

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
ANA CABRAL

v.

Docket No. 06-BEM-00942

PROTECTION ONE ALARM
MONITORING, INC. &
WILLIAM HOOPER

Appearances: Jason C. Howard, Esq. for Complainant
Thomas V. Laprade, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 7, 2006, Complainant, Ana Cabral filed a complaint with this Commission against Respondents, Protection One Alarm Monitoring, Inc., her former employer and William Hooper, her former supervisor at Protection One. Complainant alleged that she was subjected to sexual harassment by William Hooper and as a result she was forced to resign from her position as Operations Clerk/ Service Coordinator at Protection One's Westwood location on November 17, 2005.

The Investigating Commissioner found probable cause to credit the allegations of the Complainant and efforts to conciliate the matter were unsuccessful. The case was certified for a hearing on August 14, 2009 and a hearing was held before the undersigned hearing officer on June 22, 2010. The parties submitted post-hearing briefs. Having duly considered the record in this matter and the post-hearing briefs of the parties, I make the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. Complainant, Anna Cabral, began her employment with Respondent, Protection One, at its Westwood, Massachusetts location on or about September 27, 2004.

2. Protection One is in the business of providing service and support of residential and commercial alarm monitoring systems.

3. Complainant was employed by Protection One as an Operations Clerk/Service Coordinator. Her duties and responsibilities included answering service telephone calls and utilizing the company's computers and software system to schedule service calls and address customer service issues.

4. Respondent, William Hooper was Respondent's Service Manager and Complainant's immediate supervisor. He monitored her job performance on a daily basis and completed her periodic performance review. Complainant was the only female subordinate that Hooper had supervised.

5. Complainant and Hooper shared office space in a relatively small office, a diagram of which was made a joint exhibit. Complainant's desk was located against one wall of one side of the office. Hooper's desk was located against the wall opposite Complainant's and when seated at their respective desks, their backs were to each other.

6. Complainant testified that in the first few months of her employment her relationship with Hooper was professional. In the early months of 2005, Complainant became dissatisfied with Hooper's management style and certain criticisms he had of performance. In early February of 2005, she complained to Judy Lucas, the Office Manager of the Westwood location that Hooper was difficult to work for, was very demanding, corrected her too much, and was too critical of her. Hooper apologized to

Complainant, and the matter was resolved. She stated that Hooper gave her a cactus plant and a card when he apologized and wrote in the card that he was like a cactus, “rough on the outside and warm and fuzzy on the inside.” Complainant thought this was a nice gesture and it improved relations between them.

7. According to Complainant, there were no incidents with Hooper that she perceived as sexual harassment prior to the Fall of 2005. She stated that they conversed often and discussed current affairs and their personal lives. She was open with Hooper about her unhappy relationship with her boyfriend at the time. According to Complainant, Hooper discussed going to church and restaurants with his wife.

8. In August of 2005 Complainant received a positive performance review from Hooper and received a merit based pay raise from her then wage of \$12.75 per hour to \$13.23 per hour.

9. Complainant testified that beginning approximately in October of 2005, Hooper made some comments to her that made her uncomfortable and she felt that he was invading her personal space and coming to her desk frequently to use a heavy duty stapler. She stated that Hooper never touched her inappropriately when he approached her desk to use the stapler and she moved the stapler away from her desk after a week or so. Hooper testified that Complainant never voiced any discomfort with him using the stapler nor did she ever indicate to him that his approaching her desk made her uncomfortable. According to Complainant, Hooper would sometimes stand behind her to assist her with a computer problem, but only if she called him over to ask him for help. Complainant also testified that at other times Hooper would stand close by to monitor her phone conversations with customers, because he felt that she mumbled and he could not understand her. She stated

that she felt attacked because English is not her first language. Complainant did not testify that these actions made her feel uncomfortable, intimidated or threatened.

10. Complainant testified that sometime in October of 2005, Hooper discussed a conference that he attended and noted that the shades in his room were not working properly, telling her that he must have given everybody a good show. She testified that she did not know why he said this, but that this was one of the comments that made her uncomfortable. Hooper recalled talking to everyone in the office about the religious conference he attended and how the hotel was oddly designed and how he could look out of the window in his room to what appeared to be an overflow area for the hotel lounge. He denied that there was any problem adjusting the shades in his room but stated that he might have used the word “show” but stated he more likely stated he might “see a show” or “get a show” because his room overlooked the lounge area. I credit Hooper’s testimony.

11. Complainant also testified that during this same time period, her relationship with her boyfriend was deteriorating. She stated that her boyfriend was unemployed and that they had moved in together and she was supporting him. In October of 2005, she discovered he was cheating on her, which upset her a great deal. Sometime in October of 2005, her boyfriend was the victim of a shooting. Hooper testified that Complainant told everyone that she was in a fragile state with her boyfriend. He stated that she would talk on the phone with her boyfriend frequently and cry and then disappear to the ladies room for up to half an hour. I credit his testimony.

12. Complainant testified that on November 7, 2005, she asked Hooper a question and he came over to her workstation at her request and then stood behind her while she was seated at her desk and pressed his erect penis into her back at her bra line, for about a

minute while answering her question. According to Complainant, she froze and said nothing to him. She worked the rest of the day which was a Monday and the rest of the week and did not report the incident to anyone. Hooper denied the allegations. He testified that he frequently went over to Complainant's desk to give her instructions and he did this on a regular basis. He also told Betsy Scott, a Vice President of Human Resources for Respondent, that Complainant is a large woman and sometimes if he leans over to help her on the computer, he might inadvertently rub up against her arm. (Ex. C-1 p.0075) He admitted that his reaction to the accusation was to say, "I don't go near her."

13. On November 14, 2005 Complainant sent an email to Office Manager Judy Lucas complaining about Hooper, stating she'd complained about "this issue before," and that Hooper "berates" her and "makes lewd comments, and "no matter what you say or do, he's always right, there's no changing him." She also stated that she felt she was being harassed and wouldn't put up with it anymore. In that email she also informed Lucas that she had already consulted with an attorney and that Hooper "must be stopped." Her email did not mention anything about the allegation that Hooper pressed his erect penis into her back and she alleged that this was because she didn't know how to say it. After writing the email on November 14, Complainant went to see Judy Lucas and claims that she told Lucas about the erect penis allegation. Lucas is deceased and did not testify at the public hearing. According to Complainant, Lucas told her that they would move her office and that she would not have to work with Hooper. Complainant testified that her father was admitted to the hospital on that Monday and she informed Lucas she would not be coming to work for the rest of that week. November 14, 2005 was Complainant's last day of work, as she chose not to work with Hooper while an investigation was conducted. She resigned her

position over the phone with Betsy Scott of Human Resources on November 17, stating that she could no longer work with Hooper.

14. Betsy Scott was assigned to investigate Complainant's allegations against Hooper. At the time Complainant told Scott that the incident wherein Hooper allegedly pressed his erect penis into her back, occurred in late October, but testified she was not clear on dates and could not recall dates. Scott's notes of her interview with Complainant mention a number of complaints, most of them relating to her general discontent with Hooper as her supervisor and having nothing to do with sexual harassment. Scott testified that Judy Lucas never informed Scott about Complainant's most serious allegation and there is nothing about the penis incident in Scott's notes of her initial conversation with Judy Lucas (Ex. 1, p.00075) Scott testified that if Lucas had told her about the penis incident, she most certainly would have noted it in her notes of the interview and I credit her testimony. It was only when Scott spoke to Lucas in a follow up interview, and asked Lucas about her reaction when Complainant relayed the erect penis incident, that Lucas denied Complainant ever told her about the incident, saying "she never told me that, I would have remembered and would have told Steve" [Hooper's manager]. Lucas also told Scott that it would have been impossible for that to have happened because the backs of the chairs are too high and Hooper is not very tall. (Ex. 1, pp.00075- 0076)

15. Scott testified that during the course of her investigation she learned that the relationship between Complainant and Hooper was strained, that Hooper was a perfectionist and detail oriented and liked things done a certain way, and that he was always coaching Complainant, asking her a lot of questions, and standing behind her to observe her work. Both Hooper and Lucas told Scott that Complainant has lots of "mental

issues” is very emotionally sensitive and emotionally fragile. (Ex. C-1, pp. 0074-0075)

She also learned from Hooper that Complainant had missed a lot of work and that Hooper had given her paid time off, even though this was not in compliance with the company attendance policy. Scott testified that the last thing Complainant told her about was the penis incident and that she seemed to talk a lot about the stapler and her primary focus was Hooper coming over to use the stapler. Complainant told Scott that she felt like Hooper didn't trust her and didn't think she could do the job.

16. Respondents investigated whether or not Complainant's allegation that Hooper rubbed his erect penis into the middle of her back was feasible given the height of Complainant's chair and Hooper's height. Scott testified that she asked Judy Lucas and Hooper to check out the chair and they took a picture of Hooper standing behind the chair. (Ex. R-15A) Scott determined that the top of the chair was above Hooper's belt line and thus it would have been impossible for the incident to have occurred. Respondents demonstrated at the hearing using the chair in question that it would have been physically impossible for the incident to have happened the way Complainant recounted it. (Ex. C-1, p.0076)

17. Scott testified that she concluded there were communication issues between Complainant and Hooper related to his management style and because he was a detail oriented supervisor who might make subordinates feel inferior. Scott encouraged Complainant to return to work and told her they could work things out, but Complainant stated she could not work under Bill and was resigning.

18. Complainant claimed that she did not find comparable work for some forty-two weeks, almost two years after she left Respondent. She worked part-time at I-Hop and

part-time weekends at another alarm company. She also testified that she suffered emotional distress as a result of the incident and the company's response, but that the feelings eventually dissipated. There was evidence that a few months before the alleged incidents of harassment, when Complainant's car was stolen, she went to the emergency room because of the stress from that event and saw a psychiatrist who reported her having suicidal ideation because of the stolen car. Complainant sought no mental health counseling after the purported incidents at issue in this case.

III. CONCLUSIONS OF LAW

General Laws Chapter 151B §4(16A) prohibits sexual harassment in employment. *Ramsdell v. Western Bus Lines, Inc.*, 415 Mass 673, 677 (1993); *Doucimo v. S & S Corporation*, 22 MDLR 82 (2000). 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; (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, or sexually offensive work environment." G.L. c. 151B § 1(18); *Collegetown Division of Interco v. Massachusetts Commission Against Discrimination*, 400 Mass. 156, 165 (1987).

A sexually hostile work environment occurs when unwelcome or offensive conduct is so pervasive that it creates a barrier to Complainant's full and untrammled participation in the workplace, alters the terms and conditions of her employment or unreasonably

interferes with her work performance. *See Ramsdell v. Western Mass. Bus Lines, Inc.*, 415 Mass. 673, 677 (1993).

The determination of whether the conduct complained of creates a sexually hostile work environment and thus constitutes sexual harassment depends upon the nature, severity and frequency of the conduct, and whether it is unwelcome and offensive to the reasonable person. The conduct must be sufficiently severe and pervasive to interfere with a reasonable person's work performance. *Muzzy v. Cahillane Motors, Inc.* 434 Mass. 409 (2001). The alleged conduct must be both objectively and subjectively offensive from the perspective of a reasonable person. *Ramsdell, supra.* at 677. The objective standard means that evidence of gender harassment is to be considered from the "view of the reasonable person in plaintiff's position." *Muzzy, supra.* at 411-412.

Complainant in this case alleges that she was the victim of a sexually hostile work environment and that she was constructively discharged from her employment with Respondent as a result of the harassment and Respondent's refusal to remedy the harassment. The crux of Complainant's charge is that her supervisor, William Hooper, had some discussions with her that she thought were sexually inappropriate, made her uncomfortable by invading her personal space, and lastly that he rubbed his erect penis against her back on one occasion when he was standing behind her chair answering a question related to something on her computer.

Earlier in their working relationship Hooper gave Complainant a card and a cactus to apologize for some work related problems they were experiencing that had nothing to do with sexual harassment. In this card Hooper stated that he was rough on the outside like a cactus but warm and fuzzy on the inside. I believe that this was Hooper's awkward way of

apologizing by stating that although he may be prickly on the outside, he was a nice person underneath. Complainant was not offended by this and stated that she thought it was a nice gesture.

Complainant alleged that beginning in October of 2005, Hooper frequently approached her desk to use her stapler and that this made her uncomfortable. She admitted that he never touched her inappropriately on these occasions and that after about a week she moved the stapler to another location. She also stated that sometimes Hooper would stand over her to instruct her with a computer problem or to answer a computer question. She admitted that she did not feel in any way threatened or intimidated by Hooper's approaching her to use the stapler or to assist her on the computer. Hooper stated that because Complainant was a large woman, on occasion he may have inadvertently touched her arm while assisting her at the computer, but that he never sought to intentionally or inappropriately invade her personal space. I credited his testimony in this regard.

Moreover, I do not believe that Hooper made lewd or sexually harassing comments to Complainant that she found offensive. She testified about Hooper discussing a religious conference he attended and commenting about a giving a "show" suggesting there was a sexual undertone to the comment. I am not persuaded that Hooper's comment, even if interpreted as Complainant suggests, rises to the level of actionable sexual harassment. Complainant testified about other comments Hooper made concerning the workplace, or in general conversation, that she disagreed with, but none of them had any sexual connotation. Nor did such comments appear designed to sexually offend, intimidate or harass her.

However, the evidence does suggest that Hooper closely observed and monitored Complainant's work out of concern for her ability to perform the job and to communicate

accurately with clients. Complainant clearly viewed his management style as overbearing, as was noted in her testimony and her complaints about him to Lucas and Scott. I believe that she viewed this monitoring of her performance as harassment and was generally discontent with Hooper as her supervisor. If Complainant felt harassed by Hooper, it was clearly in areas related to her job performance and his criticism of her ability to do the job in conformance with his expectations.

Hooper's alleged comments or perceived invasion of Complainant's personal space did not constitute pervasive and unwelcome harassment that created a sexually hostile work environment. I find that these actions, exclusive of the allegation of inappropriate touching, fall short of actionable sexual harassment. Even if they had occurred as Complainant alleges, they were not sufficiently severe or pervasive to alter the conditions of Complainant's employment and create an abusive work environment.

The most serious of Complainant's charges involves an allegation that Hooper rubbed his erect penis against her back on one occasion in early November 2005, while leaning over her chair. She alleges that she froze in her chair and so was traumatized by this event that she was ultimately compelled to leave her employment with Respondent. Despite the seriousness of this allegation, Complainant did not complain to Lucas until several days later. Respondents investigated the allegation promptly and proved by demonstrable evidence that this action was physically impossible and could not have occurred given the height of Complainant's chair and Hooper's height. Hooper adamantly denied that the event occurred and the physical evidence suggests that this event did not occur.

Moreover, Betsy Scott, who conducted the investigation into Complainant's allegations, testified that Lucas informed her that Complainant did not relay this most serious of allegations to Lucas when she complained to Lucas about her difficulties working with Hooper. This assertion is supported by the fact that Scott's notes of her initial interview with Lucas make no note of this incident. According to Scott, in a follow-up interview with Lucas, Lucas was shocked to hear this allegation and denied ever hearing it from Complainant. This certainly calls into question Complainant's credibility on the issue of whether she reported this incident to Lucas. Lucas was someone who Complainant trusted and felt comfortable with and the fact that she did not discuss the incident with Lucas suggests that she may have fabricated it after the fact. Not only is there evidence that Complainant consulted with an attorney almost immediately after the purported incident, the evidence is clear that Complainant's problems at Respondent coincided with a very difficult time in her personal life. By all accounts, she was emotionally fragile and was reported to have been suicidal a few months earlier over the theft of her car.

The Complainant also alleges that she was constructively discharged from her employment with Respondent as a result of Hooper's alleged sexual harassment and the company's failure to respond adequately to her charges.

A constructive discharge occurs when an "employer's conduct effectively forces an employee to resign." *GTE Products Corporation v. Stewart*, 421 Mass. 22, 33-34 (1995). Constructive discharge requires a conclusion that working conditions were so difficult as to be deemed intolerable. *Id.* at 34. In this case, there is substantial evidence that Complainant was dissatisfied with her supervisor's management style and his criticism of her job performance, and that her complaints and resignation were more likely motivated

by her general dissatisfaction with the workplace, rather than resulting from a hostile work environment. Complainant was also unhappy with the conclusions of the investigation into her allegations and chose not to return to work at Respondent. Given my conclusion that Complainant was not subjected to a sexually hostile work environment and that her work environment was not abusive, she has no actionable claim for constructive discharge.

In light of the above, I conclude that Respondent is not liable for violations of G.L. c. 151B and that the Complaint should be dismissed.

V. ORDER

The Complaint in this matter is hereby dismissed. 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 (10) days of receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 21st day of June, 2011.

Eugenia M. Guastaferrri
Hearing Officer