

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION, SARAH NAGLE,
and MAUREEN SEASTRAND,
Complainants

Docket Nos. 07-BEM-00930,
07-BEM-01316

FAIRFIELD FINANCIAL MORTGAGE GROUP, INC.
CHARLES LEVESQUE, and JOSE LUIS MARCANO,
Respondents

Appearances: Michael Doton, Esq., for Complainants

DECISION OF THE HEARING COMMISSIONER

I. PROCEDURAL HISTORY

On April 6, 2007, Complainant, Sarah Nagle, filed a complaint (07-BEM-00930) with the Commission against Respondents Fairfield Financial Mortgage Group, Inc., Charles Levesque, and Jose Luis Marcano, alleging discrimination based on sex, sexual harassment and retaliation, in violation of M.G.L. c.151B, §§4(1) (4A) (5) (16A) and Title VII. On April 23, 2007, Complainant, Maureen Seastrand, filed a complaint (07-BEM-01316) with the Commission against Respondents Fairfield Financial Mortgage Group, Inc. and Jose Luis Marcano alleging discrimination based on sex and sexual harassment in violation of M.G.L. c.151B, §§ 4 (1), (4A) and (16A) and Title VII.¹

¹ Complainant Seastrand settled with Marcano prior to hearing.

On February 26, 2009, the Investigating Commissioner found probable cause to credit Complainant Seastrand's allegations and the matter was subsequently certified to public hearing. On February 27, 2009, the Investigating Commissioner found probable cause to credit Complainant Nagle's allegations and the matter was subsequently certified to public hearing. The matters were consolidated for purposes of the administrative hearing.

A Pre-Hearing Conference was held on June 1, 2009. Respondents failed to attend. A Public Hearing was held on September 14, 2009. Respondents, who had been duly served with notice of the hearing, did not appear and the hearing proceeded as a default hearing in accordance with the Commission's Procedural Regulations at 804 CMR 1.21(8). On September 15, 2009, an Order of Default was entered on the record against Respondents. A Notice of Entry of Default and an Order of Entry of Default were mailed to Respondents by certified mail, return receipt requested. In accordance with the Commission's Procedural Regulations, 804 CMR 1.21 (8) within ten days of receipt of the notice of entry of default, Respondent may petition the Commission to vacate the entry of default. Respondents did not do so.

Complainants submitted post-hearing briefs on November 3, 2009.

The record before me consists entirely of the Complainants' testimony and other evidence accepted at the public hearing. Based on the credible evidence and the reasonable inferences drawn therefrom, I make the following findings of fact.

II. FINDINGS OF FACT

Sarah Nagle

1. The Complainant, Sarah Nagle, commenced her employment with Respondent Fairfield Financial Mortgage Group, Inc. ("Fairfield") in April 2006 subsequent to Respondent Luis Marcano offering her part time employment as a loan processor in the Hingham office of Fairfield. Nagle worked three days per week and approximately fifteen hours per week. Her job duties included selling residential mortgages; she testified that she was to be paid a sixty percent origination fee on all mortgages.
2. At all relevant times, Complainant's direct supervisor was Respondent Luis Marcano, Fairfield's Vice President of Operations.
3. Fairfield's corporate headquarters are located in Danbury, Connecticut ("Danbury"). The company employs more than six employees. Respondent Charles Levesque is the President of Fairfield and works in the Danbury office. Fairfield's Hingham office is no longer operational.
4. Complainant Nagle testified that during her first week at Fairfield, Marcano asked her out to lunch. She responded that she could not go and that she had a boyfriend.
5. Complainant Nagle offered no testimony as to why she believed being asked to go to lunch by her immediate supervisor was inappropriate or what about the invitation made her feel as though she should not attend.
6. Nagle became a full time employee at Fairfield on July 1, 2006. She stated that she was in the office Monday through Friday and worked between 35 and 40 hours a week. Nagle testified that her weekly salary was to be \$500.00, and that

she was to receive medical benefits for her family, as well as a continuation of the sixty percent origination fee on all mortgages.

7. Nagle testified that she could not remember if she filled out any paperwork or signed any written contract of employment with Fairfield. At all times she reported to Marcano.
8. Nagle testified that for the time period from April 2006 until July 1, 2006, she received about \$2,000.00 from Marcano in compensation for her work.
9. Nagle testified that subsequent to July 1, 2006, Marcano began to sexually harass her on a regular and repeated basis. She stated that Marcano's conduct included brushing his body up against her, running his fingers through her hair, and grabbing his genitals and asking her, "Don't you want a piece of the action?"
10. Nagle stated that on one occasion she was sitting at a table with Marcano and he grabbed her foot, pulled her over to him, and put her foot in his crotch. She told Marcano not to do this and said it was disgusting, and he responded that he loved her feet.
11. Nagle testified that at times Marcano would go out at lunch and return intoxicated, and on one of these occasions he snuck up behind her, put his arms around her, grabbed her breasts and asked her if they were real. She stated that she told Marcano never to do that again and left the office immediately.
12. Nagle testified that on other occasions Marcano tried to kiss her, and touched her buttocks.
13. Nagle testified that one day Marcano summoned all the employees into the conference room, showed them an X-rated DVD, and asked whether anyone

- present had participated in events depicted in the DVD. Co-workers Victor Breda and Marcano's sister, Betty Marcano, were also present.
14. Nagle stated that on another occasion, she was in her cubicle at work and turned to see Marcano sitting near her masturbating. She stated that he relieved himself on the floor next to her chair and that she was so upset she began crying.
 15. Nagle testified she repeatedly informed Marcano that she did not welcome his behavior and that she was there to work.
 16. Nagle stated that Marcano exhibited inappropriate behavior on a regular basis, including his asking someone over the phone in the Danbury office, "Do you shave your balls?"
 17. Nagle testified that Marcano moderated his sexually offensive behavior for a week or so in August 2006, but by September 2006, it had worsened once again. She stated that at this point, she called Joanne Urso, head of Human Resources in the Danbury office, and complained about Marcano's conduct, and that Urso instructed her to speak to the company president, Levesque.
 18. Nagle then reported Marcano's conduct to Levesque and informed him that she was afraid to go into the office because of Marcano's behavior. Levesque responded that he was aware of prior situations with Marcano and would investigate this situation and get back to her. Levesque also told Nagle that she could work from home.
 19. Nagle testified that it was difficult to work from home as she was the office manager and she sometimes had to go to the office because she did not have all

- the resources she needed at home. She stated that she attempted to go into work when Marcano was not there.
20. Nagle testified that she was promised earnings from Marcano and she felt compelled to stay working at Respondent so that she might be able to collect the money she was owed.
 21. Nagle stated that she attempted to contact Levesque on multiple occasions in late 2006 and that he never returned her calls. She stated that she believed Levesque may have spoken with Marcano about her complaints because Marcano became rude and “stand-offish” to her. However, shortly thereafter he began attempting to grope her again.
 22. Nagle stated that Marcano was not paying her the promised weekly salary or commissions and informed her she was owed \$40,000. She stated that she felt she could not leave Fairfield for financial reasons and that Marcano kept promising her the money was coming. She came to believe Marcano was holding back money from Fairfield.
 23. On or about December 20, 2006, Nagle received a letter from Urso informing her that she was entitled to carry health insurance through COBRA payments for eighteen months following her termination date of December 18, 2006. (Ex. 1)
 24. Complainant stated that prior to this letter she had not been contacted by anyone from Fairfield regarding termination.
 25. Nagle testified that she called the Human Resources office to inquire as to why she received this letter. She was told that they would get back to her.

26. On January 7, 2007, Nagle emailed Chris Aniskovich in Fairfield's Connecticut office informing him that she no longer was able to log on to the company website to perform her work. She also wrote him that she had attempted to call Levesque to speak further with him about inappropriate things that had occurred in the office but had not received a response. Nagle requested that someone get back to her and let her know what was going on. (Ex. 2)
27. Nagle testified that although Aniskovich emailed her back on or about January 7, 2007 and stated that he would follow up and get back to her, she never heard from him or Fairfield again.
28. Nagle testified that at some point in January 2007, Marcano came to the tanning salon where she worked part time. She said that he seemed really upset, grabbed her wrist, and told her that she needed to stop talking to people and that he had friends in high places and knew where she lived and where her children went to school. Nagle testified that Marcano warned her not contact the Danbury office and stated that no one would believe her allegations anyway. Nagle never spoke to Marcano again following this encounter.
29. Nagle stated that she received only \$2,000.00 in commissions between April 1, 2006 and July 1, 2006. Nagle stated that she was promised but never received a base salary of \$500.00 a week and commissions that were due her from July 1, 2006 through her termination on or about December 18, 2006.
30. Nagle testified that she had only a verbal agreement with Marcano and Fairfield regarding the terms of her employment and compensation.

31. Nagle testified that she felt she had “dug a hole for herself and didn’t know what to do.” She stated that Marcano’s behavior caused her emotional distress and “totally ruined” her life. She stated that she was impacted financially, as she still has not recouped any of the money due her and has had to take cash advances on her credit card and is now “losing almost everything.” She stated that she is “a mess” and has developed ulcers, is sick all the time, experiences migraines, and is always stressed out. Nagle stated that she has gone to counseling off and on. Nagle was a believable witness and I credit her testimony regarding the events that occurred and the emotional distress she suffered.
32. Nagle testified that she returned to a job she left at Nasr Jewelers, resulting in a large pay cut from what she was promised to be earning at Fairfield. She stated that she also worked at tanning salon part time. She estimated her future lost wages at approximately \$3000 a month. No financial documentation was submitted to verify this testimony. There was no evidence as to how many commissions Nagle might have been owed or the value of those commissions.
33. Nagle did not offer any testimony as to whether she filed a wage and hour claim with the Department of Labor for Respondent’s failure to pay her for hours she had worked or whether she filed for unemployment benefits.
34. Nagle testified that she attempted to seek other employment that would include health insurance but was unable to so she went back to her previous position at Nasr Jewelers in a part time position.

Maureen Seastrand

35. Complainant, Maureen Seastrand, commenced her employment with Fairfield in October of 2006, working for Marcano in the Hingham office as an Office Manager. At all relevant times, Marcano was Seastrand's direct supervisor.
36. Seastrand testified that she learned about the employment opportunity at Fairfield from Charles Sullivan, a bank manager whom she trusted. She stated that Sullivan referred her to Marcano, stating that he knew Marcano as a successful businessman.
37. Seastrand stated that after speaking with Marcano on the phone, she met with him at the Hingham office, where Marcano informed her: "You came to me at the right time.... You can make 15 to 20 thousand a month here." She stated that Marcano led her to believe that she was to be paid \$500.00 a week base salary, plus commissions, and that her duties would be to manage the office. Seastrand testified that she accepted a job with Fairfield and eventually resigned from her other job.
38. Seastrand testified that she filled out employment and insurance paperwork but never saw any copies of this paperwork and did not receive anything in the mail regarding her employment during the time she worked at Fairfield.
39. Seastrand testified that Marcano told her that her job would be to come in and manage the office and she would receive a base salary and commissions. She also testified that Marcano promised to give her a check for five or six thousand to get her started.
40. In early October of 2006, Complainant began working at Fairfield from Monday through Friday, from nine a.m. to five p.m. She testified that Marcano talked all

- day and she was never able to get her work done. Seastrand described Marcano's language as "uncontrolled" and explained that every time she answered the phone, he would ask, "Is it a vagina?" his term for women. She stated that she told him not to talk like that in her presence and he responded that he was just joking.
41. Seastrand testified that on one occasion Marcano wheeled his chair across the room, sat on her lap and tickled her, then put his hands down her trousers, took off her socks and shoes, and put her bare foot in his crotch. She was shocked and told him to stop and he replied that he weighed 240 pounds and would get off her when he wanted to.
42. Seastrand testified that Marcano told her if she loaned one of his client's some money that she would receive fifty percent interest on the loan. Marcano stated that this client just needed to get out from behind on her mortgage payments so that she could refinance her mortgage. Seastrand stated that she met the client who seemed genuine, and consequently withdrew her entire savings of \$45,000 giving it to Marcano and his client. She asserted that although she insisted on her name being on the client's deed, she learned later that it was not.
43. Seastrand testified that she eventually cut back her hours at Fairfield because she did not have any real job responsibilities and Marcano never gave her a job description. She explained that in the fall of 2006, the office moved and she and two other women paid for carpeting out of their own pocket as Marcano neglected to leave them any cash to pay for the carpet.
44. Seastrand did not testify as to why she felt compelled to pay for the renovations from her own money having only worked for Marcano for a short time.

45. Seastrand testified that in early November of 2006, she was attempting to perform a task that required her to ask Marcano about a work-related matter, when he grabbed her foot, removed her shoe, and rubbed her feet. She testified that he stated, "This is what is going to happen next," and drew a picture of a foot. (Ex. 1A)
46. Seastrand stated she grew nervous about going in to work because of Marcano's inappropriate behavior. She testified that when she entered the office on the morning of November 28, 2006, Marcano came out of the bathroom and said, "Give me a hug," and that her stomach became so tight that she vomited and left work.
47. Seastrand did not testify as to why suddenly she found herself getting sick by Marcano's behavior considering that she had been subjected to similar behavior for some time and appeared to take it in stride, while loaning Marcano large sums of her own money. Seastrand stated that she was vomiting for the next 24 hours and went to the hospital. She explained that she ran into a coworker who was at the hospital because his wife had just given birth. Seastrand testified that the coworker admonished her about Marcano stating: "I hope you did not lend him any money."
48. Seastrand testified that she was admitted to the hospital, where she underwent extremely painful tests that showed she had an upper bowel obstruction. She stated that she was put in the critical care unit and remained hospitalized for two to three days. Seastrand also testified that she believed that the bowel obstruction

issues and the later diagnosed bowel spasms were caused by the stress she endured at work.

49. Seastrand submitted an undated doctor's note documenting that she had been admitted to the South Shore Hospital in Weymouth, Massachusetts on several occasions from October 2006 through April 2007 with symptoms of uncertain etiology, but the existence of a small bowel spasm was entertained. The doctor wrote, "It was felt that the cause may have been job related because when the patient changed her employment there have been no further intestinal problems."

(Ex. 2A)

50. Seastrand testified that while driving in the car on a business trip to Connecticut with Marcano in late 2006, he pulled a gun out from the back seat of the SUV he was driving and showed it to her in a threatening manner.

51. Seastrand did not testify as to why she continued to work with Marcano and even went alone with him on business trips after being hospitalized.

52. Seastrand testified that after Christmas of 2006, she went to the Registry of Deeds and learned that her name had not been recorded on the deed to the property she had helped finance with her \$45,000, as Marcano had led her to believe.

53. Seastrand did not testify as to whether or not she confronted Marcano about not being named on the deed.

54. Seastrand testified that around January 1, 2007, Marcano began working at Ladd Financial ("Ladd") and she joined him at this company. She testified that she followed him to the company in spite of the harassment because he still owed her so much money in both wages and for the loan. She stated that his inappropriate

conduct continued while they worked at Ladd and included his telling her that he wanted to marry her, his frequently cornering her and touching her body when he passed by, his repeatedly asking her and other women if they shaved their legs, and his occasionally trying to remove her shoes. Seastrand testified that on one occasion Marcano kissed her on the lips and on her feet. She stated that he touched her breast on a number of occasions during her employment at Fairfield and Ladd.

55. Seastrand testified that in approximately late February of 2007, she called the management at Ladd and informed someone whose name she could not recall about Marcano's inappropriate conduct. This person asked her to come to Danbury to discuss the matter and she did so. She stated that subsequently someone from Ladd's management team came to the Hingham office to discuss her complaints and she gave him the pornographic DVDs and playboy boxer shorts that Marcano kept in the office.

56. Seastrand testified that she went to the police concerning Marcano on or about March 22 or 23, 2007 and reported possible financial fraud and sexual harassment. The police report states in part that Complainant informed a detective that Marcano's "action and demeanor were at times troubling and inappropriate." In the report, Seastrand recounts Marcano's pushing her into a chair and sitting on top of her and trying to kiss her and put his hands on her, Marcano's producing a gun on one occasion in the car and once in the office, and Marcano's talking her into investing approximately \$80,000. She also stated that

the only reason she had remained working with him was to recover her money.

The formal police report was filed on April 27, 2007. (Ex. 3A)

57. Seastrand stated that the only compensation she received from Marcano was \$2,000.00 which he put under the lamp on her desk at one point. Seastrand testified that she spoke to Marcano's lawyer about the remaining money Marcano owed her and stated that she eventually recovered \$13,000 from Marcano prior to leaving her employment at Ladd. Seastrand stopped working for Ladd and Marcano after reporting him to the police.
58. Seastrand stated that, in total, she turned over \$80,000 of her own money to Marcano in the form of a bank check for \$45,000, and \$35,000 in cash from her credit union.
59. Seastrand collected \$628.00 a week in unemployment while out of work from late March 2007 until July 15, 2007. She testified that she received a 1099 from Ladd but did not testify as to the dollar value.
60. Subsequent to her employment at Fairfield, Seastrand worked for the companies Extralis SP and Main Point. She was not employed at the time of hearing having been laid off two weeks earlier.
61. Seastrand testified that small bowel obstruction incidents resulted in her being hospitalized three times, twice while employed at Fairfield and once while at Ladd. She stated that an incident occurred when she was working at Extralis but it did not require hospitalization. She also stated that she underwent surgery while at Main Point because of small bowel obstruction and was out for six weeks.

III. CONCLUSIONS OF LAW

A. Sexual Harassment

M.G.L. c. 151B, sec. 4, paragraph 1 prohibits workplace discrimination, including sexual harassment. See, Ramsdell v. Western Bus Lines., Inc., 415 Mass. 673, 676-77 (1993). Chapter 151B, § 4, (16A) also prohibits sexual harassment in the workplace. See 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 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. M.G. L. c. 151B, § 1 (18).

Both Complainants in this matter allege they were subjected to a sexually hostile work environment by their supervisor Marcano. In order to establish a “hostile work environment” sexual harassment claim, Complainants must prove by credible evidence that: (1) they were subjected to sexually demeaning conduct; (2) the conduct was unwelcome; (3) the conduct was objectively and subjectively offensive; (4) the conduct was sufficiently severe or pervasive as to alter the conditions of employment and create an abusive work environment; and (5) the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. See College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987); Parent v. Spectro Coating Corp., 22 MDLR 221 (2000); MCAD Sexual Harassment in the Workplace Guidelines, II. C. (2002).

Sexual harassment must be objectively and subjectively offensive. See Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 677-78 (1993). The objective standard means that the evidence of sexual harassment must be considered from the perspective of a reasonable person in the plaintiff's position. Id. at 678. The reasonable woman inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating, whether it unreasonably interfered with the worker's performance, and what psychological harm, if any, resulted. See Scionti v. Eurest Dining Services, 23 MDLR 234, 240 (2001) *citing Harris v. Forklift Systems, Inc.*, 510 U.S.17 (1993); Lazure v. Transit Express, Inc., 22 MDLR 16, 18 (2000). The subjective standard of sexual harassment means that an employee must personally experience the behavior to be unwelcome. It is a personal one related to Complainant's own reaction to the harassing conduct. See Couture v. Central Oil Co., 12 MDLR 1401, 1421 (1990) (characterizing subjective component to sexual harassment as ... "in the eye of the beholder."). An employee who does not personally experience the behavior to be intimidating, humiliating or offensive is not a victim within the meaning of the law, even if other individuals might consider the same behavior to be hostile. See MCAD Sexual Harassment in the Workplace Guidelines, II. C. 3 (2002); Ramsdell v. Western Bus Lines, Inc., 415 Mass. at 678-679.

Sarah Nagle

The credible testimony of Nagle in this case establishes that she was subjected to sexual harassment by Marcano. Marcano subjected Nagle to sexually offensive conduct that included touching her breasts, touching her feet and placing them near his genitals,

masturbating near her, making her watch pornographic DVDs in the office, grabbing his genitals and asking whether she “wanted a piece of the action?” Marcano’s conduct was continuous and pervasive as it persisted throughout her employment. Complainant Nagle made Respondents Fairfield and Levesque aware that this subjectively and objectively offensive conduct was unwelcome. The unwelcomeness of Marcano’s conduct eventually resulted in Nagle working from home to avoid Marcano because she was fearful of him and his conduct interfered with her performing her job.

Since Marcano was a vice president and manager of Respondent who supervised Nagle, Fairfield is vicariously liable for his conduct towards her. An employer is vicariously liable for the sexual harassment perpetrated by its managers and supervisory personnel regardless of whether the employer is aware of the harassment. College-Town Division of Interco v. Massachusetts Commission Against Discrimination, 400 Mass. 156 (1987). Nagle also reported Marcano’s sexual harassment to Levesque, the President of Fairfield, and he failed to take any action, after receiving notice of Marcano’s potentially unlawful conduct. I find that Respondents Marcano and Levesque individually and Fairfield Financial are liable for sexual harassment and retaliatory discharge of Nagle from the company in December of 2006 after she reported Marcano’s unlawful behavior.

Maureen Seastrand

Although Seastrand testified to sexually offensive conduct by Marcano that included his repeated attempts to touch her body when he passed by, repeatedly asking her and other women if they shaved their legs, removing her shoes and rubbing her feet, and touching her breast on a number of occasions, I conclude that Marcano did not find

this conduct objectionable and that it did not interfere with her ability to do her job or to relate to Marciano. While a reasonable woman would have been offended by Marciano's conduct, I am not persuaded that Complainant Seastrand was. This is evidenced by her agreeing to loan Marciano a large sum of money and her following him to another company. I find that a reasonable woman in this situation would not have loaned the alleged harasser the entire amount of her life's savings, would not have paid for new office carpeting out of her own pocket, would not have continued to work in the same office as the alleged harasser and would not have followed the alleged harasser to a new job. Her testimony indicates that she realized early on in her employment that Marciano behaved inappropriately but she continued to trust Marciano and essentially give up her life savings at his request. Moreover, there is no evidence that she ever complained to anyone in Fairfield's home office regarding Marciano's conduct, as Nagle did repeatedly.

Seastrand's testimony also indicates that her reason for filing the charge of discrimination when she did was because she realized she had no other options for getting back her money. While I believe the Seastrand came to understand that she was being financially swindled by Marciano, I do not credit her testimony that she found Marciano's sexual behavior offensive and I do not believe that it interfered with her ability to do her job, as was the case with Nagle, or that she considered her work environment to be abusive and hostile on account of his behavior. Therefore I do not find Fairfield Financial Group liable for sexual harassment of Seastrand by Marciano.

Individual Liability

The Commission has held that individuals may be liable under M.G.L. c.151B, §4 (4A) if they “coerce, intimidate, threaten or interfere with another person in the exercise of enjoyment of any right granted or protected by this chapter . . . “. Where there is direct evidence of discrimination and the alleged perpetrator was in a supervisory position in which he or she had direct control over Complainant’s employment, the individual may be named as acting in deliberate disregard of Complainant’s rights. Woodason v. Town of Norton School Committee, 25 MDLR 62 (2003). Also, M.G.L. c.151B, §4 (5) provides that it is unlawful for “any person, whether an employer or employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under [G.L. c. 151B] or to attempt to do so.”

The evidence in the record supports a finding of individual liability against the individually named Respondent, Marciano in Nagle’s case in that he harbored the requisite intent to discriminate and committed acts of discrimination that interfered with Complainants’ rights to a work environment free of sexual harassment. There is ample testimony of discriminatory actions on the part of Marciano to support a finding of individual liability against him. I conclude that Marciano shall be held individually liable for unlawful discrimination in this matter. I also conclude that Levesque is individually liable to Nagle, because as President of the company who was on notice of the harassment, he had a duty to act, and utterly failed to do so, in a manner that implicated the Complainant Nagle’s rights. This failure to act was in deliberate disregard of Complainant Nagle’s rights permitting the inference that there was intent to discriminate. See Woodason, supra.

Retaliation

Massachusetts General Laws c. 151B § 4(4) prohibits retaliation by any person against someone who has filed a complaint with the MCAD, assisted in such a complaint, or who has engaged in other protected activity, including opposing practices forbidden by M.G.L. c. 151B. The statute makes it unlawful “for any person, [or] employer... to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five.” See Kelley v. Plymouth County Sheriff’s Department, et al., 22 MDLR 208, 215 (2000) *citing* Bain v. City of Springfield, 424 Mass. 758, 765 (1997). Retaliation is a separate and independent claim of discrimination, “motivated, at least in part, by a distinct intent to punish or rid the workplace of someone who complains about an unlawful employment practice.” Kelley, supra. at 215 quoting Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In order to prove a claim of retaliation, Complainant must state a *prima facie* case consisting of the following elements: (1) that she engaged in protected activity; (2) that her employer knew of the activity and subjected Complainant to an adverse employment action; and (3) there is a causal connection between the adverse action and the protected activity. See MacCormack v. Boston Edison Co., 423 Mass. 652, 662-6 (1996).

Here, Complainant Nagle alleges retaliation against Respondents Fairfield and Levesque. Evidence showed that she engaged in protected activity by complaining repeatedly to Fairfield’s headquarters and Levesque about Marciano’s sexual harassment beginning in September 2006 and through the fall of that year. In December 2006, Complainant received a letter from Fairfield referring to health insurance options

following termination. Although no documentation was submitted as to the actual date that Complainant Nagle was subsequently terminated, she was locked out of Fairfield's computer system and her employment with Fairfield ceased in late 2006. Based on the timing of her protected activity and the adverse action she was subjected to by Respondents, a temporal relationship is demonstrated. Complainant Nagle has accordingly established an un-rebutted prima facie case of retaliation against Fairfield and Levesque.

IV. REMEDY

The Commission is authorized to award damages and such other relief that will make an injured Complainant whole. Pursuant to G.L. c. 151B §5, the Commission may award damages for lost wages and benefits and for emotional distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004). An award of damages for emotional distress must be fair and reasonable and proportionate to the harm caused. There must be substantial evidence that the damages are causally connected to the unlawful acts of discrimination and of the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant suffered or expects to suffer, and whether the Complainant has attempted to mitigate the harm. *Id.* at 576.

No financial documentation was submitted to verify either of the Complainant's testimony with regard to wages or lost wages. Each Complainant testified credibly however, that they had an agreement with Marcano to be paid \$500.00 per week. This was in addition to a percentage of origination fees on any residential mortgages they sold. There is no evidence in the record regarding the number of mortgages Nagle may have

originated, and I am therefore unable to grant damages for this lost earning potential. But I find that from July 1, 2006 until December 18, 2006 Nagle should have received \$500.00 a week in base pay. It is not clear how long she would have worked for Fairfield had she not been unlawfully terminated, because there was testimony that Marcano left Fairfield in January of 2007 to work for another company called Ladd. Based on this, I conclude that she is entitled to 22 weeks of lost wages amounting to an award of \$11,000.00.

Complainant Nagle offered credible and persuasive testimony that Marcano “totally ruined” her life financially, that she still has not recouped her money and has had to take cash advances on her credit card and is now “losing almost everything.” She stated that she is “a mess” emotionally and physically and has developed ulcers, is sick all the time, experiences migraines, and continues to suffer from a great deal of stress. Nagle was so threatened by Marcano’s conduct that she attempted to work outside the office and avoided being in the office when she knew he was there. He continued to threaten her and her family, even after she was terminated from Fairfield. I find that she suffered emotional distress as a result of Marcano’s discriminatory conduct.

On the basis of Nagle’s credible testimony that she suffered emotional distress as a result of harassment and retaliation by Marcano, I find that she is entitled to an award of \$25,000.00 in damages for emotional distress arising from his discriminatory workplace conduct.

V. ORDER

Respondents Fairfield, Levesque, and Marcano are hereby ordered to:

(1) Cease and desist from engaging in future conduct that constitutes sexual harassment in the workplace.

(2) Pay to Complainant Nagle the sum of \$11,000.00 for lost wages with interest thereon at the statutory rate of 12% per annum from the date of the filing of the complaint until such time as payment is made, or until this order is reduced to a court judgment and post judgment interest begins to accrue.

(3) Pay to Complainant Nagle the sum of \$25,000.00 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum until such time as payment is made or until this order is reduced to a court judgment and post judgment interest begins to accrue.

This decision represents the final order of the Hearing Commissioner. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 C.M.R. 1.23 by filing a Notice of Appeal of this decision with the Clerk of the Commission within ten days after receipt of this Order and a Petition for Review within thirty days of receipt of this Order.

So Ordered this 7th day of October, 2010

Sunila Thomas-George
Hearing Commissioner