

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

APRIL BROWN AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
Complainants

Against

Docket No. 07 BEM 01753

FEEL WELL REAB CLINIC
and
GOPE GIDWANI,

Respondents

Appearances: Caroline Gibson, Esq. for Complainant
James W. Bagnell, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 7, 2007, April Brown, (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that she was sexually harassed by Respondent Gope Gidwani during the course of her employment at Respondent Feel Well Clinic.

The Investigating Commissioner issued a probable cause finding and certified the case for public hearing on June 16, 2010. A public hearing was held on February 18, 2011.

The Complainant, Respondent Gidwani, and witness Tyrone S. Goddard testified at the public hearing. The parties submitted post-hearing briefs.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. In December of 2005, Complainant April Brown, a resident of Quincy, MA, was hired by Respondent Gope Gidwani as a clerical employee at Feel Well Rehab Clinic, a therapeutic massage business. She earned \$12.00 an hour. Complainant functioned as a receptionist, scheduled patients, kept track of supplies, and engaged in some marketing activities. Complainant started in the Clinic's Mattapan office but thereafter went to the Jamaica Plain location.
2. Respondent Gope Gidwani was the owner of Feel Well Rehab Clinic and Complainant's direct supervisor. The Clinic had several locations: Matttapan, Somerville, Jamaica Plain, and New Bedford. The Clinic employed approximately five individuals who performed administrative work and also contracted with doctors and physical therapists on a part-time basis. Liz Medeiros was the supervisor directly beneath Gidwani. She worked out of the New Bedford office. As of 2008, all locations of Feel Well Clinic stopped doing business and were closed.
3. Complainant testified that in the beginning of her employment, she worked several days per week, but she also testified that she worked 32 hours per week on a four-day a week, eight-hour a day basis. Employment records indicate that there was only one week in 2006 during which Complainant worked 32 hours,

and during the rest of her employment, she generally worked between 15 and 28 hours per week. Respondent's Exhibit 1. Complainant also received checks for referrals when she brought new clients into the Clinic.

4. According to Gidwani, his clinic locations were open only three days per week for three to four hours each day. He testified that he permitted Complainant to work flexible hours, generally 12-15 hours weekly, but up to 20 hours per week provided she performed extra clerical and marketing work.
5. Complainant testified that she set up a bank account specifically for the purpose of receiving direct deposit paychecks from Respondent but that Gidwani told her that he could not make direct deposits into her particular bank account. I do not credit this testimony. Complainant asserted that she did not want to have her checks mailed to her house because "others" stole her mail. According to Complainant, Gidwani insisted that she meet him at various sites away from work in order to be paid. Complainant's boyfriend, Tyrone Goddard, testified that sometimes Complainant had to meet Gidwani at various locations in order to receive her paychecks.
6. Gidwani testified that he offered to deposit Complainant's paychecks directly into her bank account as he did for most of his employees but that Complainant wanted to be paid in person. He stated that it was difficult for him to deliver Complainant's checks to her in person because he only sporadically visited the various clinic locations and because the payroll company which processed the checks mailed them to him on Thursdays or Fridays which resulted in the checks sometimes arriving after the close of the work on Fridays. Gidwani occasionally

met Complainant at a Dunkin Donuts in order to hand-deliver her check. He mailed checks to other employees without direct deposit or else gave them out on Mondays. I credit this testimony.

7. Complainant testified that she was pregnant for the first six to seven months of her employment and that after she gave birth in June of 2006, Respondent began making sexual comments to her. Complainant claimed that Gidwani told her on one occasion that he wanted to have a “threesome” with her and a client and on another occasion asked her to go to Puerto Rico with him and to wear a bikini while she was there. Complainant asserted that she heard Gidwani offer to purchase breast implants for another employee.
8. Gidwani acknowledged knowing plastic surgeons in Brazil and stated that he would provide referrals to individuals interested in breast enhancement surgery. He denied inviting Complainant to Puerto Rico but admitted that he took another woman who was a client of the Clinic.
9. Complainant testified that in March of 2007, she had to go to Gidwani’s house on a Saturday morning in order to pick up her paycheck. She claims that she asked Gidwani to leave the check on her desk at the Clinic but when she went to the Clinic on Saturday to get it, the check was not there. According to Complainant, she called Gidwani and he told her to come to his house to pick up the check. When she arrived, Gidwani allegedly invited her in and asked if she wanted a martini, asked her to sit down, and started to massage her shoulders. Complainant asserts that she “shrugged” him off and they talked about marketing strategies until her daughter beeped the car horn. Complainant asserts that on the following

Monday, her hours of employment were cut one to two days per week.

10. According to Respondent Gidwani, Complainant called him, said that she wanted her paycheck, and offered to pick it up at his house. Gidwani testified that after Complainant knocked on the door, he got the paycheck from his briefcase. Gidwani estimates that Complainant was at his house for seven to ten minutes. He denies that he offered Complainant a drink and denies that he reduced Complainant's hours because of anything that happened -- or failed to happen -- at his house. According to Gidwani, he reduced Complainant's hours because of decreased business. The Jamaica Plain location where Complainant work closed at the end of 2007.
11. Gidwani described Complainant as a "decent" employee but said that he had to discourage her from having her friends, children, and boyfriend visit the Clinic while she was working. Gidwani testified that he never asked Complainant to go out for drinks except along with other employees and he never asked her to give him a massage. He acknowledges that he asked the Clinic's massage therapists for ten-minute massages when they had free time.
12. Gidwani loaned Complainant \$1,000.00 to buy a car during the period of time that she worked for him. Complainant paid back the loan.
13. According to Complainant, she stopped working for Respondent because she felt uncomfortable at the Clinic, didn't like the idea of traveling with Respondent, and was working too few hours to qualify for child care assistance. I do not credit Complainant's testimony that she stopped working for Respondent because she felt uncomfortable at the Clinic and didn't like the idea of traveling with

Respondent.

14. According to Respondent Gidwani, the end of Complainant's employment occurred when she took off time to care for her children who became sick with chicken pox. After Complainant had been out of work for a few weeks, Gidwani received notice from the Division of Employment Security that Complainant had filed a claim for unemployment compensation. The claim for unemployment compensation was denied.

15. Complainant found another job approximately four or six months after she stopped working for Respondent.

16. Gidwani testified that in 2001, another employee "may have" alleged sexual harassment against him. He believes that he settled the case.

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, sec. 4, paragraph 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 and (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, sec. 1, para. 18.

In order to establish a “hostile work environment” sexual harassment claim, Complainant must prove by credible evidence that: (1) she was 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).

The objective standard of sexually-unwelcome conduct means that the evidence of sexual harassment must be considered from the perspective of a reasonable person in the plaintiff’s position. 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. 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.

Applying the aforesaid standards, I conclude that credible evidence in the record fails to sustain Complainant's allegations of sexual harassment. In arriving at this conclusion I am mindful of the fact that Complainant bears the burden of proving her case by a preponderance of the credible evidence. In circumstances where opposing witnesses present equally credible versions of the same events, the conflict must be resolved in favor of the Respondent.

An important component of Complainant's case is the assertion that she sought to be paid through direct deposit but that Respondent Gidwani refused to do so, instead contriving opportunities to meet Complainant at after-hour locations. The facts do not bear out this contention. Instead, the credible evidence establishes that it was Complainant who refused to implement a direct deposit arrangement. Her demand to be paid in person required that Gidwani meet her at various locations in order to hand over her checks. The evidence likewise fails to support the assertion that Gidwani cut Complainant's hours because she spurned his alleged advances. I base this conclusion on the fact that Complainant only worked 32 hours for one week during the entire time she was employed by Respondent. Throughout the rest of her employment, she worked a variety of hours, generally ranging from 15 to 28. To the extent her hours were cut, the credible evidence indicates that Complainant's hours were reduced -- and the Jamaica Plain clinic location was ultimately closed -- because of lack of business.

Complainant also bases her claim of sexual harassment on allegations that following the birth of her child in June of 2006, Gidwani began making sexual comments to her such as saying that he wanted to have a “threesome” with her, asking her to go to Puerto Rico with him, and discussing the purchase of breast implants. She also alleges that he tried to massage her shoulders when she stopped by his house to pick up her paycheck. Whether any of these allegations are true, they fall short of actionable harassment. There may have been some inappropriate banter or actions, but there is no evidence that Complainant was victimized by it. The contrary is demonstrated by Complainant asking to borrow \$1000.00 from Respondent Gidwani to buy a car and taking unrestricted time off to care for her children. Whatever occurred between Complainant and Gidwani was not sufficiently severe or pervasive to alter the conditions of Complainant’s employment and create an abusive work environment.

B. Constructive Discharge

In order to establish constructive discharge, Complainant must prove that her working conditions were so intolerable that a reasonable person would have felt compelled to resign. See GTE Products Corp. v. Stewart, 421 Mass. 22, 34 (1995) (constructive discharge in sexual harassment context); Choukas v. Ocean Kai Restaurant, 19 MDLR 169, 171 (1997) (same). See generally MCAD Sexual Harassment in the Workplace Guidelines, VIII - Constructive Discharge. Constructive discharge can occur even if the employer does not act with the specific intent of forcing an individual to resign. See Langford v. Division of Unemployment Assistance, 17 MDLR 1043, 1063 (1995), *aff'd*, 18 MDLR 36 (1996) (Full Comm'n). A claim of constructive discharge under chapter 151B does not arise, however, when Complainant resigns due to general

dissatisfaction with the workplace or as a result of other conduct that does not violate chapter 151B. See GTE Products, 421 Mass. at 35 (citations omitted). Adverse working conditions must be unusually “aggravated” or amount to a “continuous pattern” in order to be deemed “intolerable.” Id.; see also Robinson v. Hafner’s Service Stations, Inc., 23 MDLR 283 (2001) (no constructive discharge despite allegations of pornographic material in work area, solicitation that complainant show her breasts and pull up her skirt, and placement near complainant of carved peach in shape of a female sex organ).

An employee is expected to make a reasonable attempt to straighten out any misunderstandings before claiming constructive discharge. See Pio v. Kinney Shoe Corp., 19 MDLR 127, 131 (1997). An unwillingness to compromise cannot be grounds for a claim of constructive discharge. See GTE Products v. Stewart, 421 Mass. at 34. The standard to prove constructive discharge is an objective one; an employee’s subjective perceptions do not govern. See Lee-Crespo v. Schering-Plough del Caribe, 354 F.3d 34, 45-46 (1st Cir. 2003).

Complainant asserts that she was forced to resign because her hours were cut after she refused to allow Complainant to massage her shoulders but the more convincing evidence is that her hours fluctuated in concert with the number of clients at the Clinic. Although Complainant alleged that she was hired to work 32 hours per week, there was, in fact, only one week when she worked 32 hours during the entire sixteen months she was employed by Respondent. Complainant’s hours were reduced towards the end of her employment because of decreasing clientele. She left work altogether because the reduced hours did not permit her to receive subsidized child care and because she needed to care for her sick children.

Based on the foregoing, I conclude that the evidence is insufficient to establish a constructive discharge cause of action.

IV. ORDER

The case is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 21st day of June, 2011.

Betty E. Waxman, Esq., Hearing Officer

