

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

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia M. Guastaferrri in favor of Complainants, Danielle Mills and April Ronan. The Hearing Officer concluded that Respondents violated G.L. c. 151B, which prohibits discrimination, including sexual harassment, and retaliation against an employee who has engaged in activity protected by statute. The Hearing Officer awarded Complainant Mills \$5,307.68 in lost wages and \$25,000 in damages for emotional distress. The Hearing Officer awarded Complainant Ronan \$29,962.50 in lost wages and \$40,000 in damages for emotional distress. The Hearing Officer also ordered Respondents to pay a civil penalty in the amount of \$10,000, and to cease and desist from engaging in the types of unlawful conduct that were adjudged to constitute sexual harassment and the creation of a sexually hostile environment. Respondents have appealed the decision to the Full Commission.

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 et seq.), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, § 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a conclusion..." Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., Ingalls v. Bd. of Registration in Medicine, 445 Mass. 291, 301 (2005); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The role of the Full Commission is to determine, *inter alia*, whether the decision under appeal was rendered on unlawful procedure, based on an error of law, unsupported by substantial evidence, whether the decision was arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23(1)(h); Kacavich, et al. v. Halycon Hill Condominium Trust, et al., 32 MDLR 148, 149 (2010). Substantial evidence is defined as such evidence as a "reasonable mind" would accept as adequate to support a conclusion. M.G.L. c. 30A, §1(6); see also Gnerre v. MCAD, 402 Mass. 502, 509 (1988). The standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support the contrary point of view. See O'Brien v. Dir. of Emp't Sec., 393 Mass. 482, 486 (1984).

SUMMARY OF THE FACTS

Both Complainants testified about a pervasive pattern of sexual harassment in the workplace. They testified that Respondent Prete often and repeatedly leered obviously at their breasts, looked down their blouses, and made comments about their chests. Because Prete's behavior made them feel uncomfortable and humiliated, both Complainants wore vests, sweatshirts and hoodies in an attempt to cover up their bodies and discourage any leering and offensive remarks, and Ronan sometimes reacted by crossing her arms over her chest. In response, Prete told Mills at one point that he would fire her if she wore a hoodie to work, and he told Ronan that female employees should "wear low necklines and show more skin." He also told Ronan that there was a new policy of "wear your bathing suit to work day." Four mechanics who worked at A.E. Sales testified that they saw Prete repeatedly lean over the Service Counter and stare at Complainants' breasts. Mills testified that this behavior was especially embarrassing because the mechanics, individuals with whom she worked or supervised, saw her being demeaned in this fashion.

Mills testified about other acts of harassment by Prete. She stated that Prete told her she should choose her work clothes from Frederick's of Hollywood, and on one occasion he dropped that company's catalogue on their desk, asked Complainants to select outfits, and told them stiletto heels were required. Mills also testified about an email that Prete sent, which featured a picture of woman in ripped jeans that exposed her rear end. Prete accompanied the image with text suggesting that the woman pictured was Mills being "spotted walking" and that "someone" was "checking [her] out." Further, Mills testified as to a number of other unwelcome comments from Prete, such as: telling

her if she wanted a raise, she would have to go his office and see him raise; calling Fridays “birthday suit Fridays”; saying “we are like gynos, we like to check out what looks nice”; making numerous comments about her breasts; making references to ads for prostitutes while he was on Craigslist; and telling sexual jokes directed at Mills.

There was testimony from other employees at A.E. Sales about the workplace environment which corroborated the Complainants’ testimony. Jim Coogan, Keegan Van Sicklen, Kenneth “Chip” Myers, Christopher Spartichino and Victor Stewart testified that Prete frequently told sexual jokes and made sexual comments, and they also acknowledged that they joked around as well. There was also evidence that Mills herself participated in some of the joking that took place at work. Mills sent and forwarded off-color and sexually-themed emails to Prete and others at A.E. Sales.

Mills also testified that on several occasions Prete came up behind her while she was stationed at the service counter and panted or breathed heavily on her neck as he made “grunting” or “creepy” noises. He also touched her hair or shoulders while he made these noises, despite the fact that Mills swatted his hand away and told him to get away from her. Mills testified that on one occasion in front of Mills’ mother, Prete approached her from behind, breathed on her neck and made grunting noises. Prete admitted to this conduct, but testified that he did this “to demonstrate to Complainant’s mother how a stalker would react to her daughter.” Although there was evidence that Mills forwarded some emails of a sexual nature to Prete and others, there was no evidence 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.

Mills also testified that Prete received a “penis pump” at work and as he showed it to Mills and simulated how it worked, he made repeated humping motions. In acknowledging that he was excited to receive the pump at work, Prete testified that he discussed the “vacuum pump,” as he termed it, in a clinical, non-sexual way, as its use was related to sexual dysfunction caused by cancer surgery.

On one occasion, Prete stapled a condom to Mills’ bonus check and explained that if she wanted the bonus she would have to use the condom, and as he handed her the check he remarked that his action “will probably get me in trouble with the MCAD.” Prete testified that he made this statement because in a prior dealing with the MCAD, he found the agency did not appreciate “satire.” Mills stated that the fact that this incident was witnessed by several other employees was especially upsetting and humiliating, since she had to work with and, on some occasions, supervise such employees.

The Complainants testified that Prete brought prostitutes into the workplace and the Complainants found such conduct offensive. Prete admitted bringing women he contacted on Craig’s list into the workplace, but claimed that his sex therapist told him he should “get a hooker” to aid in his treatment, and that the women were brought in for “clinical and medical reasons.” One of the male witnesses testified that Prete hired both prostitutes and masseuses whom he brought into the workplace, and that Prete offered their services to him for free. The Hearing Officer found that Prete engaged in such conduct in the workplace, and that the Complainants found this behavior offensive.

Both Complainants testified that there was a sign behind the Service Counter desk where they worked that read “I ♥ oral sex.” Ronan testified that this sign was offensive because it was placed directly behind her, ostensibly indicating to customers that she

approved of and “accepted the sign.” Ronan felt that it was hard to be taken seriously while a customer viewed her and the sign at the same time, and she asked Mills if the sign could be removed. Ronan turned the sign around in order to obscure its message, but even though she did this at least three times, Prete turned it back so that the message was again in full view of customers. Prete testified that he approved of the sign and thought it was funny.

Ronan testified that when Prete hired a computer specialist to help train her on the use of the computer, he remarked, “I knew you would like this one,” upon introducing her with an exaggerated gesture. Ronan was embarrassed and humiliated by this conduct, as she believed Prete was referring to her body and making her uncomfortable in front of and next to a person who was training her. Ronan also testified that although she was excited about a marketing and website design project at work, she was offended when Prete suggested that every picture used to market the company should contain half-naked women. When she objected to this practice, Prete responded, “Sex sells,” and remarked that use of the artwork was appropriate.

Ronan was employed at A.E. Sales for a total of approximately six weeks. Following a confrontation she had with Prete when she tried to discuss his offensive behavior, during which he dismissed her statements and told her to “shut the f—k up,” Ronan decided to resign. On July 16, 2009, Ronan submitted a letter of resignation, in which she stated specifically that she was terminating her employment with A.E. Sales due to having been “harassed” by Prete, both “sexually and verbally.” In this letter, Ronan referenced certain sexually explicit comments that Prete had made, and also recounted Prete’s final words to Ronan during their confrontation. After she resigned,

Ronan went to the police station to report what had happened. She took this step because she was afraid of Prete's volatility and temper due, in part, to reports of violence that she had heard about Prete having struck a female employee in the past.

Mills, who began working at A.E. Sales in January of 2007, left A.E. Sales in August 2009, shortly after Ronan did. She testified that on several occasions after Ronan resigned, she saw Prete behind her gyrating his hips and simulating sex in a motion she described as dry humping. While Prete described this conduct as dancing, four mechanics testified that Prete's actions were definitely simulations of sex and could not be mistaken for dancing. On August 5, 2009, Mills spied Prete engaging in this conduct while she discussed some repairs with a mechanic, and even though she told Prete to stop, he engaged in the very same conduct the following day. On August 6, in response to Prete's repetition of his offensive behavior, Mills raised her fist and threatened to hit Prete if he did it again. On August 7, Mills had an argument with Prete about a customer's car, during which Prete told her to "get the f—k out." Because Prete had used the same language when terminating another employee, Mills understood his directive to mean that he had terminated her employment. Mills then began crying, and packed up her belongings and left.

Mills also alleges a case of retaliation in this matter. She testified that after she left A.E. Sales, she received a postcard advertisement for A.E. Sales featuring a picture of a female service advisor with the initials "DM" written next to it, and the card referred to her new employer (Village European) as "Village of the Damned." Another card showed a superhero flying with the decapitated head of the service advisor. Mills felt threatened by this postcard, as she inferred that the initials "DM" and the depiction of the service

advisor were meant to reference her. In addition, Mills testified that Prete wrote a Google review of Village European, which disparaged her, Myers and another mechanic who had formerly worked at A.E. Sales. The Google review included the comment that “Ms. Mills has slapped us with a bogus sexual harassment suit filed against me...” Mills testified that she was concerned that this negative posting harmed her reputation and could potentially jeopardize her opportunities with a future employer.

BASIS OF THE APPEAL

Respondents first contend that the Hearing Officer’s decision was not supported by substantial evidence. Specifically, Respondents argue that because the Hearing Officer found some of the testimony presented by Complainants not to be credible, then her findings of liability were necessarily inconsistent with the evidence. This argument is not persuasive. While it is true that the Hearing Officer did not accept all of Complainants’ testimony as credible, this fact does not obviate or undermine in any way the ultimate findings of liability in this case. The record is replete with the Hearing Officer’s careful and detailed evaluations and analyses of each incident about which Complainants testified. This record clearly demonstrates that the Hearing Officer evaluated each allegation on its own merits, examined the exhibits, weighed the credibility of all the witnesses, and made a final determination about each incident according to all of the evidence presented. That final determination -- that Respondent Prete’s conduct constituted an unlawful hostile work environment, sexual harassment and gender-based harassment, and that Complainant Mills was subjected to retaliation – is

well supported by the record, notwithstanding the Hearing Officer's findings that some parts of Complainants' testimony were not as credible as other parts.

For example, in noting that Mills routinely forwarded emails of a sexual nature to Prete and others, including some of the mechanics at Respondent A.E. Sales, the Hearing Officer found that the evidence suggested Mills not only participated in, but sometimes initiated, the tawdry and off-color joking in the workplace. The Hearing Officer did not believe that Mills was offended by off-color, sexual jokes and references, and she was not persuaded that Mills was fearful of Prete but, rather, the Hearing Officer believed that Mills was disgusted and annoyed by this particular aspect of Prete's behavior. However, this finding that Mills was less than credible on these discrete elements of her claim did not operate to preclude an overall finding of liability against Respondents. The great balance of the testimony and evidence amply showed that Prete committed numerous instances of unwelcome verbal and physical conduct that was sexual in nature, conduct that was sufficiently severe and pervasive to alter their work environment at A.E. Sales. This conduct included unwanted touching of Mills and leering at Complainants' breasts; encouraging Complainants to dress more provocatively and wear more revealing clothing; insisting upon retaining a sign reading "I ♥ oral sex" above Complainants' workspace despite Ronan's attempts to turn the sign around; making numerous comments of a sexual nature to Mills that were both objectively and subjectively unwelcome; touching Mills' hair and shoulders while panting on her neck and making overtly sexual grunting noises; stapling a condom to Mills' paycheck and telling her, in front of other employees with whom Mills worked and whom she supervised, that if she wanted the bonus she would have to use the condom; gyrating his hips and simulating sex in a manner Mills

described as “dry humping” her from behind, in front of other employees; displaying in the workplace a device he described as a “penis pump” and demonstrating how he would use it; and inviting prostitutes and masseuses into the workplace and openly discussing with employees his sexual exploits. The Hearing Officer found credible Complainants’ testimony about these incidents, concluding that the totality of Prete’s conduct was unwelcome, offensive, outrageous, severe and pervasive, and that a reasonable woman in Complainants’ position would have found the conduct a hindrance to full participation in the workplace. The Hearing Officer’s discounting of a small portion of Complainant’s testimony necessarily must be measured against the broad finding of Complainants’ credibility on many instances of conduct in this matter and the sum total of the evidence, including corroborating testimony from other witnesses. Accordingly, the Hearing Officer’s findings of liability are well supported by an overwhelming proportion of the testimony and evidence presented, and they should not be disturbed.

Respondents next contend that the Hearing Officer erred in making her award of lost wages damages to Complainants. The Hearing Officer awarded \$29,962.50 to Ronan and \$5,307.68 to Mills for lost wages. With respect to Ronan, Respondents argue that the Hearing Officer’s award was arbitrary and capricious because Ronan had no expectation of continued employment given that she was employed by Respondents for such a short time and given Respondent A.E. Sales’ financial condition, because she “suffered from prior adverse chronic physical and emotional health,” and because the award did not take into consideration any unemployment benefits received by Ronan. However, Respondents’ arguments are unavailing. The Hearing Officer based her award upon the evidence placed before her, namely that Ronan was unemployed for a period of 47 weeks

after being constructively discharged by Respondents and that her weekly pay was \$637.50. Without any more evidence, the Hearing Officer was bound to calculate Ronan's lost wages on the evidence presented and nothing more. It was Respondents' burden to introduce evidence concerning mitigation of damages. J.C. Hillary's v. MCAD, 27 Mass. App. Ct. 204 (1989). Yet the Respondents introduced no such evidence at the public hearing. Regarding the factors they now cite as preclusive of the Hearing Officer's award of lost wages, Respondents did not offer at the hearing any evidence, either as to the duration of Ronan's employment, her mitigation of damages, any interim earnings, or her receipt of unemployment compensation benefits. Respondents' failure to offer such evidence and carry their burden of proof at the hearing cannot at this stage of the proceedings form the basis of an appeal on the issue of lost wages.

The same reasoning applies with respect to the Hearing Officer's award of lost wages to Mills. Respondents argue that the Hearing Officer's award of lost wages did not take into consideration Mills' receipt of unemployment compensation benefits. As explained above, the Hearing Officer was not bound to consider such benefits where Respondents failed to introduce any evidence regarding the mitigation of damages or any such benefits received, and the Hearing Officer properly calculated the amount of Mills' lost wages based upon the evidence presented, namely four lost weeks of wages or \$5,307.68. Further, even if the Respondents had introduced evidence of any award of unemployment benefits, the Hearing Officer would not have been obligated to offset the back pay award by the receipt of unemployment benefits. School Committee of Norton v. MCAD, 63 Mass. App. Ct. 839, 849 (2005) (affirming MCAD's decision not to offset

back pay award by unemployment benefits and recognizing validity of “collateral source rule” to employment discrimination context).

Respondents next contend that the Hearing Officer’s award of damages for emotional distress was excessive, arbitrary, without foundation as to causality and degree, and not supported by substantial evidence. The Supreme Judicial Court articulated standards for the Commission to consider in rendering damage awards for emotional distress in Stonehill College v. MCAD, 441 Mass. 549 (2004). The relevant factors articulated in Stonehill include the nature, character, severity and length of the harm suffered. The award should be “fair and reasonable, and proportionate to the distress suffered.” Id. at 576.

Respondents first argue that the Hearing Officer erred by “strongly dissuad[ing]” Respondents from introducing expert medical testimony, which, they assert, was “required” and “crucial to this case.” Respondents argue that the Hearing Officer’s suggestion not to provide expert testimony was erroneous and highly prejudicial. Respondents insist that the Hearing Officer should have requested expert medical testimony before finalizing her decision and order in this matter. However, a complainant’s entitlement to an award of monetary damages for emotional distress can be based on expert testimony and/or her own testimony regarding the cause of the distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-83 (1988). Proof of physical injury or treatment by medical providers may provide support for an award of emotional distress, but it is not a necessary prerequisite for such an award. See Stonehill at 576. It is the role of the fact finder to assess the demeanor and reliability of witnesses. The Hearing Officer

was under no obligation to request medical expert testimony. To the contrary, it was Respondents' obligation to call an expert to testify if they believed it was crucial and required under the circumstances. While it may be true that the Hearing Officer opined that expert testimony was not necessary, she did not prevent anybody from calling experts but, rather, left that decision up to the parties and their attorneys.

Respondents also argue that the awards for emotional distress are excessive. Yet the record demonstrates that the Hearing Officer based her award upon convincing testimony from both complainants and that they sustained emotional harm as a result of Respondents' unlawful, discriminatory and retaliatory acts.

The Hearing Officer credited Ronan's testimony that she sustained emotional distress despite the fact that she worked at A.E. Sales for a much shorter period of time than Mills did. In fact, the Hearing Officer stated that, despite the disparity in duration of employment, she found Ronan's claim for emotional distress damages to be the more convincing and compelling. Respondents assert that the Hearing Officer accorded "unreasonable weight" to Ronan's testimony due to empathy and sympathy, and that the Hearing Officer improperly substituted such empathy and sympathy for credibility. However, the record does not support Respondents' assertion. The Hearing Officer begins her analysis with respect to Ronan's emotional distress by noting that Ronan appeared to be "much more emotionally fragile and vulnerable" than Mills. She makes this observation not to betray an "unreasonable weight" or improper surfeit of sympathy toward Ronan, but to explain her belief that Prete recognized Ronan's emotional fragility at the time of hire. The Hearing Officer recognized Prete's testimony concerning Ronan that within a few short weeks of employment he viewed her as "too needy" and a

“wounded individual.” This observation played an integral part in the Hearing Officer’s decision to award a greater award of damages to Ronan than to Mills, both because she believed that Prete knowingly played and preyed upon Ronan’s fragility and because, as a result of Ronan’s fragile nature, she suffered a greater degree of emotional harm.

The Hearing Officer credited Ronan’s testimony that she was constantly on guard that Prete would come out of his office to harass and abuse her. Ronan testified that she was intimidated and humiliated by Prete’s behavior, that she was always nervous at work, and that her stomach was always in knots. Ronan described how she suffered anxiety and panic attacks, characterized by tension and shortness of breath, which caused her to have to leave the workplace and calm down outside. These panic attacks continued even after Ronan left A.E. Sales. The Hearing Officer also credited Ronan’s testimony that Prete’s numerous acts caused her shame and guilt, especially Prete’s display of the “I ♥ oral sex” above Complainants’ workspace despite Ronan’s repeated attempts to turn the sign around. In Ronan’s view, this sign, fully visible to customers, made it seem that she was to be viewed as a sex object, an object of derision. Yet even though Prete’s sex-infused workplace made her feel as though she were a sex object rather than an employee, she endured the discomfort and humiliation for over a month because, as a single mother, she needed the income in order to support herself and her son. Ronan felt guilty about putting up with the workplace harassment for as long as she did. The fact that Ronan ultimately resigned from her job, despite her financial exigencies of needing to pay rent and make payments on her vehicle, is testament to the degree of humiliation and distress to which she was ultimately subjected by Prete. The Hearing Officer also credited Ronan’s testimony that, in addition to feeling anxious and humiliated, she felt fearful of

Prete. Ronan testified that because of reports that Prete had hit a female employee on a prior occasion, Ronan was afraid that he might strike her as well. Indeed, such fear for her physical wellbeing caused Ronan, directly after she resigned, to go right to the police station to report what had happened, namely a confrontation with Prete about his offensive behavior during which he dismissed her statements and told her to “shut the f— k up.” Ronan took this step because she was genuinely afraid of Prete’s volatility and temper.

The Hearing Officer also found credible Ronan’s testimony that her anxiety continued beyond her period of employment at A.E. Sales. Due to the financial difficulties she endured as a result of leaving her job, including the inability to pay her rent, Ronan was anxious and on edge about being confronted by her landlord, who sent her multiple eviction notices. This anxiety occasioned more panic attacks and a prescription for medication to treat them. Because she had to apply for food stamps, Ronan felt embarrassed and ashamed that she was unable to support herself and her son on her own. Unwilling to ask for money from family or friends because of embarrassment and shame, Ronan was unable to buy Christmas gifts for her son, and this inability made her feel depressed on top of the anxiety, self-consciousness and sadness from which she was already suffering. Ronan also testified that she was feeling stress right up until the time of the public hearing in this matter. Because of her experience at A.E. Sales, Ronan currently worries about losing her job again, and she is hyper-conscious of how her co-workers, who are all male, react to her. In preparing for the hearing, and concomitantly recalling the harassment she endured at the hands of Prete,

Ronan felt increased anxiety on several occasions, including once when her breathing became so rapid that she had trouble calming herself down.

Respondents argue that Ronan had “health problems and emotional distress issues” prior to, during and after her employment at A.E. Sales, and they appear to suggest that Respondents were not responsible for her emotional distress. However, while the Hearing Officer specifically acknowledged that Ronan was unemployed and under financial stress prior to working at A.E. Sales, she concluded that “the circumstances she encountered at Respondents’ workplace gravely exacerbated her emotional distress.”

The decision demonstrates that the Hearing Officer based her award of emotional distress damages to Ronan upon convincing testimony and that Ronan sustained emotional harm as a result of Respondents’ acts. The Hearing Officer’s award of emotional distress damages of \$40,000 does not shock the conscience and is not an abuse of discretion. In light of the totality of the testimony presented, the Hearing Officer’s award of damages is reasonable and consistent with the standards set forth in Stonehill, and the award is commensurate with the emotional pain suffered by Ronan. It should therefore remain undisturbed.

Similarly, the Hearing Officer’s award of emotional distress damages to Mills should also be upheld, although the facts relating to her emotional distress admittedly are different. Respondents argue that because the Hearing Officer did not accept as credible some of Mills’ testimony regarding her distress, she should not receive any emotional distress damages at all. Yet such a result is not warranted. The fact that the Hearing Officer did not believe that Mills was the victim of harassment throughout her entire tenure at A.E. Sales does not negate that Mills was harassed by Prete during the final

months of her employment. Likewise, the fact that the Hearing Officer did not credit Mills' testimony that Prete's actions were the sole source of Mills' distress does not negate a finding that Mills grew more disgusted and infuriated with Prete's constant sexual comments and conduct, particularly those which involved touching her or simulating sex in an effort to provoke and antagonize her. And the fact that the Hearing Officer did not accept that Mills was "deeply humiliated" by Prete's actions or that her weight gain was attributable to Prete's conduct does not negate a finding that Mills nevertheless experienced some emotional distress as a result of her work situation and that Prete's conduct exacerbated distress that Mills suffered in her life outside of work. Even though Mills may not have suffered to the extent that she claimed, this does not mean that Respondents were not liable for their conduct or that Mills did not suffer emotional harm in any respect that was caused by her workplace environment. As the Hearing Officer explained, "the existence of previous sources of emotional distress do not absolve Prete of liability for his discriminatory conduct or for exacerbating pre-existing distress, but may affect the degree to which he is liable and the resulting compensatory award."

It is the Hearing Officer's responsibility to assess the demeanor and credibility of witnesses. With respect to Mills, the Hearing Officer did just that. The Hearing Officer calibrated and weighed every aspect of Mills' testimony and adjusted accordingly the degree to which Respondents were liable for Mills' emotional distress. The Hearing Officer appropriately recognized and analyzed the relationship between Prete's unlawful, discriminatory actions and Mills emotional distress, and she took into account other