

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
BARBARA AVILA,

Complainants

v.

DOCKET NO. 09-BEM-01557

J & S RESTAURANT ENTERPRISES, INC.,
d/b/a THE KOZY NOOK RESTAURANT
and JEFFREY ABRAMS,

Respondents

Appearances: Pamela A. Thomure, Esq. for Complainant
Kenneth S. Mello, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On June 24, 2009, Complainant Barbara Avila filed a complaint with this Commission against her former employer, The Kozy Nook Restaurant and its principal and manager, Jeffrey Abrams. The complainant alleged that Complainant was sexually harassed by Abrams and constructively discharged from her employment as a waitress at the Kozy Nook. The Investigating Commissioner found probable cause to credit the allegations of the complaint and conciliation was unsuccessful. The matter was certified for hearing and a hearing was held before the undersigned hearing officer on April 19 and 20, 2012. Prior to the Hearing, monetary sanctions were imposed against Respondents for repeated failure to respond to Complainant's discovery requests.

The parties submitted post-hearing briefs in June 2012. Having reviewed the record in this matter and the post-hearing submissions, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Barbara Avila, is a resident of North Dartmouth Massachusetts.

Complainant began working as a part-time waitress at the Kozy Nook Restaurant in Westport Massachusetts in 2007, when she was 33 years old.

2. Respondent, J & S Restaurant Enterprises, Inc. is an employer within the meaning of G.L. c. 151B, doing business as a restaurant and bar under the name of the Kozy Nook Restaurant. Respondent, Jeffrey Abrams became owner of the restaurant in 2006. He testified that it is a family business previously owned by his father and that he has worked at the restaurant since he was 13 years old. Approximately 40 to 50 people work at the restaurant and Abrams is responsible for the general management and supervision of the restaurant.

3. Complainant is married to Scott Avila, who is her second husband, and had three children at the time, the youngest born in December 2004. She became a licensed practical nurse in 2006 and worked full time as an LPN at Alden Court in Fairhaven, MA prior to working for Respondent. Complainant testified that she is an alcoholic who has struggled to maintain her sobriety. She testified that she could not cope with the stress of working full time at Alden Court from 3-11 pm, and raising three children, and that in 2007 she began drinking heavily. She voluntarily left her position as an LPN at Alden Court and entered the Substance Abuse Rehabilitation Program, a program for medical professionals. She participated in mandatory counseling, meetings and adhered to the program's guidelines.

4. Complainant subsequently applied for a part-time job with Respondent, and considered the job to be a low stress position that would facilitate her recovery and allow her to get well. She interviewed with Jeffrey Abrams' wife Cheryl Abrams and was hired as a part time waitress, initially working Saturday evenings from 4:00pm to 9:00pm and Sunday brunch from 7:00am to 2:00pm. Her hours were later increased to include a waitress shift on Wednesdays from 4:00pm to 9:00pm and a hostess shift on Fridays from 4:00pm to 9:00pm. The evening and weekend schedule suited Complainant's family's needs, since her husband could be home with the children when she worked.

5. Jeffrey Abrams was Complainant's supervisor at the Kozy Nook. According to Complainant and Abrams, he worked long hours at the restaurant, from 70 to 90 hours per week, often seven days a week. In addition to having responsibility for general oversight of the restaurant and supervising staff, Abrams was also involved in cooking and ordering food and supplies. Complainant testified that he worked hard.

6. Respondent Abram's wife Cheryl prepared the schedule and payroll for the Kozy Nook and handled the paperwork for the business, but was not a paid employee. According to Abrams his wife handles the Human Resource functions. While she and her husband reside a few houses away from the Kozy Nook, she came to the restaurant infrequently after the birth of her first child in 2007.

7. The layout of the Kozy Nook was presented in photographs and a diagram. Upon entering the restaurant, the hostess area is straight ahead behind a counter. The employee schedule was posted on the right side of the wall behind the counter in an enclosed area. The main dining room is to the right of the entrance and a bar and smaller dining area are to the left of the entrance. The hostess area cannot be viewed from the bar area. (Exs. 1; 6a-6m)

8. Complainant never received a formal evaluation or any written warnings but on occasion she received a verbal reprimand to “watch her orders” and to take care to press the correct buttons on the computer. She testified that except for inappropriate behavior by Jeffrey Abrams, she enjoyed working at the restaurant. With one exception on New Year’s Eve in 2008, Complainant maintained her sobriety for a long period while working at Respondent.

9. Complainant testified that she observed Abrams behaving inappropriately with younger female staff. She witnessed him touching some of the young waitresses including massaging one’s shoulders and smacking another one’s “butt.” She stated that she also observed Abrams, who was a large man, “violate the personal space” of a young waitress by standing in front of her as she tried to get by him and sticking out his chest and not moving out of her way. I credit her testimony that she witnessed this behavior.

10. On one occasion, Abrams followed Complainant and a bus girl into a storage closet, shut off the lights and blocked the door. Complainant yelled when he turned off the lights and Abrams laughed. Complainant stated that Abrams’ actions felt like bullying to her. Abrams did not deny this incident, but stated that it was a joke. This type of behavior was reportedly confirmed by another waitress in a statement to the Westport police during an investigation of a subsequent complaint of assault made by Complainant against Abrams. (Ex. 7)¹

11. Complainant testified that two other waitresses complained to her and told her that Abrams had “smacked” their “butts.” This testimony is also consistent with a statement one of the waitresses made to the Westport police in connection with the same investigation of the subsequent criminal complaint made by Complainant against Abrams. Id. This waitress also

¹ A portion of the police report was submitted by Respondent. (Complainant’s voluntary statement of 6-22-09; Ex. R-2) The Hearing Officer ordered that the entire police record be submitted as an exhibit and entered into the record. A certified copy of the Westport Police Department record was submitted by Complainant’s counsel on June 1, 2012 as a post-hearing exhibit and is admitted into evidence as part of the record and designated Exhibit 7.

reported to the police that Abrams would tell her she looked sexy and on occasion would corner her in different areas of the restaurant making her feel uncomfortable, or follow her into the dry storage room and shut the door behind them. She reported to the police that Abrams' behavior initially seemed to be a joke, but became more consistent and at one point she stopped working at the restaurant because she was, in her words, "creeped out" by Abrams. (Ex.7) Abrams denied any inappropriate behavior but acknowledged that the father of one of the waitresses came to the restaurant and accused him of smacking his daughter's "butt."

12. A hostess who worked with Complainant on Friday nights told Complainant that Abrams had once unsnapped her bra. During that same discussion, another hostess relayed to Complainant that Abrams had pulled out his pants pockets and asked her, "Do you want to kiss the bunny between the ears." All told, Complainant identified at least four female co-workers who spoke to her or relayed incidents of Abrams' sexually inappropriate conduct. I credit Complainant's testimony that these incidents were relayed to her and I find based on the consistency of reporting it is more likely than not that they occurred.

13. Complainant testified that she had to deal directly with Abrams on Friday nights but she mostly tried to avoid him because she was uncomfortable with his behavior and he intimidated her. He once referred to her as "Mrs. Robinson" to a younger cook she was talking to. On another occasion during a discussion with customers at that hostess station about working out at a gym, Abrams stated in reference to Complainant, "she likes it hard." Complainant felt he was implying that he had had sexual relations with her and she was embarrassed and humiliated.

14. Abrams followed Complainant out to her car at the end of her shift on multiple occasions and a few times asked her to go to Wareham with him for a drink, where no one would know them. Complainant responded that she couldn't drink and asked what about his wife. Complainant stated that she felt intimidated by this but did not want to be rude because he was her boss. On one such occasion he stated words to the effect of "what's in it for me and how about a little job security," and then laughed and tapped the back of her car.²

15. On another occasion when Complainant was working as a waitress and was in the kitchen, Abrams made a reference to the pants she was wearing and said, "I see you have your money makers on." On another occasion, he made a sexual innuendo in front of the cooks and other staff, commenting on Complainant's small size and stating that he could lift her up and use her as "a sit and spin," gesturing that he would put her on his penis. This comment embarrassed and humiliated her and she just walked away.

16. On the night of June 10, 2009, at the end of her shift and after the restaurant had closed, Complainant was counting money at the bar and Abrams was sitting next to her on a bar stool. Waitress and bartender, Lisa Burke, was cleaning behind the bar. Complainant mentioned to Abrams that she was not on the schedule for Friday night as hostess, and questioned if this was a mistake or accurate. Abrams told her to go check the schedule which was behind the hostess station. As Complainant proceeded to the hostess station she did not hear Abrams come up behind her. Complainant testified that Abrams came up behind her, put his arms around her and she smelled alcohol on him. He placed a hand on her right breast and commented that her

² In her initial police report Complainant cited two other incidents of unwanted sexual touching by Abrams that she did not testify to at the hearing. (Ex. R-2) She alleged that in April of 2009, while she was working at the hostess desk on the computer, Abrams touched and rubbed her back and tried to unsnap her bra. On another occasion in early June of 2009, Abrams followed her to the parking lot of the restaurant asking her, "what are you gonna do for me," stated that he would "tear her up," and loosely placed his hands around her neck. I find these complaints to be consistent with the conduct she testified to at the hearing.

breasts were “mosquito bites.” Complainant was cornered behind the hostess station and felt trapped. She managed to get loose and punched Abrams in the stomach, at which point he grabbed her left arm, twisted it and pushed her down to the floor with his knee. Complainant yelled for Lisa Burke to help her. She stated that Abrams then got up and flexed his muscles like “the Hulk” and his veins and his eyes were popping out. Burke came around the corner with a broom and told Complainant she would get Abrams from the front and Complainant should get him from the back. As a result of Burke’s intervention, Complainant was able to get away from Abrams and returned to the bar area. Burke yelled at Abrams to leave Complainant alone saying that he was three times her size. As they continued to argue, Abrams pushed Burke into one of the booths in the bar area. After this altercation, Burke and Complainant left the premises together. Complainant testified that she called Burke at home the night of the incident and discussed what had happened and that they were both shocked by Abram’s behavior. She stated that they were afraid to talk about the incident in the restaurant and it was “hush-hush.” I credit her testimony.

17. Kyle Reis, an employee who was sitting in the bar that evening, overheard Complainant yelling for help. He also gave a statement to the Westport Police that was generally consistent with his testimony at the hearing. He stated that he heard Complainant shouting at Abrams to leave her alone and thought nothing of it initially until he heard her yell for help, and then thought that something was wrong. He saw Burke go into the other room and heard yelling from Abrams. He witnessed Complainant return to the bar and saw in her face that she was upset and he knew then that something was wrong. He overheard Burke tell Abrams to leave Complainant alone and that he was three times her size. In the Westport Police record of June of 2009 Reis is reported to have witnessed Abrams arguing with Burke and saw him push

her down into a nearby booth and threaten to punch her in the face. At the hearing he stated that he does not remember telling the police officer this and is uncertain if the police report mischaracterizes or embellishes his statement. He testified that he and Burke were nervous to talk about the incident and did not talk about it at work.

18. Burke, a six year employee of Respondent, testified that she has known Abrams for 25 years. She was clearly uncomfortable testifying about the incident in question and seemed reluctant to answer questions. She testified that she never witnessed any untoward conduct between Abrams and the younger female wait staff and that no one complained to her about inappropriate behavior. She did admit that she wrestled a bit with Abrams when she went to Complainant's aid and his behavior escalated and he pushed her into a booth and she asked him "what the hell's going on?" She testified that she doesn't know whether Abrams pushed Complainant to the ground because she did not see this. Burke told the Westport police investigating Complainant's assault allegations that she would rather not get involved and when pressed, stated that she knows Abrams' wife and would feel uncomfortable saying anything. Burke testified that she heard rumors that when Complainant was working at the Olive Garden she had a lesbian affair with another waitress who worked there. Complainant initially denied any such affair, but later admitted that she had one sexual encounter with the woman when she had been drinking heavily.

19. After the events on the night of June 10, 2009, Complainant arrived home emotionally distraught and relayed the incident to her then sixteen year-old son. Her son testified credibly that he had never seen his mother so upset as she was that night. He was so angry after hearing her account of what had transpired that he immediately called Abrams at the restaurant and threatened to kill Abrams if he ever touched his mother again.

20. Complainant worked only two more shifts at the Kozy Nook after the incident in question. She returned to work with some trepidation and agreed to have her husband come to pick her up after both shifts. She was scheduled to work the Friday evening shift on June 19th but had begun to drink that day prior to her shift and did not report for her shift. That night she continued to drink at a local bar and she encountered Abrams at the bar. Abrams asked her why she had not reported for work that evening and she told him she would not be returning to work at the Kozy Nook and accused him of assaulting her.

21. Complainant testified that a few days after the incident on June 10, she began to drink heavily and “hit rock bottom.” She stated that she has been an alcoholic since her mid-twenties, has attended AA meetings for a long time and struggles with sobriety. She sought other employment after leaving the Respondent and worked at an Olive Garden restaurant for a very short time in July and August of 2009, but left because she was drinking and continued on a downward spiral. She continued drinking until December of 2010.

22. Complainant was being treated by a therapist in June of 2009, who urged her to file a criminal complaint against Abrams. She filed a complaint with the Westport police on June 22, 2009 charging him with indecent assault and battery and assault and battery. (Exs. 2& 7) The incident was investigated and went forward to a jury trial. Complainant made an entry on her Facebook page the night before the trial stating, “hi,ho, hi,ho, it’s off to court I go.” She stated that she made light of the court proceeding because she was so nervous and tried to calm herself by making a joke. She testified credibly that she did not take the court proceeding lightly and did not think it was a joke. I credit her testimony the she realizes this was a mistake and poor judgment. The statement was used against her in the court proceeding. Abrams was found not guilty of the charges against him. Complainant and her family were upset by the outcome, but

testified from the outset they sought only an apology from Abrams and for him to attend counseling and would have accepted a disposition of “continued without a finding,” in the criminal matter. Complainant filed her charge at the MCAD upon the suggestion of a Westport police officer.

23. Complainant’s husband confirmed that she struggles with sobriety but regularly attends AA meetings and has been sober for long periods of time. He stated that when Complainant falls off the wagon and drinks, it is horrible, and she may disappear and not come home for a night, but often goes to her mother’s. He testified that except for Abrams’ behavior, Complainant loved her job at the Kozy Nook and had one of her longest periods of sobriety while working there. She began a downward spiral of drinking that lasted for some time after the incidents at the restaurant. Complainant’s husband wanted to confront Abrams when she related the incidents of his inappropriate behavior, but she feared Abrams would alter her advantageous schedule if she complained. After the incident of June 10, 2009, they discussed Complainant not returning to work at the Kozy Nook. He agreed to pick her up at the end of her shift. After working only two more shifts, Complainant decided she could not work there any longer. Her husband testified that she was extremely upset by Abrams’ physical harassment and agonized over whether to file the criminal complaint. Ultimately it was her concern for the younger waitresses at Respondent that caused her to file that complaint. I found Complainant’s husband to be an extremely credible witness.

24. In 2009, Complainant earned \$6,414.40 working for Respondents, exclusive of tips. (Ex. 2) She testified that she made approximately \$200 to \$300 per week in tips while working at Respondent. Complainant worked for two months at the Olive Garden restaurant immediately following her termination, but there is no evidence in the record regarding her earnings at that

job. In September of 2009 Complainant began working at the New Bedford Health Care Center as a Licensed Practical Nurse and worked there until March of 2010. In 2009 she earned \$5,512.00 at that job. (Ex. 3-B) Through March of 2010, she earned \$16,244.20 at that job. (Ex. 3A) Complainant left her employment at the New Bedford Health Care Center because of the high cost of child care and the stress of working full time while caring for her home and children. In September 2010 she began working as a cook at UMass Dartmouth working part-time from 10:30 a.m. to 2:30 p.m. and earned \$3,174.15 in 2010 and \$2,814.70 in 2011. (Exs. 4A & 4B) This job ended at the end of the academic year in the Spring of 2011. In the summer of 2011, Complainant worked as a waitress at the Huddleston House in Fairhaven, earning \$1,913.85 exclusive of tips. (Ex. 5) She left that job because the restaurant had no air conditioning and she was pregnant at the time.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B §4(4) and (16A) prohibit sexual harassment in the workplace.³ In order to prove a claim of hostile work environment harassment, Complainant must prove that she was: (1) 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.*

³ 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. G.L. c. 151B s. 1(18)

v. MCAD, 400 Mass. 156, 162 (1987); *Ramsdell v. Western Mass Bus Lines, Inc.*, 415 Mass. 673, 678 (1993).

Complainant alleges that she was subjected to unwelcome touching, comments and propositions of a sexual nature by her boss and owner of Respondent restaurant, Jeffrey Abrams. Complainant testified that such conduct occurred on a number of occasions and was demeaning, intimidating and threatening to her. Complainant is a relatively small woman and Respondent Abrams is a very tall, large man. Complainant was intimidated by his size and physical strength. His conduct is alleged to have culminated in a physical altercation that began with Abrams' cornering her and touching her breast. This incident frightened and intimidated Complainant sufficiently to cause her to leave her employment and to file a criminal complaint against Abrams for assault and battery. Complainant's account of these incidents was consistent and credible.

The evidence of sexual harassment must be considered from the perspective of a reasonable person in Complainant's position. This is an objective inquiry that requires an examination of all the circumstances including the frequency of the conduct, its severity and whether it was physically threatening or humiliating and whether it unreasonably interfered with the worker's performance and what, if any psychological harm resulted. *See Scionti v. Eurest Dining Service's*, 23 MDLR 234, 240 (2001) citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). The subjective standard of sexual harassment inquires into whether the complainant personally experiences the behavior to be unwelcome. *See Couture v. Central Oil Co.*, 12 MDLR 1401, 1421 (1990)

Complainant's testimony about Abrams' unwelcome sexual conduct was very credible and consistent with her past reporting of the events. I do not believe that Complainant invited

such conduct. Since Abrams was the owner and manager of the restaurant and his wife functioned in a human resources capacity, there was no one to complain to about Abrams' conduct. In my assessment, Complainant was a sincere and convincing witness and I do not believe that she fabricated these allegations. Beyond my own observations and conclusions as to Complainant's demeanor and credibility, her testimony at the hearing is bolstered by her account of Abrams' behavior made in her statement to the Westport Police Department soon after the events in question and by credible testimony from her son and husband about what she relayed to them on the night of June 10, 2009, when she arrived home very upset. I found Complainant's husband and son to be extremely credible witnesses and do not believe they fabricated testimony about Complainant's emotional state. In addition there were statements made to the Westport Police by other employees that corroborate Complainant's allegations that Respondent Abrams engaged in similar conduct with at least one other young female employee of the restaurant.

Respondent Abrams denied engaging in any inappropriate or unwelcome sexual conduct with Complainant or any other employee. Respondents would have me find that Complainant is not a credible witness because of her alcohol use and because she initially denied, but later admitted, having a sexual liaison with a woman she met after leaving her employment at Respondent and which occurred during a period of heavy drinking. Respondents also implied that Complainant filed this action to extort money from Abrams because she was having financial difficulties and was upset that her schedule at the restaurant was being curtailed. I do not believe that Complainant acted out of such an ulterior motive.

I found Complainant to be a sincere and quite vulnerable individual who was very forthright about her struggle with alcoholism and how her bouts of uncontrolled drinking

negatively impacted her behavior and her relationships with her family. She did not deny that she has struggled with sobriety and that she had a particularly difficult period after the events that led to her leaving Respondents' employ. It is understandable that she would have been reluctant to testify publically and to be humiliated in the presence of her husband about a one-time sexual encounter she had with a female co-worker subsequent to her employment with Respondent during a period when she was admittedly drinking heavily and about which she is embarrassed. I refuse to draw any negative inference about Complainant's character and veracity because she is an alcoholic or was reluctant to admit to a purely private and extremely personal matter that was unrelated to the claim at issue.

Respondent also argues that Complainant's veracity surrounding the events at issue is questionable because she appeared to make light of the court proceeding against Respondent on her Facebook page. I accept Complainant's explanation that she did not undertake the assault complaint lightly and that she was very nervous about the court proceeding and confronting Abrams and attempted to calm her jitters by making a light hearted comment. Moreover, the fact that the criminal proceedings resulted in no conviction does not alter my view of Complainant's credibility.

Ultimately, I conclude that the conduct complained of did occur and that it was offensive and unwelcome and sufficiently severe and pervasive as to alter the conditions of Complainant's employment and to create a sexually hostile work environment. Moreover, the credible evidence also suggests that on more than one occasion, Abrams asked Complainant to go to another town with him for drinks after work and on at least one of those occasions, suggested that she should consider sexual favors in return for some job security. Such a proposition constitutes quid pro quo sexual harassment.

Finally, I conclude that Complainant had no option but to resign her employment after the events of June 10, 2009 and that she was constructively discharged. Prior to the events of June 10, Complainant was intimidated, demeaned and humiliated by Abrams' unwelcome sexual comments, propositions and innuendos, but his actions of that evening caused her to feel threatened and to fear Abrams. There was no individual in the workplace with whom Complainant could lodge a complaint and no avenue for seeking relief. She was without expectation that the situation would improve. A finding of constructive discharge requires a showing that the conditions under which Complainant worked were so intolerable that a reasonable person would have felt compelled to resign. *Choukas v. Ocean Kai Restaurant*, 19 MDLR 169 (1997) I find that Complainant's work environment had become sufficiently intolerable so as to cause her constructive discharge and that Respondent is liable for violations of G.L. c. 151B.

IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole and to ensure compliance with the anti-discrimination statute. G.L. c. 151B, §5; *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004) The Commission may award monetary damages for, among other things, lost wages and emotional distress suffered by the Complainant as a direct and probable consequence of the unlawful discrimination. In addition, the Commission may issue cease and desist orders and award other affirmative, non-monetary relief and has broad discretion to fashion remedies to best effectuate the goals of G.L. c. 151B. *Conway v. Electro Switch Corp.*, 825 F. 2d 593, 601(1st Cir. 1987).

In this case, Complainant is entitled to lost wages for a period of time after she left Respondents' employ. Complainant earned \$6,414.40 working for Respondent up until mid-June of 2009, exclusive of tips. It is reasonable to assume that had she continued working for Respondent she would have earned at least \$12,800 for the year exclusive of tips, in addition to approximately \$10,400 in tips. Thus, her income including tips was anticipated to be at least \$23,200 for the year. Utilizing Complainant's most conservative estimate of tips which was \$200 per week, she would have earned an additional \$5,200 in tips for the year. Thus her anticipated earnings for the second half of the year would be \$11,614.40. Complainant sought and obtained employment at another restaurant almost immediately after her constructive discharge. There is no evidence in the record regarding her earnings at the job. It is the Respondent's duty to introduce evidence of earnings made in mitigation of damages. *JC Hillary's v. MCAD*, 27 Mass App. Ct. 204 (1989) The only record evidence regarding Complainant's earnings from subsequent employment during that year shows that she earned \$5,512.00 working as a practical nurse. Thus I conclude that Complainant is entitled to back pay in the amount of \$6,102.40 for 2009. In 2010, Complainant's earnings from her employment as a practical nurse were \$16,244.20 and her employment from UMass Dartmouth cafeteria was \$3,714.16. Had she continued to work as a practical nurse beyond March of 2010, her earnings would have exceeded what she could have earned working for Respondent. I decline to award Complainant back pay beyond March of 2010 when she left her employment as a practical nurse of her own accord for reasons unrelated to Respondent's actions and thereafter was employed only intermittently in the food industry. Her total lost wages for 2009 are \$6,102.40.

In addition to damages for lost wages, I conclude that Complainant is entitled to damages for emotional distress caused by Respondents' actions. Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. A complainant must also show a sufficient causal connection between the respondent's unlawful act and the complainant's emotional distress. *Stonehill College v. Massachusetts Commission Against Discrimination, et al*, 441 Mass. 549, 576 (2004). "Emotional distress existing from circumstances other than the actions of the respondent, or from a condition existing prior to the unlawful act, is not compensable." *Id.*

Complainant testified credibly that Abrams' abuse, culminating in his actions on June 10, 2009, caused her to resume drinking and that she drank heavily and began a downward spiral that lasted for some time and which she described as "hitting rock bottom." There is sufficient evidence of a causal relationship between Abrams' unlawful conduct and Complainant's distress. Complainant was unable to tolerate Abrams' physical harassment and after the events of June 10, feared for her safety. She was sufficiently upset by Abrams' actions that she began to drink after a long period of sobriety and felt compelled to leave her employment. She agonized over whether to file a criminal complaint against him for indecent assault and battery, something she did not do lightly. Complainant's husband confirmed that she had one of her longest periods of sobriety while working at Respondent until Abrams' conduct escalated and made her fear for her safety. He stated that when Complainant is drinking the situation is horrible and she sometimes disappears and does not come home at night. Complainant left her subsequent employment at the Olive Garden because she could not control her drinking. Complainant admitted to struggling with sobriety for many years and has had periods of time when she drank heavily prior to the incidents with Respondent, including when she left previous job. Nonetheless, I conclude

that for some time after she left her job with Respondent, Complainant suffered severe emotional consequences resulting from Abrams' harassment, and is entitled to damages for emotional distress in the amount of \$50,000.

V. ORDER

Based upon the foregoing findings of fact and conclusions of law, and pursuant to the authority granted the Commission under G.L. c. 151B §5, it is hereby Ordered that Respondent:

- (1) Cease and desist from engaging in discriminatory conduct on the basis of sexual harassment;
- (2) Pay to the Complainant, Barbara Avila, the sum of \$6,102.40 for lost wages in the form of back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed 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 the Complainant, Barbara Avila, the sum of \$50,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post judgment interest begins to accrue.
- (4) Respondent, J & S Enterprises, Inc. develop a sexual harassment policy to be distributed to all employees and designate someone other than Abrams or his wife as the sexual harassment officer to investigate and remediate any such complaints. Such policy shall be posted in a conspicuous place in the workplace and shall state to whom complaints of sexual harassment may be filed internally, the names of state and

federal agencies where complaints may be filed externally and provide clear notice that retaliation for filing internal and external complainants is unlawful.

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.

So Ordered this day of February, 2013.

Eugenia M. Guastaferrri
Hearing Officer