

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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M.C.A.D. &  
JULIE COBURN,  
Complainants

v.

DOCKET NO 08-SEM-00558

CUCA, D/B/A  
BELLA NOTTE,  
Respondent

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Appearances:

G. David Sharp, Esquire for Complainant  
Tani E. Saperstein, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On February 14, 2008, Julie Coburn filed a complaint with this Commission charging Respondent with discrimination on the basis of sexual harassment. Specifically Complainant alleges that Respondent failed to adequately remedy her complaints of sexual harassment by a co-worker, which ultimately caused her to be constructively discharged. The Investigating Commissioner issued a probable cause finding. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on July 17, 2012 at the Commission's Springfield office. After careful consideration of the entire record before me, and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Complainant Julie Coburn resides in Bernardston, Massachusetts. For the past 12 years, Complainant has worked as a math tutor for the Pioneer Valley School district. In 2001,

Complainant began working a second job as a server at Respondent. At the time she left Respondent's employment, Complainant was working an average of three nights per week and earning approximately \$100.00 per night.

2. Respondent Bella Notte, opened in 2001, is an upscale restaurant and function venue located in Bernardston, MA. It is owned and operated by Abaz Cecunjanin. Complainant was hired as a server shortly after the restaurant opened. Complainant and Cecunjanin had a good relationship. Complainant was an excellent employee with no performance issues. She spoke her mind but she and Cecunjanin were able to work through disagreements. (Testimony of Cecunjanin)

3. Also hired around the time of Bella Notte's opening were a teenager Dmitri Vlasenko, a busboy; Richard Luippold, the bar manager; and servers Christopher Tilley and Lisa Rubeck. Luippold, Rubeck and Tilley were still employed by Respondent at the time of the public hearing.

4. The atmosphere at Bella Notte was informal and friendly. Many of Cecunjanin's family members worked at the restaurant and as did members of Vlasenko's family, including his brother. Complainant's daughter worked briefly as a coat check girl in the winter of 2006 and Cecunjanin once lent Complainant money. At work, Complainant would play Sudoku with Vlasenko and others and she would discuss matters such as high school sports with Vlasenko, who was a few years older than her son. Rubeck babysits for Cecunjanin's children and has borrowed his car. Richard Luippold has socialized with Cecunjanin outside of work.

5. By all accounts, Vlasenko was odd and goofy and made bizarre statements in the workplace. He often stared at people without speaking, frequently talked about the coming of the apocalypse, told co-workers that Algerians were aliens and that in the future everyone would

have chips planted in their heads and their movements would be tracked. Vlasenko's odd behavior worsened after he suffered a head injury in a car accident on Super Bowl Sunday in 2005 or 2006. Cecunjanin testified that while Vlasenko was "a little slow," he became one of Respondent's best workers and Cecunjanin had promised Vlasenko's mother he would look after him and felt obligated to help him. Rubeck testified that Vlasenko was goofy and annoying; for example he once snapped a rubber band at her. (Testimony of Rubeck; testimony of Luippold; testimony of Cecunjanin)

6. Complainant testified that at on occasion, Vlasenko asked her whether she was hot when she was younger, if she was a virgin when she graduated from high school and whether she was virgin when she got married. Sometime around 2005, Vlasenko told Complainant that he wanted her daughter, then in grammar school, to lose her virginity to him when she turned 16, and Complainant slapped his face.

7. Complainant testified that Vlasenko would sit on a bench at the restaurant and when she was about to sit down, he would place his hand, palm up, on the bench, so that she sat on his hand. When he did this, Complainant would stand up and tell him to move his hand or leave.

8. Christopher Tilley acknowledged that his then girlfriend, who was also a co-worker, told him that she felt uncomfortable about a comment made to her by Vlasenko. Tilley claimed that she did not tell him what Vlasenko said. Complainant testified that she and Cecunjanin witnessed Tilley push Vlasenko against the wall in anger over this incident. She stated that Cecunjanin said that by Tilley's action, Vlasenko would "get the point" that he had said something wrong. Tilly denied pushing Vlasenko but stated he was angry with Vlasenko and reported the incident to Cecunjanin. I credit Complainant's version of events. It is not credible

that Tilley did not know what Vlasenko said to his girlfriend. He acknowledged the incident reluctantly and I believe that he minimized the events out of loyalty to Cecunjanin.

9. Complainant testified that in October 2006, Vlasenko's comments became "more personal." On approximately October 15, 2006, Complainant, Vlasenko and a waiter named Ray were setting up for a large banquet, when Vlasenko turned to her and said, "Julie, lick my dick." Complainant was flabbergasted and appalled. She asked Vlasenko if he would talk to his mother that way and said he had no respect for her. I credit her testimony.

10. Later that evening, when Complainant was preparing to leave work for the night, Vlasenko asked her, "Julie, when you do 69, do you prefer the six or the nine?" Complainant was upset and told Vlasenko to "shut the hell up." As Complainant was leaving in her car, Vlasenko tried to apologize to her, but she drove off. Complainant told Rubeck and Luippold about the "69" remark. I credit her testimony.

11. Complainant testified that she stayed up all night crying after this incident. She was so upset that she was reluctant to work the next evening. The following day, she talked to Cecunjanin about the comments Vlasenko had made the day before. She testified that Cecunjanin told Complainant that Vlasenko thought he was being funny and told Complainant that because she was more mature than he, she should not let Vlasenko's remarks bother her. Complainant then threatened to contact a lawyer if something wasn't done about Vlasenko and Cecunjanin assured her that he would speak to Vlasenko and would terminate him if he made any more offensive comments. I credit Complainant's testimony.

12. On November 17 or 18, 2006, Complainant preparing salads in the kitchen with Vlasenko and Cecunjanin's brother Eddie, when Vlasenko told Eddie that he needed to have his dick licked again. Complainant became very upset and angry. She told Vlasenko that he was he

was already in enough trouble and his comment would cause him further trouble. As she left the room, Vlasenko said, nonsensically, "If you and I were in Africa, it would be different."

Complainant left the kitchen and went into the bathroom in tears. I credit her testimony.

13. Complainant then learned from co-workers that Vlasenko had been drinking alcohol from the glasses of patrons whose tables he was busing. She told bar manager Richard Luippold about Vlasenko's drinking and about his comment in the kitchen. Luippold told her he would ask Vlasenko to leave the premises. She later saw Vlasenko sitting on the bench staring at her. I credit her testimony.

14. Complainant testified that Vlasenko's comments were so upsetting that she began to shake and could not lift trays or carry an order downstairs to the dining room. She varied her route through the restaurant in order to avoid Vlasenko. I credit her testimony.

15. Later that evening Complainant came to see Cecunjanin in his office and asked him what he planned to do about Vlasenko. Cecunjanin said that the comment in the kitchen was not directed to her and he could not control what Vlasenko said while intoxicated. He also stated that he could not fire Vlasenko before the busy Christmas season because he was a hard worker and would be difficult to replace, but he agreed to discuss the matter with Vlasenko. I credit Complainant's testimony.

16. The day before Thanksgiving, Vlasenko called Complainant's home several times; however she refused to talk to him. That evening, Vlasenko came to her house and tried to open the kitchen door and told Complainant that he really needed his job. Complainant's husband came to the door and Vlasenko left a bag of candy at the door and went away. Complainant called Cecunjanin to tell him Vlasenko had come to her house and learned that Cecunjanin had told Vlasenko to talk to her. He also assured her that she would not have to work with Vlasenko.

17. Complainant worked the day after Thanksgiving without incident.

18. Complainant worked the Saturday after Thanksgiving. Although not scheduled to work, Vlasenko appeared at the restaurant looking for work. As Complainant carried a tray into the kitchen she observed Vlasenko leaning against a shelf, looking at her and smiling. She stated that, at that point, she was fearful of Vlasenko. She began to shake and nearly dropped the tray. When she got home she called Cecunjanin and complained that Vlasenko had been present at the restaurant. I credit Complainant's testimony that she feared Vlasenko.

19. On the Sunday after Thanksgiving, Complainant was scheduled to assist in decorating the restaurant for Christmas. When she arrived at work, Vlasenko was present and was also decorating for the holidays. Complainant complained to Cecunjanin, who said he would assign them to work in separate rooms. Complainant responded that she could not be in the workplace at all with Vlasenko and threatened to quit her job. Cecunjanin assured her he would handle Vlasenko. That same day, he hand-delivered to Vlasenko a letter stating that he was "temporarily released of all duties" due to his improper behavior and work performance.

(Ex. 2)

20. Cecunjanin testified that he suspended Vlasenko's employment solely because of his drinking on the job. I do not credit Cecunjanin's testimony. I find that Cecunjanin removed Vlasenko for a variety of reasons including his comments to Complainant, his drinking and his otherwise bizarre behavior.

21. Cecunjanin denied that Complainant ever complained to him about Vlasenko making sexually inappropriate remarks to her. However at his deposition, he stated that he vaguely remembered "something about 69" but not the details. He claimed that when he told Complainant not to let Vlasenko's comments bother her he was referring to his comments about

the apocalypse and the like. He stated that he instructed Vlasenko to apologize to Complainant for his comments in order to “calm her down.” I do not credit his testimony that Complainant did not complain to him about Vlasenko’s sexually inappropriate remarks.

22. Complainant continued to work her regular hours from December 2005 to May 2006, without incident. During this period of time she never saw Vlasenko in the workplace.

23. In winter 2005/2006, Complainant had dealings with Cecunjanin in a matter unrelated to work when Cecunjanin agreed to testify on behalf of Complainant’s son in a lawsuit concerning the sale of a defective snowmobile.<sup>1</sup> Cecunjanin changed his mind and decided not to testify because he feared retaliation against his family by the opposing party in the lawsuit. When Cecunjanin failed to appear at the trial as promised, Complainant was very angry and told him he had “no balls” and was a “pussy.”

24. During this time period, Complainant had troubles with her son, who on one occasion put his hands around her neck, leaving bruises that were witnessed by her co-workers.

25. In April 2007, Complainant’s daughter told her that Vlasenko had approached her in downtown Hubbardston and said to her, “Tell your mom I’m sorry,” and “How’s your mom’s pussy cat?” As relayed to Complainant, he paused between the words “pussy” and “cat,” which caused Complainant to believe his question had a sexual innuendo. Complainant owned a house cat at the time. I credit her testimony.

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<sup>2</sup> The circumstances surrounding the lawsuit are unclear. Cecunjanin testified that he considered buying a snowmobile that an acquaintance of Complainant’s son was selling, but decided not to buy it because it did not start. Complainant’s son subsequently purchased the snowmobile and sued the buyer because it was defective and wanted Cecunjanin to testify as to his observations of the snowmobile. Complainant recalled that her son sold a snowmobile to someone who then sued her son because the snowmobile was defective.

26. Complainant did not see Vlasenko again until April 2007, when he appeared at the restaurant seeking work. Cecunjanin assured Complainant that Vlasenko would not be rehired. I credit her testimony.

27. One evening in May 2007, when Complainant arrived at work, Vlasenko was standing outside the restaurant. He greeted her, but she did not respond. Vlasenko was not scheduled to work that evening and he left the premises when Complainant arrived.

28. On or about May 19, 2007, upon arriving at work, Complainant was very upset to see Vlasenko in the dining room dressed in work clothes. She was unaware that he had been re-hired and went immediately to Cecunjanin's office, altering her route to avoid Vlasenko, in order to confront him about Vlasenko's status. I credit her testimony.

29. Cecunjanin explained that Vlasenko had just finished working a banquet and they would not be working the same shift. Notwithstanding, Complainant's shift overlapped with Vlasenko's for about an hour that day. Cecunjanin acknowledged that Vlasenko had also worked a shift a few days earlier. Complainant felt that she should have been offered that shift instead of Vlasenko, as she could have rearranged her school schedule in order to come in. She told Cecunjanin that she was quitting because of his failure to protect her from Vlasenko. Cecunjanin again told her to let Vlasenko's comments roll off her back. Complainant walked out of the restaurant and did not return. I credit her testimony.

30. Cecunjanin stated that when Complainant learned that Vlasenko was working, she immediately began screaming at him. He stated that Complainant simply walked out and did not quit. I do not credit his testimony that Complainant did not tell him she was quitting her job.

31. Cecunjanin testified that it ultimately became apparent that Vlasenko could not properly fulfill his duties, even working functions where he had little interaction with others, so



he assigned Vlasenko to perform landscaping duties outside the restaurant. When that did not work out, Vlasenko left the job altogether.

32. Complainant testified credibly that she was flabbergasted, appalled and upset by Vlasenko's conduct, she had difficulty performing aspects of her job, she broke into tears, varied her route in order to avoid contact with Vlasenko and she suffered from insomnia. After leaving her employment, Complainant cried all the time, was shaky and felt nauseous. After unsuccessfully trying to deal with her symptoms on her own for several weeks, in July 2007, Complainant saw her primary care physician who prescribed Celexa which she took until September, when she changed her medication to Zoloft, which she stopped taking in December 2007 or January 2008 because it caused her to feel "flat" and emotionless.

### III. Conclusions of Law

#### A. Sexual Harassment

G.L. Ch. 151B, sec. 4(16A) prohibits sexual harassment in employment. Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions or (b) 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 (c) the harassment was carried out by an employee with a supervisory relationship to Complainant or Respondent knew or should have known of the harassment and failed to take prompt remedial action to stop the sexual harassment. See, College-town Division of Interco. v. MCAD, 400 Mass. 156, 165 (1987). I conclude that the conduct of Vlasenko, including unwelcome touching and sexually

offensive comments to Complainant that caused her to alter her route to avoid him at work, caused her to cry and to have difficulty performing her duties, such as carrying trays, created a hostile work environment for Complainant that interfered with her work performance. Since Vlasenko was not a supervisor, Respondent is liable for his offensive conduct only if it knew or should have known of the harassment and failed to remedy the situation. College-town, supra. In this case the credible evidence was that Respondent, through its owner Abaz Cecunjanin, was aware of Vlasenko's conduct. In November 2006, Cecunjanin suspended Vlasenko's employment, thus temporarily remedying the situation for Complainant. However, on May 17, 2007, Complainant was unpleasantly surprised to learn that Vlasenko had been returned to the workplace and after an argument with owner Cecunjanin over Vlasenko's reemployment, she left the workplace for good.

#### B. Continuing Violation

G.L. Ch. 151B § 5 requires that complaints be filed within 300 days of an alleged incident of discrimination. An exception to this rule exists where the Complainant proves that the conduct constitutes a continuing violation. Cuddyer v. The Stop & Shop Supermarket Company, 434 Mass. 521 (2001); Couture v. Central Oil Company, 12 MDLR 1401, 1419(1990).

For actions that occur 300 days prior to the filing of a complaint to be actionable, there must be at least one incident of discriminatory conduct within the statute of limitations period which substantially relates to, or arises from, earlier discriminatory conduct and anchors the related incidents, thereby rendering the entirety of the claim timely. See Cuddyer, supra. at 531-532; 804 Code Mass. Regs. §1.10(2)

Complainant filed her complaint with this Commission on February 14, 2008. Her only interactions with Vlasenko occurring within the 300 day limitations period were in May 2007 when he merely greeted her at the restaurant door and on May 17, 2007, when Complainant observed Vlasenko working once again at the restaurant, confronted Respondent's owner about his presence and left her job. Respondent asserts that because neither of these incidents was sexual in nature, that there is no anchoring event bringing the earlier incidents of sexual harassment within the statute of limitations. Alternately, Complainant argues that by returning Vlasenko to the workplace, Respondent failed to provide effective remedial action to stop sexual harassment and this was the anchoring event which was inextricably connected to the earlier acts of sexual harassment, thus making the earlier events timely and ultimately causing Complainant's constructive discharge. I concur with Complainant.

Notwithstanding having suspended Vlasenko for several months, I conclude that Respondent was under a continuing obligation to keep the workplace free of sexual harassment. Cecunjanin may have rehired Vlasenko, in part, out of sympathy for his mental illness and his promise to his mother that he would watch out for him; however, this does not justify his failure to continue to remedy Vlasenko's behavior in the workplace, because Complainant had a right not to be subjected to such behavior. Therefore, I conclude that Respondent's conduct on May 17, 2007 constituted the anchoring event that renders the earlier events timely, resulting in a continuing violation and therefore I conclude that Respondent has engaged in unlawful sexual harassment in violation of M.G.L.c.151B§4 and 16. See Cuddyer, supra. at 533; G. L. c. 151B, §5.

### C. Constructive Discharge

I also conclude that Complainant was constructively discharged. In order to establish a constructive discharge, Complainant must prove that her working conditions were so intolerable that a reasonable person would have felt compelled to resign. See GTE Products Corp. v. Stewart, 421 Mass 22, 34 (1995); Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171 (1997) See generally, MCAD Sexual Harassment in the Workplace Guidelines, VIII - Constructive Discharge. Although the events of May 2007 were not sexual in nature, given Complainant's past history with Vlasenko, when she saw that Vlasenko had been rehired, she had good reason to believe that Vlasenko's inappropriate behavior would resume and when she complained to Cecunjanin about Vlasenko's rehire and was told to be mature and put up with it, she had no reason to believe that the work situation would improve. Cuddyer, supra. I conclude that Respondent's actions following her complaint would have compelled any reasonable woman in Complainant's position to resign. There is sufficient evidence that Respondent engaged in unlawful sexual harassment and caused Complainant to be constructively discharged from her employment in violation of MGL c. 151B.

### IV. REMEDY

Pursuant to M.G.L. c.151B §5, the Commission is authorized to grant remedies in order to make the Complainant whole. This includes an award of damages to Complainant for lost wages and emotional distress suffered as a direct and probable consequence of her unlawful treatment 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).

An award of emotional distress “must rest on substantial evidence and its factual basis must be made clear on the record. Some factors that should be considered include: (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 (e.g., by counseling or by taking medication).” Stonehill College vs. Massachusetts Commission Against Discrimination, et al, 441 Mass. 549, 576 (2004). In addition, complainant must show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. “Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable.” Id. at 576.

Complainant testified credibly that she was flabbergasted, appalled and upset by Vlasenko’s conduct, she had difficulty performing aspects of her job, she broke into tears and varied her route in order to avoid contact with Vlasenko and she suffered from insomnia. After leaving her employment, Complainant cried all the time, was shaky and felt nauseous. After unsuccessfully trying to deal with her symptoms on her own for several weeks, in July 2007, Complainant saw her primary care physician who prescribed Celexa, which she took until September, when he changed her medication to Zoloft, which she stopped taking in December or January because it caused her to feel “flat” and emotionless. Complainant’s testimony on her emotional distress following her constructive discharge was scant and was confined to a period of time lasting several months. Therefore I conclude that her distress was not long-lasting and severe. I nonetheless conclude she suffered some distress as a direct result of discriminatory treatment and constructive discharge by Respondent and I award her damages for emotional

distress in the amount of \$20,000.00. I conclude that Complainant is not entitled to lost wages because she failed to mitigate her damages by seeking employment.

V. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, §5, it is hereby ordered that:

1. Respondent immediately cease and desist from engaging in discrimination on the basis of gender and sexual harassment.

3. Respondent pay to Complainant the sum of \$20,000.00 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.

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 19th day of December, 2012

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JUDITH E. KAPLAN,  
Hearing Officer