

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
DANIELLE M. MILLS and
APRIL L. RONAN,
Complainants

v.

DOCKET NOS. 09-BEM-02162
09-BEM-02956

A.E. SALES, INC. and ERNEST
PRETE,
Respondents

Appearances: Steven Rosenberg, Esquire for Complainants
Steven E. Murra, Esquire for Respondents

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On August 18, 2009, Complainant, Danielle M. Mills (hereinafter “Mills”) filed a claim of discrimination alleging sexual harassment and retaliation in violation of G. L. c. 151B, §4, ¶¶ 1, 4, 4A and 16A against Respondents, A. E. Sales, Inc. and Ernest Prete.

On November 16, 2009, Complainant, April L. Ronan (hereinafter “Ronan”) filed a claim of discrimination alleging sexual harassment and retaliation in violation of G. L. c. 151B, §4, ¶¶ 4A and 16A, and Title VII, against Respondents, A. E. Sales, Inc. and Ernest Prete.

The Investigating Commissioner found probable cause to credit the allegations of both Complainants Mills and Ronan. Conciliation efforts were not successful and the matters were certified for hearing. A hearing was held before the undersigned hearing officer on November

13, 14, 15, and 16, 2012. Having reviewed the record in this matter and the post-hearing briefs submitted by the parties I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Respondent, A. E. Sales, Inc. is an automobile repair shop located in Lexington Massachusetts, specializing in the repair and service of high end foreign automobiles. Respondent, Ernest Prete, is the sole owner of A. E. Sales, Inc. A.E. Sales, Inc. employs mechanics and technicians who service customers' automobiles and office/customer service staff. At all relevant times, A. E. Sales, Inc. had at least six (6) employees.

2. Complainant, Danielle Mills, began working for A. E. Sales, Inc. in January of 2007. Mills interviewed with Ernest Prete and Prete hired her to be a Service Advisor or Service Writer. Mills' job responsibilities included customer relations, including writing service orders, giving estimates, scheduling appointments, ordering parts, and invoicing. (Ex. C-1) Mills worked Monday through Friday and occasionally on Saturdays, generally from 8:00 a.m. to 6:00 p.m., and reported to Prete in his capacity as the owner.

3. Complainant April Ronan, began work at A. E. Sales, Inc. on or about June 10, 2009. Ronan was hired to assist her co-complainant, Danielle Mills, and performed other jobs such as helping to develop marketing strategies, filling in for absent employees and cleaning. Ronan worked Monday through Friday from 9:00 a.m. to 5:30 or 6:00 p.m., as well as an occasional Saturday. Ronan's direct supervisor was Danielle Mills. Ronan's last day of work for Respondent was July 16, 2009, a mere five weeks after her employment commenced.

4. Ronan testified that she was looking for a job on Craig's List and responded to a posting placed by Prete. Her initial reaction to the job posting was that it was unusual because it said

‘we do not discriminate’ yet the ad contained comments about race and body types, and stated that certain cultures did not get the “work thing.” (Exhibit C-9) The job posting asked that applicants not send a resume, but instead send a list of things they like to do.

5. When Ronan responded to the job ad, Prete asked her in an email (Exhibit C-11) to answer a riddle which had three letters in it. She initially thought “sex” was the answer he was looking for, but upon reflection, she could not believe a prospective employer would pose such a question, so she responded with the word “JOB.” (Exhibit 12) Ronan testified that the unusual job posting, the email exchange she had with Prete regarding her application, and the interview itself, made her feel ill at ease, but she was intrigued by Prete’s unorthodox hiring methods. She was uncertain about whether the ad was a joke or if it was genuine and Prete was just an unusual person.

6. Ronan testified that her interview with Prete “went okay,” except for his comment at the beginning of the interview, that she “got everyone’s attention when she walked from her truck into the building.” His comment made her uncomfortable because she was uncertain if Prete was commenting about her looks. According to Ronan, she did not realize until after she began working at A. E. Sales, Inc. that the interview process itself was part of a pattern of sexual harassment she would endure throughout the course of her employment. I credit her testimony.

7. Both Mills and Ronan testified that Prete repeatedly leered quite obviously at their cleavage and/or breasts and that this made them very uncomfortable. Both Complainants demonstrated how Prete would lean over the service counter where they worked and would look down their blouses. According to their testimony, Prete’s conduct was not subtle, and occurred repeatedly throughout their employment. Mills testified that Prete made comments to her or others about her breasts and that she felt humiliated by Prete leering at her chest. Her initial

response was to cover up and turn away, and she began wearing sweatshirts, hoodies and/or tee shirts, to discourage this behavior. Prete told her the hoodie made her look like a thug and that hoodies did not belong in Lexington. She felt that Prete singled her out as a female, and when she asked him why it was okay for the guys to wear hoodies and not her, he responded he would fire her if she wore a hoodie to work. Mills nonetheless continued to dress down at work by wearing tee shirts, sweatshirts and jeans so that she would look less attractive. Since Prete was the owner of A. E. Sales, Inc., there was no one in the company to complain to about his behavior, although she did discuss the situation with female co-workers.

8. When Ronan started work at A.E. Sales, Inc. on June 10, 2009, she worked at the service counter as an assistant to Danielle Mills. During Ronan's first week at work, Prete came over to the service counter where she and Mills were seated, leaned over the service counter and looked down their shirts. Ronan testified that Prete did this with a smirk on his face and said "we love low necklines." She reacted by crossing her arms over her chest to cover up and walked away to try and compose herself because she was in disbelief at Prete's behavior. Ronan testified that she asked Mills, "Did that really just happen?" Mills responded that Prete had done this to her in the past and that it was time to start wearing sweatshirts again. Ronan testified that she was upset and humiliated by Prete's behavior and that Mills' response did not sit well with her. Nonetheless she took the advice and started wearing vests and sweatshirts at work to cover up. When she did so, Prete would comment that his female employees should "wear low necklines and show more skin." On another occasion Prete told Ronan that there was a new work policy of, "wear your bathing suit to work day." Ronan understood Prete's comment to mean she should wear less clothing to work and show more skin, which she found offensive. She believed Prete made the comment because he did not like them changing their work attire to

sweatshirts and vests.

9. Mills testified that Prete's leering was all the more embarrassing because it was often witnessed by the technicians in the shop, guys she worked with or supervised. She felt that Prete's demeaning behavior caused the technicians to lose respect for her. A. E. Sales mechanics James Coogan, Kenneth "Chip" Myers, Keegan Van Sicklen and Chris Spartichino testified that they witnessed Prete's repeated act of leaning over the counter and staring at Complainants' breasts. Prete admitted leaning over the counter and looking down at the Complainants; however, he testified this was to demonstrate to Complainants how his customers reacted to them, and was an attempt to use humor or satire to convey the message that Complainants were not dressing appropriately. Prete stated that he believed skimpy outfits or low cut plunging necklines to be inappropriate dress in his workplace and that he was attempting to convey this to Complainants. He conceded that he never considered issuing a memorandum about appropriate work attire, but instead asked his part-time bookkeeper to speak with the Complainants about their dress. The bookkeeper denied being asked to do this and she never spoke with Complainants about work attire. I credit the testimony of Complainants and their co-workers regarding the multiple incidents where Prete leaned over the service counter and leered down their shirts.

10. Mills claimed she was offended and humiliated on two separate occasions when Prete told her that she should choose her work outfit from a Fredrick's of Hollywood catalogue. The first time Prete did this he was addressing both Complainant and the bookkeeper. On the second occasion, Prete dropped the Fredrick's of Hollywood catalogue on the desk where Mills and Ronan sat, and asked them to pick out their outfits from the catalogue, telling them that stiletto heels would be required. This incident was witnessed by Van Sicklen, Coogan and

Spartichino. Prete admitted asking both Complainants to pick out “French Maid outfits” from the Fredrick’s of Hollywood catalogue, but purportedly told them it was the idea of Van Sicklen and Spartichino, both of whom denied making this suggestion. Prete testified that the Fredrick’s of Hollywood comment was not meant to be serious and could only be viewed as funny by anyone with a sense of humor.

11. Mills testified that she felt humiliated by a May 5, 2009 email Prete sent her that pictured a blonde woman in ripped jeans walking with her “butt” exposed. The email from Prete stated “you were spotted walking” and “FYI, ... someone is checking you out D!” (Exhibit C-4). Prete testified that he sent Mills this email to “cheer Danielle up” because she seemed depressed and he thought the email would make her feel better about herself. Mills testified that the email had the opposite effect; it humiliated her and she felt singled out by this unwelcome conduct.

12. According to Mills, Prete made numerous unwelcome sexual comments to her over the course of her employment, which included the following:

- a. Telling her if she wanted a raise, she would have to go into his office and see him raise; which Complainant understood as meaning she would have to perform a sex act on him if she wanted a raise;
- b. Calling Fridays “birthday suit Fridays”;
- c. Saying, “We are like ‘gynos;’ we like to check out what looks nice”;
- d. Making numerous comments about her breasts;
- e. Making references to prostitute ads he browsed on Craig’s List; and
- f. Telling numerous sexual jokes directed specifically at Mills.

There was ample evidence that Prete directed frequent sexual comments and “jokes” to Mills over the course of her employment.

13. Mills testified that she discussed Prete's "sex comments" and acts with Respondent's bookkeeper. On April 1, 2009, Mills sent her an email which stated "he makes me want to vomit! I hate to listen to him and his sex comments." The bookkeeper responded, "just smile and laugh and vomit in your mouse [sic] like I do." (Exhibit C-3). The bookkeeper testified that she could not remember whether she discussed Prete's "sex comments" with Mills, but her response to Mills' email confirms the likelihood that they had some discussion about Prete's behavior and supports Mills' testimony that she viewed Prete's comments and behavior as offensive.

14. Jim Coogan, Keegan Van Sicklen, Kenneth "Chip" Myers, Christopher Spartichino and Victor Stewart all testified that Prete frequently told sexual jokes and made sexual comments. They admitted that while the mechanics also occasionally joked around, Prete made most of the sexual jokes and was the only one who did so in the presence of Complainants. I do not fully credit this testimony and find that it is more likely than not, that they participated in and contributed to the bawdy, raucous, sexualized work environment.

15. There was evidence that Mills also participated in this joking. Throughout her employment at A.E. Sales, Mills often sent or forwarded emails to Prete and others containing inappropriate, off-color, sexual jokes and other jokes in bad taste. At times she initiated or was a willing participant in sending off-color, adult humor and sexually suggestive jokes and cartoons which she generated, passed on or emailed to Prete, co-workers and others in her personal circle. Prete was often included in her circle of email recipients throughout her employment with A.E. Sales. (Exhibits R-13 through R-22 and R-27 through R-30) Mill's explanation for why she sent Prete off-color, sexually suggestive jokes or jokes that were generally in poor taste, was that she included Prete reflexively, without even considering who she was forwarding the emails to. I do

not credit this testimony and find that Mills deliberately included Prete in her circle of email recipients.

16. Prete testified that he could not believe that Mills or anyone with a sense of humor, would find his conduct and comments offensive. He based his belief with respect to Mills, in part, on the many sexually suggestive and off-color emails on her computer at work, and the fact that she forwarded many of these emails to him. Prete testified that while he did not find these emails funny and thought they were sophomoric, he came to the conclusion that anyone who had forwarded these emails to him, could not be offended by his conduct and/or comments, and was a willing participant in his office humor. Prete also described the employees as a “riotous, rowdy, boisterous group of guys who engaged in “blue bawdy” humor and that Mills had known many of the guys for a long time, was comfortable with them, enjoyed their humor, and participated in it. Mills claimed that Prete’s conduct and comments to her were not welcome and that by forwarding off color emails to him she did not intend to befriend him or indicate she welcomed any of his conduct. At some point later in her employment, Mills became more vocal about Prete’s sexual conduct being unwelcome, particularly his physical gestures. Prete admitted that Mills did not like to be touched and told him not to touch her. However, I find that for much of her employment Mills was not as put off or embarrassed by Prete’s sexual jokes or innuendo as she claims to have been. Rather, the evidence suggests she willingly participated in the sexual joking at the workplace and found it amusing until her relationship with Prete deteriorated towards the end of her employment.

17. Mills testified that several times throughout her employment Prete would come up from behind her while she was seated at her service counter position and pant or breath heavily on her neck while making “grunting noises” or “creepy noises.” She stated that Prete would

touch her hair or shoulders while making these noises and that she would indicate her displeasure by recoiling from Prete, swatting his hand away and telling him to get away from her. Mills testified that she felt sick whenever Prete touched her and that she made it clear to him by her actions and statements that his conduct was unwelcome. I credit Mill's testimony that she did not invite such conduct and told him to "get away." Prete did not deny that he would come up from behind Mills and touch her or talk in her ear, but stated that he did this to get her attention. I do not credit Prete's reason and find that he thought it amusing to deliberately provoke Mills. Prete admitted that Mills was unequivocal about not wanting to be touched by him.

18. On one occasion, Prete approached Mills from behind, breathed on her neck and made grunting noises, in the presence of her mother. Prete admitted to this conduct, but testified it was to "demonstrate to Complainant's mother how a stalker would react to her daughter." Mills stated she felt humiliated that Prete did this in front of her mother. While I believe that Mills did not find Prete's conduct amusing, and was angered or annoyed by it, I am not persuaded that she felt as disgusted and humiliated as she suggested.

19. Mills testified that one day Prete received what he referred to as a "Penis Pump", at work and that he started bragging about it, showing it to the Mills, and making repeated humping motions simulating use of the pump. Prete did not deny receiving the pump at work or being excited and vocal about receiving it. He testified that he called the pump a "vacuum pump" and that he discussed the pump with Mills in a clinical way, not in a sexual manner, and that its use was related to sexual dysfunction caused by surgery for cancer. I credit Mills' testimony regarding Prete's discussion and simulation of the pump.

20. Both Mills and Ronan testified that Prete brought prostitutes to the workplace and that they found such conduct offensive. Jim Coogan also testified that Prete hired prostitutes and

masseuses whom he brought into the workplace, and that Prete offered their services to him for free. Prete admitted bringing women he contacted on Craig's List into the workplace, but claimed his sex therapist told him he should "get a hooker" to aide in the treatment of the sexual dysfunction caused by his cancer surgery, and that these women were brought in solely for clinical and medical reasons. I find that Prete engaged in such conduct and made no secret of this to the employees, and that Mills and Ronan found this behavior in the workplace offensive.

21. Mills and Ronan testified that they witnessed Prete viewing pornography on his computer at work. Mills testified that she was offended by this and stayed out of Prete's office. Ronan testified that she observed Prete viewing pornography on his computer on at least two occasions, and that this made her uncomfortable. I credit her and Mills' testimony that they found such behavior in the workplace offensive and inappropriate.

22. Mills testified that on one occasion, Prete stapled a condom to her bonus check and told her that if she wanted the bonus she would have to use the condom. According to Mills, Prete handed her the check stating, "this will probably get me in trouble with the MCAD." This incident was witnessed by other employees who were present. Keegan Van Sicklen testified he heard Prete tell Complainant she would have to use the condom if she wanted the bonus. Mills testified that the incident was humiliating and upsetting, but was made worse by the fact that it occurred in the presence of employees she worked with and/or had to supervise. Prete admitted stapling the condom to Mills' bonus check, but testified that he found the condom when vacuuming a customer's car and this was his funny way of making the point that cars should be cleaned and checked before being returned to the customer. Nonetheless, he admitted that it was not Mills' responsibility to clean the cars, and that he did not consider circulating a memorandum or sending an email about the proper cleaning of cars. Prete also admitted saying

something to the effect of “this will get me in trouble with the MCAD,” because, in a prior dealing with the MCAD, he found the agency did not appreciate satire.

23. Both Complainants testified that a sign was hung in the area behind the Service Counter desk where they worked which said “I ♥ oral sex.” Ronan testified that she found the placement of the sign offensive because it was visible to customers who came up to the service-counter and that when a customer was facing her the sign was directly behind her. Ronan testified that she felt ashamed because “it was like the customers would think I accepted the sign.” Ronan also felt it was hard to be taken seriously at work when a customer was looking at her and simultaneously looking at the sign. Ronan complained about the sign to Mills and asked if she could take the sign down. Instead, Ronan turned the sign around so that it could not be seen by customers. She did this at least three (3) times, but each time Prete turned it back. On cross-examination, Prete admitted that he approved of the sign and thought it was funny. He thought the sign was appropriate for the workplace because the sign was “heartily condoned” by one of A. E. Sales, employees who was gay and thought it funny. The employee in question testified that he did not approve of the sign and did not think it was funny.

24. Ronan testified that Prete engaged the services of a computer specialist to give her a training session on the computer. When he introduced her to the computer specialist, Prete gestured toward her and stated with exaggeration “I knew you would like this one.” Ronan testified she believed this was a reference to her body and she was embarrassed and humiliated that Prete would introduce her in that manner to a stranger that she had to sit next to and be trained by, and that his introduction made the entire training exercise very uncomfortable for her.

25. Ronan also worked on a marketing project and website design for A. E. Sales, Inc. Prete told her that she was doing a good job, that he was excited about the website and

marketing, and needed more employees like her. However, Ronan was offended by Prete's suggestion that every picture used to market A. E. Sales, Inc. contain half naked women, and she objected to such methods of advertising or marketing the business. Prete's response to her objection was that "sex sells" and that he considered the artwork for the advertisements to be appropriate.

26. Both Complainants and all their witnesses testified that none of them had ever seen or been made aware of the existence of the Auto Engineering Employee Handbook, produced by Respondents and which contains a model anti-discrimination policy. (Exhibit C-2). Respondents admitted that although A. E. Sales, Inc. had intended to implement the Sexual Harassment Policy contained in the Employee Handbook, there was no credible evidence that the policy was ever disseminated to employees or implemented. The last page of Exhibit C-2 is an "Acknowledgement of Receipt" of a copy of the Employee Handbook. Respondents did not produce a single signed acknowledgement and Prete admitted on cross-examination that no A. E. Sales, Inc. employee had ever signed an "Acknowledgement" for receipt of the Employee Handbook. Based on the testimony and Exhibits, I find that Respondents had not implemented a Sexual Harassment Policy and that no protocols existed for Complainants to report allegations of sexual harassment. Ronan testified that because Prete was the sole owner of A. E. Sales, Inc. there was no one to complain to about his harassment. Since her direct supervisor, Mills, was also the target of Prete's harassment and there was no human resource officer, she felt there was no recourse for remedying the harassment.

27. Mills and Ronan were aware of the fact that another young female employee alleged that Prete hit her on one occasion. Both testified that they came to be frightened of Prete, at least in part because of the allegations that he had struck a female employee. Christopher Spartichino

testified that he was told by the female employee that Prete had struck her and he overheard her tell Prete several times not to hit her again. Prete testified that he merely touched her cheek to get her attention, but did not “hit” her, and kept insisting to her that he had not done so. No one witnessed the incident. I credit the testimony of the Complainants that word of this event raised concerns that Prete had become sufficiently volatile that he was capable of striking one of them, but I find that Ronan was significantly more frightened of and intimidated by Prete than Mills was.

28. Ronan testified that Prete’s actions and comments made her feel ashamed and she felt guilty about putting up with the harassment because she needed the job. She felt uncomfortable and humiliated working at a job where the boss made frequent and continuing references to sex. She felt it sent a message that she was viewed as a sex object and not valued for her work. She took great umbrage at the sign referencing oral sex that hung above where she sat and the message it sent to customers. Ronan always felt anxious and uptight at work and hoped that Prete would leave her alone and not come out of his office to harass and abuse her. Her stomach would be in knots at the thought of Prete engaging in sexual or abusive behavior towards her. She described in detail how these feelings of anxiousness lead to panic attacks which left her feeling short of breath and very tense. She testified that she had a number of panic attacks while working at A. E. Sales, Inc., and that when they came on, she would go outside to calm down. Ronan also testified to panic attacks after she left Respondent when she felt stressed by her inability to pay rent and her bills. I credit her testimony that she felt considerable stress at work because of Prete’s behavior and that this lead to her resigning a mere six weeks into her employment because she could no longer tolerate Prete’s harassment and abusive behavior. She discussed his behavior with Mills, but there was obviously nothing Mills could do, since Prete

treated her in the same manner.

29. Despite needing her job very badly, Ronan felt so humiliated and intimidated by Prete's behavior that she decided to resign, after she had a confrontation with him while attempting to discuss his offensive behavior and he completely dismissed her and told her to shut the f—k up. On July 16, 2009, Ronan submitted a Letter of Resignation. (Exhibit C-14) Her letter stated that the "reasons for terminating employment are because I have been harassed by the owner, Ernie Prete sexually and verbally. Many sexually explicit comments were made. Examples being that "tomorrow is wear bathing suit to work day"; and "we are going to be getting uniforms from Fredrick's of Hollywood." The letter ended by saying Complainant tried to talk with Prete and was told to "shut the f—k up." (Exhibit C-14) Ronan stated she could no longer work under those circumstances. I credit her testimony that she was significantly offended and humiliated by Prete's conduct and felt intimidated by him and fearful of his temper, as demonstrated by her actions after resigning.

30. After resigning on July 16, 2009, Ronan went to the Lexington Police Station to report what had happened. She did this because she knew how volatile Prete could become and she feared how he might react to her resignation and the charges in her letter. Ronan was earning \$637.50 per week at the time of her separation from A.E. Sales, Inc. She remained unemployed for a period of 47 weeks after July 16, 2009 and lost \$29,962.50 in wages. Respondents did not introduce any evidence with respect to mitigation of damages and no evidence was introduced concerning unemployment benefits Ronan may have received.

31. Ronan testified that it was very hard to resign, but that she felt she had to because of Prete's offensive and abusive behavior. Before resigning, she considered the fact that she was a single mother raising a son, would have no income, and would be unable to pay rent or buy

enough food or make her truck payments. Despite these considerations, Prete's abusive behavior compelled her to resign. After her separation she had difficulty paying her rent, and lived for months with the fear that she and her young son would be evicted. She feared seeing her landlord and having a confrontation over her inability to pay the rent, made up excuses and made promises to pay to stave off eviction for months. This situation caused her great anxiety and she felt on edge all the time. Her landlord eventually served her with multiple eviction notices, which caused her to have panic attacks and required her to take prescription medication.

32. Ronan testified that her emotional distress affected her parenting as well. She felt guilty for not providing for her son, and avoided letting him play in a nearby playground because she did not want her landlord to see them. Coping with feelings of stress, depression and sadness also adversely affected her relationship with her son. Ronan was compelled to apply for Food Stamps, which embarrassed her and exacerbated her feelings of depression. She was ashamed that she could not support herself and her child and felt self-conscious every time she had to use food stamps. Ronan testified that she was embarrassed to ask friends and family members for small loans to help her, and was especially depressed at Christmas because she could not buy gifts for her son. She testified that the anxiety she experienced while working at A. E. Sales, Inc. worsened when she left and continued up to the time of hearing. Ronan testified her anxiety continues even now that she is employed. She constantly worries about losing work again and how her co-workers, who are all male, are reacting to her. Preparing for the hearing and recounting the harassment also caused Ronan to feel anxious and on one occasion caused her breathing to become so rapid she had trouble calming herself down. Ronan testified that the feelings of anxiety and panic attacks continued up until the date of the hearing. I credit her testimony.

33. Mills remained employed at A.E. Sales, Inc. for a short time after Ronan's departure, but her relationship with Prete continued to deteriorate. Mills testified that on several occasions, she caught Prete behind her gyrating his hips, simulating sex in what she described as dry humping her from behind. These incidents were witnessed by mechanics Myers, Coogan, Spartichino and Van Sicklen. They testified that Respondent's actions and gyrations could not be mistaken for dancing, as Prete claimed, and that he was definitely simulating sex when he was in close proximity to Complainant and thrusting his pelvis towards her from behind. Mills told Prete to "knock it off," or walked away making known her displeasure. She testified that the most serious of these incidents occurred on both August 5th and August 6th, 2009.

34. On August 5, 2009, Mills was talking with mechanic Van Sicklen about a repair, when out of the corner of her eye, she spied Prete gyrating behind her and thrusting his hips and pelvis at her. She reeled telling him, in no uncertain terms, to stop it. This incident was witnessed by Keegan Van Sicklen. On the very next day, August 6, 2012, Prete engaged in virtually the same exact conduct with Mills in Van Sicklen's bay. This time, Mills turned on Prete with her fist raised and threatened to hit him if he did it again. Mills testified that she was shaking with anger, and was utterly humiliated by Prete's persistent harassment. She testified that she wanted to cry, but instead walked away shaking because she did not want Prete to see her cry. Van Sicklen confirmed Mill's version of what occurred. I credit Mills testimony that she was angry and upset by these incidents. I do not credit Prete's testimony that he was just "dancing." I believe this conduct was undertaken to provoke and antagonize Mills.

35. On August 7, 2009, Mills and Prete argued over a customer's car and whether the repair of the customer's car could be accomplished before 11:00 a.m. – when the customer needed his car back. After the altercation, Prete told Complainant to "get the f--k out." Mills

understood this to mean that her employment had been terminated, since this is the same language Prete had used to terminate other employees. Jim Coogan, Keegan Van Sicklen and Christopher Spartichino also testified that they had heard Prete terminate other employees using the same language. When Prete ordered Mills to “get the f--k out,” she cried, packed her belongings at work, and went home. She telephoned the Attorney General’s office about receiving her last pay check and applied for unemployment benefits. She told her boyfriend that she had been fired. Despite Prete’s assertion that he did not intend to fire Mills, I find that Mills was justified in believing her employment was terminated by Prete on August 7, 2009.

36. At the time of her separation from A. E. Sales, Inc., Mills was earning \$69,000 per year and/or \$1,326.92 per week. Mills testified that she was out of work for four (4) weeks and lost Five Thousand Three Hundred Seven and 68/100 (\$5,307.68) Dollars in wages. Soon after her termination, she began working for Christopher Myers, assisting him in opening a new competing high end car repair business in Concord, MA, where she was the service writer. Mills received unemployment compensation for a short period of time but there is no evidence in the record regarding the amount she collected for the approximately one month that she was unemployed before going to work with Myers.

37. Myers had a business relationship with Prete who asserts that Myers was a co-owner of A.E. Sales as a 10% partner in the business. Their dispute over Myers’ interest in the business resulted in subsequent litigation. Myers quit A.E. Sales on or about June 12, 2009, to begin working as chief BMW mechanic for a competitor in Belmont, MA. Prete testified that the loss of Myers as chief mechanic was significant. Sometime thereafter, Myers assisted his new employer, Village European, which was a direct competitor to A. E. Sales, in opening a second location in Concord, MA, a town adjoining Lexington.

38. Myers had been the foreman in charge of the technicians at A.E. Sales and Prete testified that he also supervised Mills in her capacity as service writer at the front desk. Mills generated the orders, and as chief mechanic, Myers was charged with overseeing the work. After completion of the work, the orders were returned to Mills for billing, payment collection, and preparing the car to return to the customer. During the time leading up to these incidents, Prete was ill from cancer, had a number of surgeries, and took morphine for pain. As a result he lost considerable time from work and he was not in control of the day to day operations for a period of time. He testified that during this time, Myers ran the back of the business and Mills ran the front office. During this time, Myers and Mills worked more closely together and Prete testified that after Myers' departure, Mills became much more hostile to him.

38. According to Prete, Village European featured Mills and Myers prominently in its advertisements to lure away his customers. Prete asserted that Myers and Mills had collaborated to leave A.E. Sales and begin working for a competitor and that this concerted action was undertaken with deliberate attempt to undermine his business. He believed that Mills left her employment at A.E. Sales as part of what he viewed as a pre-arranged insurrection against him. In addition to Myers, A.E. Sales mechanics, Coogan, Van Sicklen and Spartichino all left Respondent's employee around the same time and were not on good terms with Prete when they left. The loss of a number of crucial employees at about the same time caused serious disruption to A.E. Sales' business. Prete also believed some employees were stealing from the company and accused them of this. It was clear from the all the testimony that the business underwent great upheaval during the period of time Prete was ill, that the company was in jeopardy, and there was, and still is, a great deal of bad blood between Prete and his former

employees. I find that these events are partially responsible for the enormous animosity Prete's employees, particularly Mills, displayed towards him.

39. There was also evidence of animosity between Prete and Mills' boyfriend. At some point in 2008, Prete had hired Mills' boyfriend (now her husband) who was unemployed at the time, to do some work at his residence, which included felling some large trees. One of the trees fell on Prete's shed and another fell on a neighbor's property, causing property damage. Prete was upset about this and withheld \$200 from payment to Mills' boyfriend, and accused him of taking his chainsaw. Prete claimed that when Mills confronted him about the hold back and complained about financial difficulties, he lent her \$1000, she seemed happy and they hugged. Despite his offer of a loan to help Mills and her boyfriend through a difficult financial period, Mills' relationship with Prete appears to have deteriorated significantly from this point on. Prete also testified that Mills' boyfriend would come to the shop frequently on his large, very loud, Harley motorcycle, revving the engine loudly. Prete felt this did not fit in Lexington and he'd tell him to pull the bike around the back of the shop and not to park it in customer parking spaces. He stated that Mills and her boyfriend were involved in a "biker scene" that was out of place in Lexington and that they associated with unsavory characters who would hang around the shop.

40. Prete testified that, in addition to giving Mills a loan, he also contributed to a motorcycle event that was a fundraiser in her deceased brother's memory and paid his company's graphic artist for work for the event. Prete provided Mills and other employees with cash for lunch quite liberally, and paid them well. He also testified that Mills came to parties at his home with her then boyfriend. In his view, Mills and other employees did not appreciate his generosity, deserted him, and plotted against in an attempt to destroy his business.

41. Within a month after Mills left A.E. Sales she received a card advertising A.E. Sales and depicting a female Service Advisor, which was Mills' job, staring in a manner that Prete referred to as Mills' "far away stare." The initials "DM" which Mills believes refer to her are handwritten onto the postcard next to the female. The postcard purportedly refers to Mills' new employer, Village European, as Village of the Damned. (Ex. C-5; C-6) Exhibit C-6 depicts a Superhero flying with the decapitated head of the Service Advisor, which Mills believes was meant to be her. Mills testified she felt threatened by the receipt of this cartoonish post card, and frightened by what Prete might do to retaliate against her. Prete also posted a Google review of Village European in which he disparaged Mills and Myers and another mechanic who had left A. E. Sales to join the same competitor. (Exhibit C-7) Mills testified that this review harmed her reputation and she was concerned that a future employer would Google her name and not hire her because of the disparaging remarks in the Google posting. Mills contacted Google in an attempt to have the reference to her removed, but was not successful. I find that Exhibits C-5, C-6 and C-7 were acts of retaliation by Prete for Mills having filed a discrimination claim against him and that these actions upset her.

42. Mills testified that she had anxiety attacks in response to Prete's behavior and she sometimes would become short of breath, or feel like she was going to pass out. She stated that her body would tense up to such a degree that her muscles would ache afterwards and she described these muscle aches as feeling like she had been punched all over her body. I credit her testimony that Prete's touching and references to her body caused her to feel unsettled and tense, and that his references to, and conduct regarding, his sexual dysfunction disgusted her. However, I am not persuaded that his sexual joking caused her anxiety and panic.

43. Mills and her husband testified that Prete's harassment caused her to be depressed and humiliated. According to Mills, she experienced a loss of self-esteem and felt guilty for not quitting and for allowing Prete to continue to sexually harass her. She claims to have gained approximately thirty (30) pounds while working at A. E. Sales, Inc., and even though she knew she was not eating properly and sought counseling, she continued to eat badly, which she attributed to being depressed. The weight gain made her feel less attractive and she stopped caring for herself and did not care about controlling her diabetes or weight. While I do not doubt that Mills suffered from bouts of depression and loss of self-esteem, Mills had other sources of stress in her life.

44. Mills stated that the emotional distress caused by Prete's harassment caused her to withdraw and no longer participate in daily activities that she used to enjoy. Both she and her husband described how she used to enjoy gardening and how her once meticulously maintained garden became overgrown with weeds. They also discussed her disinterest in caring for her home and stated that her home was once meticulously maintained and organized, but is now unkempt and much less clean. They testified that they used to go out frequently and enjoyed playing pool and karaoke, but that Mills no longer wants to socialize and do the things they used to do together. Mills would prepare food and entertain friends for football games at their house, but now she just stays in her room when friends come over. I credit their testimony that Mills altered her life activities but do not believe that all these changes are entirely attributable to the events at her former workplace.

45. There was testimony about Mills lack of energy and how she often seems depressed and sometimes just starts crying. Mills described how she used to organize girls' night out, but stopped doing this. Both she and her husband testified that their sexual relationship has suffered

because of Mills' depression and because she feels bad about herself and her weight gain. While I find that Prete's behavior was a contributing factor to Mills' asserted depression and lassitude, I am not persuaded that that these changes are wholly attributable to his conduct in the workplace.

46. Prete stated that except when Mills was joking with the guys, she always seemed depressed and complained constantly about her weight and could not control her eating, and he would frequently try to cheer her up. He stated that she did not take good care of herself and did not have control of her diabetes. Her husband described her as a "junk food junkie." While Mills denied that she ever discussed her health issues at work, I do not credit this testimony. There was evidence that Mills had gone through a divorce just prior to coming to work at A.E. Sales, had been fired from her previous job, and suffered through the suicide of her brother, who she had been close to.

47. Mills sought therapy with a Licensed Psychologist, Joseph Lillyman in early 2010, some five months after leaving Respondent. She claimed that she first realized the extent of the emotional distress she had suffered when she tried to describe Prete's acts to the MCAD person who assisted her in filing her Complaint in August of 2009. She began to cry and could not get through the intake process without taking several breaks and regaining her composure. Her primary care physician recommended Dr. Lillyman, whom she saw once a week for approximately two (2) years. She stopped treatment for a few months when she was feeling better, but notices from counsel or from MCAD regarding her new activity on her case triggered panic attacks, and she resumed therapy.

48. Dr. Lillyman wrote to Mills' primary care physician that Mills appeared to be suffering from reactive depression with anxiety and panic, as a result of the upcoming MCAD hearing and that this disturbance should pass with the resolution of the court proceeding.

(Exhibit C-8) The letter dated May 3, 2011, stated that Mills was being seen for “interpersonal issues, especially related to difficulties in her previous employment circumstances,” and stated that the upcoming trial in June was triggering anxiety and panic attacks. The letter describes her sleep disturbances and periods of feeling faint, and goes on to recommend she seek psych/pharm anti-anxiety medication. Mills testified that she was prescribed and took Lisinopril, Lorazepam and other medications for her anxiety and panic attacks.

49. Mills claimed that records from the Joslin Clinic, where she was treated for diabetes, and which listed Paxil as a drug she was taking before she claimed the onset of her current depression, were incorrect. Mills testified instead that Paxil had been prescribed for her during her divorce proceedings in 2006 through 2007, but that she only took Paxil for a very short time, and never renewed the prescription. Complainant also testified that while the Joslin records said she was prescribed Lantis, that she had never taken the drug or been prescribed it. I do not credit her testimony that Paxil was not prescribed as part of her treatment at the Joslin Clinic.

50. According to Mills, her emotional distress and/or depression and anxiety began in 2008, but became worse in August 2009 after she recalled the events in her complaint to the MCAD and continued for over three (3) years and that she still suffers from depression, anxiety and panic attacks, despite therapy. I do not find Mills’ testimony about the reasons for the onset of her depression to be entirely credible, as there were significant difficulties and very sad events in her life just prior to her working for Prete, including a divorce, being fired from her job and her brother’s suicide, and these events were likely to have caused emotional upset. I do credit Mills’ testimony that Prete’s harassment exacerbated her emotional distress and that she suffered additional distress as a result of Prete’s retaliatory actions after she was discharged.

III. CONCLUSIONS OF LAW

A. Sexual/Gender Harassment

General Laws, Chapter 151B, §4, paragraph 1, prohibits sexual harassment¹ and gender based harassment in the workplace. *Ramsdell v. Western Bus Lines, Inc.*, 415 Mass. 673, 677 (1993). General Laws, Chapter 151B, §4, paragraph 16A, also prohibits sexual harassment in employment. *Doucimo v. S & S Corporation*, 22 MDLR 82 (2000).²

To establish liability for a hostile work environment based on their sex (female), Complainants must show by a preponderance of the evidence that: (1) they were subjected to gender based unwelcome verbal or physical conduct; (2) the unwelcome verbal or physical conduct was sufficiently severe or pervasive to alter the terms or conditions of their employment at Respondent A. E. Sales, Inc. and create an abusive working environment; (3) the harassment was carried out by an owner, manager, or someone in a supervisory relationship at Respondent A. E. Sales, Inc. *Kelley v. Plymouth County Sheriff's Department, et. al.*, 22 MDLR 208 (2000); *Beldo v. University of Massachusetts*, 20 MDLR 111 (1998). Complainants must demonstrate that their work environment was pervaded by gender-based or sexual harassment that posed a barrier to their full participation in the workplace. *College-Town, Division of Interco v. Massachusetts Commission of Discrimination*, 400 Mass. 156, 162 (1987). If Complainants establish by credible evidence, that Respondent sexually harassed them or targeted them because of their gender – female – they can prove prohibited sex discrimination under G. L. c. 151B

¹ 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.” *Collegetown Division of Interco v. Massachusetts Commission Against Discrimination*, 400 Mass. 156, 165 (1987).

² This case may be analyzed as a claim of hostile work environment based on Complainant’s gender or a hostile work environment sexual harassment claim. The elements of a claim of sexual harassment are similar, but they include the element that the behavior be sexual in nature.

regardless of whether the conduct was “of a sexual nature.” See e.g., *Brown v. Phoenix and Foxwood*, 22 MDLR 160 (2000) (repeated derogatory comments regarding the complainant’s gender constituted unwelcome or harassing conduct); *Rowe v. American Paper Products, Inc.*, 22 MDLR 279 (2000) (sexually explicit conversations about pornography and “nudie bars” coupled with a supervisor slapping the complainant on the buttocks were sufficient to warrant a finding that the complainant’s work place was permeated with gender harassment). In this case, Complainants proffered evidence of both sexual and gender based harassment.

The unwelcome conduct must be both objectively and subjectively offensive from the perspective of a reasonable person in the complainant’s position. *Muzzy v. Cahillane Motors, Inc.*, 434 Mass 409 (2001); *College-Town Division of Interco v. Massachusetts Commission Against Discrimination*, 400 Mass at 162; *Ramsdell v. Western Bus Lines, Inc.*, 415 Mass at 678. Complainant is not required, however, to show that the offensive conduct was sexually motivated. *Melynchenko v. 84 Lumber Co.*, 424 Mass 285, 286 (1997) (finding individual liable under Chapter 151B for vulgar joking despite fact that his conduct was not sexually motivated). There is also no quantitative requirement relative to the number of incidents necessary to constitute a harassment claim. *Gnerre v. Massachusetts Commission Against Discrimination*, 402 Mass 502, 507-508 (1988).

The determination of whether a particular work environment is hostile requires a factual inquiry into all the circumstances, including the frequency and severity of discriminatory conduct. While isolated or occasional comments or incidents may not be sufficient to alter the terms and conditions of employment, a single incident may, in certain circumstances, constitute a claim of sex discrimination. *Candelieri and MCAD v. Vanson Leathers, Inc.*, 24 MDLR 228 (2002); *Pio v. Kinney Shoe Corp.*, 19 MDLR 127, 131 (1997). A single episode of harassment

may constitute actionable sex discrimination if its effect on an employee is profound. *Gnerre v. Massachusetts Commission Against Discrimination*, *supra*. at 506-507; *Morehouse v. Berkshire Gas Co.*, 989 F. Supp. 54, 62 (D. Mass. 1997).

Complainants Mills and Ronan have established that Prete's conduct during their employment at A.E. Sales, Inc. constituted unlawful hostile work environment sexual harassment and gender based harassment. Prete was the owner of A.E. Sales, with complete authority to hire, fire, and direct the work of employees. Both were subjected to unwelcome conduct by Prete that was sexual in nature and/or targeted at them or calculated to offend them because of their gender. Mills was employed for a much longer period of time than Ronan and claims she was subjected to Prete's conduct throughout her employment; however most of the incidents that are tied to specific dates occurred in the latter months of her employment. Notwithstanding, the evidence supports a the conclusion that Prete directed unwelcome verbal and physical conduct toward Complainants that was sexual in nature, and that his conduct was sufficiently severe and pervasive to alter the conditions of their work environment at Respondent A. E. Sales, Inc.

There was ample evidence that Prete engaged in unwanted touching of Mills and leering at Mills and Ronan's breasts. Both Complainants testified credibly that the offensive acts and comments by Prete were pervasive. They both testified that Prete frequently leered at their chests, making it clear he was looking at their cleavage and/or breasts. They demonstrated how Prete would lean over the counter and stare; sometimes making comments to them or to others about their bodies or reference to sexy clothing. Mills testified this occurred throughout her employment and that in response she modified her dress at work by wearing hoodies, sweatshirts or tee shirts to discourage this behavior and to be less attractive at work. A number of the male mechanics witnessed this behavior, and I credit their testimony that this occurred frequently.

Prete's explanation that this was his humorous attempt to demonstrate to Complainants how customers were reacting to them because of their inappropriate dress was not credible. No dress code existed and Prete issued no written warning regarding proper attire. I credit Complainants' testimony that Prete actually suggested that they dress more provocatively and wear more revealing clothing and made comments about both Ronan's and Mills' physical appearance. While he may have thought that his comments were funny, they were unwelcome and Complainants did not find them amusing.

Ronan experienced offensive conduct beginning with the interview process, although she was uncertain from the start about whether Prete's unorthodox approach to hiring was merely odd or actually offensive. Once she began working at A. E. Sales, Ronan came to realize the entire interview process was part of the pattern of harassment. In response to Prete's leering at her breasts, she also modified her dress at work by wearing vests or sweatshirts. Ronan also felt humiliated by other unwelcome statements which Respondent made to her suggesting she wear a bathing suit or an outfit from Fredrick's of Hollywood catalogue to work and encouraging female employees to wear low necklines.

Ronan was particularly upset by the sign about loving oral sex which was placed prominently above her and Mills' workspace in full view of customers. She felt this sign was demeaning to her and Mills and was so embarrassed and humiliated by its placement that she turned it around several times. She was humiliated by the message that this sent to customers. Ronan also felt threatened by word that Prete had struck another female employee. Believing that Prete was capable of hitting a female employee exacerbated her fear and intimidation. This was evidenced by the fact that she went to the Lexington police immediately after she had resigned, fearing that Prete might physically harm her because she made allegations of

harassment against him as her reason for resigning. Ronan testified that Prete's unwelcome sexual conduct and comments created an atmosphere which made it hard for her to work. She spent her day with her stomach in knots worrying that Prete would come out of his office and be offensive and abusive to her. Her Letter of Resignation specifically cited Prete's sexually explicit comments and conduct as the reasons she could no longer work at A. E. Sales, Inc. I found Ronan's testimony about her subjective reaction to Prete's conduct to be compelling and credible.

Prete sent Mills graphic sexual emails and made other numerous comments of a sexual nature to her which were both objectively and subjectively unwelcome. At some point later in her employment, Mills took greater offense at these emails and comments as illustrated in an email conversation between Mills and Respondent's bookkeeper in April of 2009. Mills wrote to the bookkeeper, "he makes me want to vomit! I hate to listen to him and his sex comments."

Mills testified credibly that Prete would touch her hair and shoulders on numerous occasions and pant on her neck making grunting noises, and that she let him know, in no uncertain terms, that he was not to touch her. Prete admitted to much of this conduct and contended his behavior was not meant to harass or intimidate Mills, but merely to get her attention or to joke with her. I find that he engaged in this behavior deliberately to antagonize Mills and provoke a negative emotional reaction from her.

There is no evidence that Mills solicited or initiated Prete's unwelcome actions, although she did routinely forward emails of a sexual nature to Prete, and others in her email circle, including some of the guys in the shop with whom she was friends. This conduct is insufficient to establish that Mills solicited or welcomed Prete's touching her hair and shoulders, panting on her neck like a stalker might, and commenting on her breasts and body. However, it does

suggest that Mills not only participated in, but sometimes initiated the tawdry joking in the workplace. I do not believe that she was offended by off-color, sexual jokes or references. And while she did not welcome Prete's touching, I am not persuaded that she was intimidated or fearful of Prete, so much as disgusted and annoyed by his outrageous and sophomoric behavior. She indicated this by recoiling from Prete, swatting his hand away, and telling him to get away from her.

There was evidence of other unwelcome and offensive behavior by Prete such as his stapling a condom to Mills' pay check and telling her that if she wanted the bonus she would have to use the condom. Prete understood this conduct to be offensive and inappropriate in the workplace, even openly admitting at the time that "this will probably get me in trouble with the MCAD." Still he found it amusing. Mills testified that the condom incident took place in front of her fellow employees, and that this it more difficult for her to supervise and work with the guys who witnessed or heard about the incident. This incident clearly contributed to a sexually charged and hostile work environment. Mills and her husband testified that they argued over the incident, after Prete told him about it when he visited A. E. Sales, Inc. shortly after the incident.

Mills also complained of several instances when Prete stood behind her gyrating his hips and simulating sex in a manner that she described as dry humping her from behind. These incidents were witnessed by several of the male mechanics, and the final two incidents occurring in early August 2009, provoked Mills' termination. I did not credit Prete's assertion that he was just dancing on these occasions, but believe he was deliberately attempting to annoy and provoke Mills with this conduct. Van Sicklen testified that Prete's acts could not be mistaken for dancing. It is clear that Prete was simulating a sexual act and directing this behavior toward Mills, who became very angry and told him to "knock it off," raised her fist and threatened to

punch him if he did it again. Mills was unequivocal that this conduct was unwelcome and offensive to her and that it must cease.

Perhaps the most outrageous of Prete's actions involved his conduct related to his admitted sexual dysfunction caused by his illness. The evidence that he displayed a device at work which he referred to as a "penis pump" and demonstrated how he would use it, as well as inviting prostitutes and masseuses into the workplace and openly discussing this with his employees, evidences his utter absence of discretion and respect for proper decorum in the workplace. Prete openly acknowledged these indiscretions with a cavalier attitude that displayed an astonishing disregard for professional boundaries and lack of respect for personal privacy. He admitted receiving the pump at work, which he referred to as a "vacuum pump," and claimed that he discussed the pump with the Mills in a clinical way, not in a sexual manner. Mills stated she had no interest in Prete's sex life and that such antics disgusted her. Ultimately, it matters naught that Prete was not sexually motivated when discussing the "pump" or whether he intended to use it; the discussion was offensive and not welcome, and contributed towards creating a hostile work environment.

Prete claimed that he brought female prostitutes into the workplace for medical reasons related to his cancer treatment, saw no problem with doing this, and intimated that his female employees were just too rigid and uptight regarding matters pertaining to sex. It is not surprising that both Ronan and Mills found such behavior in the workplace to be beyond the bounds of decency.

In summary, I find the totality of Prete's verbal and physical conduct, particularly in 2009, was unwelcome and sufficiently severe or pervasive that it altered Complainants' work environment at A. E. Sales, Inc. I also conclude that a reasonable woman in Complainants'

position would find that the work environment Prete created at A. E. Sales, Inc. was offensive and a hindrance to full participation in the workplace. *Gill v. Task Construction*, 24 MDLR 277 (2002); *Couture v. Central Oil Company*, 12 MDLR 1401, 1422 (1990). Since there is no dispute that Prete was the owner of A. E. Sales, Inc., both the corporate Respondent and Prete, as the individual perpetrator of the unlawful acts, are liable for the discrimination. Since Prete was the owner, no notice to the corporation was required. See *Collegetown, supra.* at 165, n. 5 (“the legislature intended that an employer...be liable for discrimination committed by those on whom it confers authority without additional notice requirement”); *Beaupre v. Smith & Associates*, 50 Mass. App. Ct. 480 (2000); *Rowe v. American Paper Products*, 22 MDLR 279, 287-88 (2000)

B. Termination/Constructive Discharge

Both Ronan and Mills allege that they were terminated or constructively discharged from their employment at A.E. Sales. A constructive discharge occurs when the employer’s conduct effectively forces an employee to resign. Accordingly, a constructive discharge is “legally regarded as a firing rather than a resignation.” *GTE Products Corp. v. Steward*, 421 Mass. 22, 35 (1995), citing *Turner v. Anheuser-Busch, Inc.*, 7 Cal. 4th 1238, 1244-1245 (1994). The test for whether Complainant was constructively discharged is objective and not subjective. *GTE Products Corp.*, 421 Mass. At 35 (dissatisfaction with nature of assignments, inter alia, is insufficient to create a triable question of constructive discharge) To establish a prima facie case of constructive discharge, Complainants must show that their working conditions at A. E. Sales, Inc. were so intolerable that a reasonable person in their position would have been forced to resign. *Holt v. Minuteman Flames Minor Hockey Association*, 22 MDLR 73 (2000); *Choukas v. Ocean Kai Restaurant*, 19 MDLR 169, 171 (1997); *Said v. Northeast Security*, 18 MDLR 255,

259 (1996); *Rosado v. Santiago*, 562 F 2d 114, 119 (1st Cir. 1977) (“the trier of fact must be satisfied that the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign”) I conclude that Ronan was constructively discharged, but Mills was terminated . (See discussion below)

The adverse working conditions under which Complainants worked continued for some time, and some of the acts complained of were unusually aggravated. *Turner v. Anheuser-Busch, Inc.*, *supra*, at 1247. I conclude that Prete made Complainants’ workplace so intolerable that a reasonable person in their position would have felt compelled to leave her employment. Not only were Complainants the victim of Prete’s unwelcome verbal and physical conduct, but his conduct so interfered with their full participation in the workplace that it became intolerable.

Ronan submitted her letter of resignation to Prete in June of 2009 believing she had no other choice. Ronan could not be expected to continue to work under conditions where she felt threatened, intimidated and demeaned by the prospect of constant harassment. Given that there was no one to complain to about Prete’s harassment and no avenue for redress of her grievances, she felt she had no choice but to submit her resignation. Respondents had no Employee Handbook or rules for reporting sexual harassment and the harasser was the owner of the company. There were no measures Ronan could have employed to ensure the unwelcome conduct did not recur before leaving her employment. Moreover, her attempts to discuss the harassment with Prete were met with a temper tantrum and his telling her to “shut the f--k up.” Based on the foregoing, I find that Ronan was constructively discharged on June 16, 2009.

Mills asserts that Prete terminated her employment on August 7, 2009 when, after an argument over a customer’s car, he told her to “get the f--k out.” Mills understood this to mean that her employment had been terminated, since this was the language Prete had used to

terminate other employees. I find that Mills was terminated from her employment by Prete on August 7, 2009. However, even if Prete had no intent to fire Mills on August 7, 2009, for all the reasons stated above, the facts support a conclusion that she was constructively discharged. I conclude the Mills' workplace had become so intolerable that a reasonable person in her position would have felt compelled to leave her employment at Respondent, A. E. Sales, Inc. The final straw was Prete's insistence on simulating a sexual act with Mills after she repeatedly told him to stop and threatened to punch him if he did not. His reaction was to have a temper tantrum and order her to get out. Mills also had no recourse and no one to complaint to about Prete's persistently egregious behavior and no means available to resolve the harassment. Based on the foregoing, I conclude that even if Mills not fired, she was constructively discharged on August 7, 2009.

C. Retaliation

Chapter 151B section 4(4) makes it unlawful for "any person...to discriminate against any person because he has filed a complaint,...while Sec. 4(4A) makes it unlawful for any person to coerce, intimidate, threaten any person" who has exercised a right protected under Chapter 151B. *Psy-Ed Corp. et.al. v. Klein, et al.*, 459 Mass. 697 (2011) *Psy-Ed* held that Sections 4(4) and (4A) of M. G. L. c. 151B apply to post-employment conduct.

Here, Mills exercised her c. 151B rights by filing her Complaint with the MCAD on August 18, 2009. Prete sent advertisements for his business to Mills at her new place of employment which she felt portrayed her in a bad light and she found them threatening and intimidating. The ad refers to Mills' new employer, Village European, as "Village of the Damned." In one ad, a superhero is portrayed holding the decapitated head of the Service

Advisor which was Mills believed was clearly meant to be her. She believed that Prete sent these to her in retaliation for her having filed a complaint against him. Mills testified that she was frightened by these ads and of what Prete might do to retaliate against her.

Prete also posted a comment on a Google advertisement, in which he mentions that Mills filed a sexual harassment and discrimination claim against him with the MCAD, and in which he disparages Complainant. Mills testified she was harmed by this and concerned that a future employer would Google her name and not hire her because of this posting. I find that these actions by Prete were undertaken in retaliation for Mills having filed a discrimination claim against him and are in violation of c. 151B, §§ 4(4) and (4A).

IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award damages to Complainants for losses or injury resulting from a Respondent's unlawful discrimination, including any proven lost wages, out-of-pocket expenses, and emotional distress. G. L. c. 151B, §5. See *Labonte v. Hutchins & Wheeler*, 424 Mass 813, 824 (1997); *Bournemouth v. Massachusetts Commission Against Discrimination*, 371 Mass 303, 315-316 (1976).

Since Mills proved she was either discharged or constructively discharged, she is entitled to an award of lost wages. Mills was earning \$1,326.92 per week at the time her employment ended, and testified that she lost four weeks of wages or \$5,307.68 before she began working a new job. While she testified that she did receive some unemployment compensation, there was no evidence of mitigation of damages. It is Respondent's burden to introduce evidence of interim earnings or other income that mitigated Complainant's damages. *J.C. Hillary's v. MCAD*, 27 Mass. App. Ct. 204 (1989). Absent such evidence, I find that Mills is entitled to

compensation for lost wages as requested. Ronan is likewise entitled to her damages for lost wages in the amount of \$29,962.50. She proved that she was constructively discharged and there is no evidence in the record of any interim earnings or of a failure to mitigate her damages.

Upon a finding of discrimination, the Commission is authorized to award additional remedies to make the Complainant whole and to ensure compliance with the anti-discrimination statute. G.L. c. 151B, s. 5. The Commission may award monetary damages for emotional distress suffered as direct and probable consequence of the unlawful discrimination. *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004). In addition, the Commission may issue cease and desist orders, award other affirmative, non-monetary relief and assess civil penalties against a Respondent.

Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in determining the extent of Complainant's suffering are the nature, character and severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. *Id.* at 576. Evidence in the form of expert testimony is not necessary to support such an award. A complainant must also demonstrate a sufficient causal connection between the unlawful acts and her emotional distress. Emotional distress arising out of other circumstances or from a pre-existing condition is not compensable. *Id.*

I conclude that Mills is entitled to emotional distress damages caused by Respondent's unlawful harassment. Although Mills claimed that she was the victim of Prete's harassment throughout her employment, I am not persuaded that this was the case. There is scant evidence in the record regarding the time frame in which Prete's actions occurred. With the exception of the allegation that Prete stared at Mills' breasts throughout her employment, the majority of incidents that support a claim of sexual harassment appeared to have occurred within the time

frame of the final months of Mills' employment. This seems to coincide with the period of time when Prete was recovering from cancer surgery, when he came to have disputes with a number of his mechanics, who either left or were fired, and when workplace operations and the business in general were in disarray.

It is apparent that Mills had a fairly congenial relationship with Prete for a good part of her employment and felt comfortable enough with him to attend parties at his home and send him off-color jokes and sexual emails, to have her boyfriend do work for Prete at his home, and to accept a \$1000 loan from him. Her relationship with Prete seems to have deteriorated and her animosity towards exacerbated during Prete's illness and recovery and around the time Ronan came to work at A.E. Sales. Prete noted that at some point in 2009 Mills changed and seemed depressed and distant. He testified that at the beginning of her employment, Mills was more outgoing and friendly, and that he observed her laughing and joking routinely with some of the guys. He confirmed that Mills became withdrawn and did not interact with him after a while, and stated that he made jokes to try to cheer her up. He attributed her lassitude and fatigue in part to her health and weight issues.

While I believe that Mills was distressed by Prete's actions in the latter part of her employment, I remain unconvinced that his actions were the sole source of her distress. There were a number of significant events in her personal life that likely contributed to her loss of self-esteem and depression, including a divorce, the death of her brother and her health and weight issues. Nonetheless, I conclude that Mills grew to become angry, upset and disgusted by Prete's constant sexual innuendos and antics, especially by his attempts to touch her, which I determined were undertaken to deliberately antagonize and provoke a negative reaction in her. Prete's actions contributed to Mills' distress and caused her to be more tense, anxious, and unhappy both

inside and out of work. I do not believe that she was particularly intimidated or frightened of Prete as is evidenced by her friendly relationship with him and her threat to punch him out if he did not cease his gyrating. I find her testimony that she was deeply humiliated by his actions and guilty for not quitting to be somewhat exaggerated. Some of her own actions belie that she was someone who took great offense at sexual and off-color humor. Mills claimed that her weight gain was caused by depression related to Prete's behavior, but I conclude that her difficulty in controlling her weight was likely also impacted by admittedly poor eating habits and her inability to manage her diabetes, which was confirmed by her husband.

Mills also testified about the anxiety or panic attacks she experienced and attributed them to the hostile work environment. She testified that in response to Prete's actions, she would sometimes become short of breath and feel extremely anxious, and that she might faint. She testified that her body would tense up to such a degree that her muscles would ache after one of her panic attacks. While I do not discredit her testimony that she had adverse reactions to Prete's behavior, I find that her response was more one of anger and disgust, which likely caused an increase in her anxiety level.

Mills also testified that she sought treatment with a Licensed Psychologist in January of 2010, some five months after her separation from Respondent and after she filed a claim of discrimination. She testified that she first realized the extent of the emotional distress she had suffered when she tried to describe Prete's acts to the MCAD employee who assisted her in filing her complaint, and began crying and needed several breaks to regain her composure. Mills was in treatment once a week for approximately two (2) years and stopped treatment few months when she was feeling better. She testified that when this case has become active that has triggered panic attacks, so she resumed therapy.

In a letter to Mills' primary care physician dated May 3, 2011, her therapist diagnosed Mills as suffering from reactive depression with anxiety and panic as a result of the upcoming MCAD hearing and noted that this disturbance should pass with the resolution of the court proceeding. The letter stated that Mills was being seen for "interpersonal issues, especially related to difficulties in her previous employment circumstances," and stated that the upcoming trial in June was triggering anxiety and panic attacks. The letter discusses that Mills suffers from sleep disturbances and periods of feeling faint, and goes on to recommend she seek anti-anxiety medication. I do not doubt that the pending litigation against Respondents was a source of anxiety for Mills, as it would be for anyone, and caused her to lose sleep and feel nervous, particularly when the litigation became active. However I do not find this doctor's letter to be sufficiently detailed or persuasive as to the sole cause of Mills' emotional distress and conclude that other stressors in Mills' life also likely contributed to her emotional state.

Mills testified that she was prescribed and took Lisinopril, Lorazepam and other medications for her anxiety and panic attacks. However she had a medical history of prescriptions for anxiety. Mills denied that she was prescribed Paxil, an anti-anxiety drug, during the course of her treatment for diabetes at the Joslin Clinic which she claims was prior to the onset of her current depression. She did admit that she was prescribed Paxil by her primary care physician during her divorce proceedings in 2006 through 2007, but stated that she took it only for a short time. The medical records support that these medications were prescribed and regardless of whether or not Mills took them, I find it likely that she presented with complaints of anxiety or depression prior to working for Respondents and this resulted in her physicians' prescribing anti-anxiety medication.

Given other anxiety provoking circumstances in Mills life and despite her allegation that she still suffers from depression, anxiety and panic attacks, I decline to attribute her distress entirely to Prete's actions. I am persuaded that Mills experienced emotional distress as a result of the situation at work, and believe that Prete's behavior certainly exacerbated existing distress from other unhappy circumstances in her life. Ultimately, the existence of previous sources of emotional distress do not absolve Prete of liability for his discriminatory conduct or for exacerbating pre-existing stress, but may affect the degree to which he is liable and the resulting compensatory award. See *Hanscom v. Boston Housing Authority*, 23 MDLR 68, 73-74 (2001); *Sverck v. American Health Care, et.al.*, 22 MDLR 50 (2000)

Based on the above I conclude that Mills is entitled to damages for emotional distress in the amount of \$25,000 to compensate her for the emotional harm she suffered as a result of Prete's harassment.

Ronan has also made a claim for damages for emotional distress. Despite the fact that Ronan worked for Respondent for a much briefer period of time, I found her claim that she was emotionally distressed from Prete's actions to be the more convincing and compelling of the two. Of the two Complainants, Ronan appeared much more emotionally fragile and vulnerable. I believe that Ronan desperately needed and wanted a job, which caused her to play along with Prete's silly and sophomoric hiring practices, and to accept his offer of employment, despite her misgivings. Prete's perception of Ronan was that she was "bright, cheery, upbeat and engaged," but in a few short weeks he came to view her as "too needy" and a "wounded individual." I believe that Prete recognized her fragility and hired her knowing that she could not survive in the work environment he fostered and that his harassment caused greater emotional harm to her.

Ronan testified credibly that she was constantly anxious and on guard that Prete would come out of his office to harass and abuse her, and came to fear he might even hit her, as he had reportedly done to another employee. Ronan testified to the humiliation she felt and the anxiety attacks she suffered in the short time she worked at A. E. Sales. She stated her stomach would be in knots in anticipation of Prete's behavior, and she was always nervous at work. She described in detail how her anxiety lead to panic attacks, which she described as feeling short of breath and very tense. Ronan had a number of panic attacks while working at A. E. Sales and that when they came on, she would go outside to calm down. She testified her panic attacks continued after she left, for the reasons discussed below. I believe that Ronan was intimidated by and frightened of Prete and suffered great anxiety as a result of how he treated her. The fear and intimidation were symptoms of a hostile environment and made it hard for her to work. Her Letter of Resignation which came a mere five weeks after she started working demonstrated that she could no longer tolerate the hostile work environment and specifically cited Prete's sexually explicit comments and conduct as the reasons she could no longer work at A. E. Sales.

I credit Ronan's testimony that Prete's acts made her feel ashamed and guilty for putting up with the harassment because she needed the job. She felt Prete's actions, lewd remarks and repeated references to sex sent a message that she was there to be a sex object and not to work. This caused her discomfort and humiliation. She was particularly discomfited by the sign regarding oral sex, hung above her work area and the message that it sent to customers about her. This served to increase her concerns that she was viewed as a sex object; an object of derision to be toyed with or laughed at. Ronan felt compelled to resign because of the hostile work environment, despite the fact that she was a single mother to her son, would have no income, and would be unable to pay rent or make payments on her vehicle. These considerations weighed

heavily on her. She remained unemployed for almost a year.

Ronan testified that after she resigned, the financial difficulties she had anticipated came to pass and her inability to pay her rent caused her great anxiety and fear of being evicted. She avoided her landlord who lived in the same building and felt anxious and on edge all the time. After repeated promises to pay rent, which she could not meet, her landlord sent multiple eviction notices. This made Ronan more anxious and nervous and resulted in her having panic attacks and necessitating prescription medication to help her calm down.

Ronan was compelled to apply for Food Stamps which caused her to feel embarrassed and ashamed that she could not support herself and her son. She felt self-conscious every time she had to use food stamps. Ronan also testified that she was embarrassed to have to ask friends and family members for small loans to help her. Her anxiety and sadness affected her parenting as well. She felt guilty for being unable to provide for her son, and was especially depressed at Christmas because she could not buy Christmas gifts for him. Despite the fact that Ronan was unemployed and under financial stress prior to being hired, I conclude that the circumstances she encountered at Respondents' workplace gravely exacerbated her emotional distress.

Ronan testified that her anxiety continued up to the time of the hearing. She stated she worries a lot about losing work again and is always conscious of how her co-workers, who are all male, are reacting to her. Preparing for the hearing and recounting the harassment she suffered also caused Ronan to feel increased anxiety. She testified to one occasion when her breathing became so rapid she had trouble calming herself down. I am persuaded that the Ronan sustained significant emotional distress that is attributable to Respondents' unlawful actions. Based on the severity and duration of her emotional distress, I award Ronan \$40,000 to compensate her for the emotional harm she suffered from Prete's harassment.

Under M.G.L.c.151B§5, the Commission is authorized to assess civil penalties for egregious violations of the statute. I find that Prete engaged in behavior that not only knowingly and deliberately fostered a hostile work environment, but went so far as to advertise the existence and acceptance of that environment by allowing sexually demeaning signs that embarrassed Complainants to be prominently displayed to the public. In doing so, he sent a subliminal message to his male employees and customers that it was acceptable to view and treat his female employees as sex objects. I conclude that the imposition of a civil penalty in the amount of \$10,000 is warranted against Ernest Prete and A.E. Sales for Prete's knowing, willful and egregious conduct of subjecting Complainants to a sexually hostile work environment and heartily condoning and defending the existence such an unlawful work environment.

V. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and pursuant to Section 5 of c. 151B, I hereby issue the following Order. Respondents shall:

- 1) Pay to Complainant Danielle Mills the sum of \$5,307.68 for lost wages, with interest thereon at the rate of 12% per annum from the date the Complaint was filed until such time as payment is made, or this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
- 2) Pay to Complainant Danielle Mills the sum of \$25,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the Complaint was filed until such time as payment is made, or this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

- 3) Pay to Complainant April Ronan, the sum of \$29,962.50 for lost wages, with interest thereon at the rate of 12% per annum from the date the Complaint was filed until such time as payment is made, or this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
- 4) Pay to Complainant April Ronan, the sum of \$40,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the Complaint was filed until such time as payment is made, or this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
- 5) Pay to the Commonwealth of Massachusetts, a civil penalty in the amount of \$10,000 for the knowing, willful, and egregious discriminatory actions committed by Respondents.
- 6) Cease and desist from engaging the types of unlawful conduct in the workplace that have been adjudged to constitute sexual harassment and the creation of a sexually hostile work environment.

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. Counsel for Complainants may also file a Motion for Attorneys' Fees.

So Ordered this 30th day of October, 2013.

Eugenia M. Guastaferrri
Hearing Officer