four individuals prior to its going out of business in 2006 -- Ferdinand, his wife, Complainant, and another individual.

In an attempt to circumvent this jurisdictional bar, Complainant argues that the operations and/or funds of ESI were co-mingled with New Millennium Sales Exchange, LLC and Fortunato Food Company. New Millennium Sales Exchange, LLC has already been dismissed per the Commission’s Order dated September 23, 2011 on the basis that Complainant had no employment relationship, either as an employee or as an independent contractor, with the company. Similarly, the evidence presented at the public hearing now supports dismissal of Fortunato Food Company (d/b/a Fortunato’s Italian Steakhouse) as well. The record does not support Complainant’s contentions that she sporadically worked for Fortunato Food Company as a waitress/bartender or that Fortunato’s operations and funds were co-mingled with ESI. Complainant could not produce any pay stubs or payroll records to establish that she ever worked at the restaurant/bar. She was likewise unable to refute evidence that the records and finances of ESI were kept separate and discrete from those pertaining to Fortunato Food

Company. In short, the companies were maintained as two separate entities, and Complainant was solely involved in the business of ESI.

Once New Millennium, Fortunato Food Company, and ESI are dismissed for the reasons set forth above, Phillip Ferdinand remains as the sole, individually-named Respondent. The Commission has long recognized individual liability under G. L. chapter 151B. See *Beaupre v. Cliff Smith & Associates*, 50 Mass. App. Ct. 480, 491 (2000); *Riggs v. Town of Oak Bluffs*, 23 MDLR 306, 311 (2001) (individual is personally liable for interfering with right of complainant to be free of intimidation and coercion); *Deeter v. Bravo's Pizzeria and Restaurant*, 23 MDLR 167, 170 (2001) (supervisor who co-owned business and engaged in sexual harassment held individually and jointly liable with employer). Individual liability is imposed under Chapter 151B, section 4 (4A) which makes it unlawful for “any person to ... interfere with another person in the exercise or enjoyment of any right granted or protected by this chapter ...” and section 4 (5) which makes it unlawful for “any person ... to ... compel or coerce the doing of any of the acts forbidden under this chapter.”

The scope of such liability is not, however, unlimited. Since individual liability protects rights explicitly granted by Chapter 151B, a limiting factor is the requirement that the workplace at issue conform to the provisions of Chapter 151B, including the requirement that there be six or more employees. See *Tunstall v. Acticell H'W Cosmetics*, 25 MDLR 301 (2003) (where employer had fewer than six employees, allegations of rape could not be sustained against an employee's supervisor pursuant to G. L. c. 151B, s. 4 (4A)). As established above, ESI did not have six employees. Therefore, there is no jurisdictional basis upon which to recognize individual liability

against Respondent Phillip Ferdinand.

Even if individual liability were recognized in the absence of a six-person workforce, the discrimination complaint filed by Complainant was untimely. Complainant filed her action on June 6, 2006, more than three hundred days from when she was allegedly first subjected to sexual harassment and long past the time when she had reason to know that the alleged harassment was pervasive and unlikely to resolve. See Cuddyer v. The Stop and Shop Supermarket Company, 434 Mass. 521 (2001) (where ongoing pattern of sexual harassment is alleged, Complainant may rely on a continuing violation theory to claim damages outside the limitations period unless her work situation was pervasively hostile prior to the filing deadline and a reasonable person would have filed sooner). Although the alleged harassment in this case is characterized as a continuing violation, there are no specific allegations of sexually-harassing acts within three hundred days of the filing of the charge of discrimination and, thus, no “anchor” for earlier claims. See Cuddyer, 434 Mass. at 532. Moreover, Complainant’s allegations about the first weeks of her employment in 2003 were sufficient to place her on notice that her work situation was pervasively hostile and unlikely to improve. Such a conclusion is based on Complainant’s charge that approximately two weeks after she began to work for Ferdinand, he compelled her to perform oral sex on him. Thus, Complainant, by virtue of her own testimony, knew or should have known that her work situation was pervasively hostile and unlikely to improve more than three hundred days before she filed suit. See Cuddyer, 434 Mass. at 539.

Apart from the jurisdictional problems with the complaint of discrimination, the evidence establishes, and I conclude, that the relations between Complainant and

Ferdinand were consensual. Thus, the parties' relationship does not constitute the prohibited workplace conduct of sexual harassment. M.G.L. c. 151B, section 4 (1).

In order to establish a "hostile work environment" sexual harassment claim, Complainant must prove by credible evidence that: (1) she was subjected to sexually-demeaning conduct; (2) the conduct was unwelcome; (3) the conduct was objectively and subjectively offensive; and (4) the conduct was sufficiently severe or pervasive as to alter the conditions of employment and create an abusive work environment. See MCAD Sexual Harassment in the Workplace Guidelines ("Guidelines"), II. C. (2002); Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 677-78 (1993); College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987) The subjective standard of sexual harassment means that an employee must personally experience the behavior as unwelcome. The standard is a personal one, based on Complainant's own reaction to the harassing conduct. See Couture v. Central Oil Co., 12 MDLR 1401, 1421 (1990) (characterizing subjective component to sexual harassment as ... "in the eye of the beholder."); Ramsdell v. Western Bus Lines, Inc., 415 Mass. at 678-679.

Complainant claims that her alleged sexual relationship with Ferdinand was unwelcome and subjectively offensive to her, but she continued to work for Ferdinand from October/November of 2003 through the fall of 2005, continued to travel with him, continued to see him socially, continued to work at his house on occasion, and continued to accept his financial assistance in making large purchases. Complainant states that she didn't quit her job because she was "embarrassed" and thought the oral sex was just a "one time thing." She claims that she "tr[ie]d to get away" from Ferdinand by telling him that she couldn't drive her car and by having sexual relations with another man. These

excuses are entirely unpersuasive. I do not believe that Complainant was the victim of multiple rapes. Had she been as fearful and uncomfortable as she claims, it is unlikely that she would have continued to submit to repeated sexual assaults for a period of two years while, at the same time, accepting financial assistance and gifts from Ferdinand. Regardless of what may have happened at the start of the parties' working relationship in the fall of 2003, the relationship evolved into a consensual one by 2005.

Having concluded that the relationship between Complainant and Respondent Ferdinand was consensual, it is unnecessary to make findings of fact on each and every lurid allegation. I find that the sum total of the claims do not support a charge of sexual harassment.

Retaliation

Complainant's retaliation cause of action must also fail because the adverse actions she claims to have suffered occurred *before* she engaged in protected activity not *after*. G. L. chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. To prove a prima facie case of retaliation, Complainant must demonstrate that she: (1) engaged in a protected activity; (2) Respondent was aware of the protected activity; (3) Respondent subjected Complainant to an adverse employment action; and (4) a causal connection existed between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000).

The protected activity in this case consists of the filing of a charge of discrimination at the Massachusetts Commission Against Discrimination. Said charge

was filed in June of 2006 *following* Ferdinand's alleged threat to physically harm Complainant and her boyfriend and following the termination of the parties' business relationship. Complainant's application for a restraining order, arguably another form of protected activity, was also made following the alleged threats of physical harm and the termination of the parties' business relationship. Rather than engage in protected activity, Complainant appears to have taken these actions to forestall Ferdinand's demand for repayment of his car loan. Such action bears no relationship to opposing practices forbidden under this chapter. M.G.L. c. 151B, s. 4(4).

For the reasons set forth above, the complaint is dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 28th day of December, 2011.

Betty E. Waxman, Esq.,
Hearing Officer