

INTRODUCTION AND PROCEDURAL HISTORY

Dana M. Achinger filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on August 22, 1997.

The Commission investigated the charge and found probable cause that Goodlife, Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on August 14, 1998.

The Complaint alleged that Respondent's president, Dr. Patrick Corp, subjected Complainant to a hostile work environment and constructively discharged her because of her sex.

Respondent filed an Answer to the Complaint on September 15, 1998. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices.

A public hearing was held on May 24, 2000 at the DiSalle Government Building in Toledo, Ohio.

The record consists of the previously described pleadings, a 244 page transcript, exhibits admitted into evidence during the hearing, and post-hearing briefs filed by the Commission on July 21, 2000 and by Respondent on August 10, 2000.

FINDINGS OF FACT

The following findings of fact are based, in part, upon the Hearing Examiner's assessment of the credibility of the witnesses who testified before him in this matter. The Hearing Examiner has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. He further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the Hearing Examiner considered the

extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on August 22, 1997.

2. The Commission determined on June 26, 1998 that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a corporation and an employer doing business in Ohio. Respondent provides psychiatric and counseling services in Holland and surrounding areas.¹ Respondent's president is Dr. Patrick Corp, a licensed psychiatrist.

¹ Holland is located in Lucas County near Toledo.

5. Complainant is a female. She became acquainted with Dr. Corp in 1994 while working as a ward clerk at Toledo Hospital. Dr. Corp, who had hospital privileges, completed patient charts across from Complainant's work area. Dr. Corp and Complainant often conversed with each other from their work areas; he discussed, among other things, "his family and problems with his girlfriends" with her.² (R.Ex. M, p.1)

6. Complainant began looking for another job in early 1995. When Dr. Corp learned that Complainant was leaving Toledo Hospital, he approached her about working for Respondent. Complainant accepted an offer to work for Respondent in March 1995.

7. Complainant began her employment with Respondent as a billing clerk. As time passed, Complainant also performed office manager duties. Complainant acted as billing clerk/office manager until her resignation in late November 1996. Complainant continued to perform billing and other functions for Dr. Corp's private corporation, Dr. Patrick J. Corp, M.D., Inc., after her resignation from Respondent.

² Complainant was married when she met Dr. Corp, and she remained married throughout her employment with Respondent. Dr. Corp was divorced during those periods.

8. In March 1997, Dr. Corp contacted Complainant about returning to Respondent. Dr. Corp informed Complainant that Respondent's president, Robert Kahl, was leaving the practice. Dr. Corp indicated that he would replace Kahl as president and asked her to assist him with business operations of the practice. Complainant accepted Dr. Corp's offer to return.

9. Prior to Complainant's return, Dr. Corp asked Complainant on March 26, 1997 to attend a business dinner at a local restaurant. Dr. Corp told Complainant that he wanted her to meet John Drybune, a business associate. Dr. Corp arranged this meeting because Drybune had information about operational standards for outpatient practices from the National Council of Quality Assurance. Complainant met Dr. Corp, Drybune, and Drybune's fiancée later that day at the Red Cedar Grill.

10. Once everyone arrived, Dr. Corp suggested that they eat dinner at another restaurant called Matthews. Dr. Corp stated that a drug seminar was being held at Matthews, and they could have "free drinks and dinner" as his guests. (Tr. 11) Everyone left the Red Cedar Grill and met at Matthews.

11. Following dinner, Dr. Corp suggested that they go to the Distillery, a nearby nightclub, to hear local musician Johnny Rodriguez sing and play guitar. Everyone agreed. Dr. Corp rode with Complainant in her car; Drybune and his fiancé rode together.

12. Drybune and his fiancé left the Distillery after approximately one hour. Dr. Corp and Complainant stayed longer. They danced at least one fast dance and then left together.

13. Complainant drove Dr. Corp back to Matthews, where his car was parked. They sat in Complainant's car and talked for a while in the parking lot. Dr. Corp discussed how excited he was about "the new changeover" with Respondent and Complainant's return to the practice. (Tr. 11, R.Ex. L, p. 65) Dr. Corp also discussed his relationship with his girlfriend and how lucky Complainant's husband was to have her. (Tr. 11, R.Ex. M, p.7)

14. At some point, Dr. Corp gave Complainant a hug and thanked her for "being such a good friend." (R.Ex. M, p.7) Dr. Corp then kissed Complainant on the mouth. As Complainant pulled away, Dr. Corp grabbed her head, pulled her toward him, and kissed her on the mouth

again. Complainant “pulled back hard” and became very angry. *Id.* at p.8. Dr. Corp apologized to Complainant and exited her car.

15. Later that evening, Dr. Corp called Complainant’s residence. Jemelle Sintobin, Complainant’s sister and babysitter that night, answered the telephone. Dr. Corp immediately began to apologize. Sintobin interrupted Dr. Corp and told him that he must have her confused with Complainant. Dr. Corp apologized for the confusion and asked Sintobin to tell Complainant that he had called. Complainant informed Sintobin after the call that Dr. Corp had kissed her earlier that evening.³

16. Complainant returned to work for Respondent the following Monday, March 31, 1997. Complainant worked more than 80 hours per two-week pay period upon her return. (Tr. 76, Comm.Ex. 2, R.Ex. M, p.10) In late April 1997, Complainant and Respondent placed the terms of her employment in writing. The employment agreement, which Complainant

³ Complainant walked into the house while the telephone was ringing. When Complainant realized Dr. Corp was calling, she told her sister that she did not want to talk with him.

and Dr. Corp signed, identified her position as “Business Operations Coordinator” and indicated that her salary was \$25,000 per year. (Comm.Ex. 1)

17. In early May 1997, Kahl left the practice and Dr. Corp replaced him as Respondent’s president. Complainant asked Dr. Corp several times during this period to change her pay to hourly due to the number of hours that she was working. Dr. Corp denied these requests.⁴

18. On May 14, 1997, Dr. Corp asked Complainant to meet him at Don Pablo’s for a business dinner. Dr. Corp told Complainant that he wanted to talk with her before leaving for an out-of-state convention. Complainant met Dr. Corp at Don Pablo’s that evening.

19. Dr. Corp discussed business matters with Complainant while inside the restaurant. Dr Corp also discussed his personal feelings for Complainant, his receipt of therapy to deal with these feelings, and his relationship with girlfriend, Suzanne Robinson. Dr. Corp told

⁴ In Commission’s Exhibit 2, which is Complainant’s diary, Complainant mentioned the possibility of receiving a year-end bonus. The record is not clear whether Dr. Corp raised this possibility to her or she hoped to receive one.

Complainant that he did not want to ruin their work relationship because they were a good team. Dr. Corp suggested that although Complainant was already married they could be “husband and wife in a business sense.” (Tr. 17, R.Ex. M, p.12)

20. Complainant told Dr. Corp that she viewed him as a “good friend” and a “father-figure.” (Tr. 19-20) Complainant stressed to Dr. Corp that she loved her husband. Complainant also told Dr. Corp that she would never have a romantic relationship with him.⁵

21. Dr. Corp and Complainant walked to her car after leaving the restaurant. They discussed the details of his upcoming trip. Dr. Corp mentioned Robinson again while they stood outside Complainant’s car. Dr. Corp stated that Robinson had small breasts, which he preferred. Dr. Corp then made a comment about Complainant also having small breasts. As Complainant turned to unlock her door, Dr. Corp reached under her arm and “cupped” her right breast. (Tr. 18, 45, R.Ex. L, p. 95) Complainant

⁵ Dr. Corp previously expressed personal feelings for Complainant during telephone conversations between them after work hours. During these conversations, Complainant rejected the possibility of having a romantic relationship with Dr. Corp.

“swung around” and made an angry comment to him. (Tr. 19, R.Ex. L, p. 96) Complainant got in her car and left Dr. Corp standing in the parking lot.

22. On May 22, 1997, Dr. Corp called Complainant at work late in the afternoon. Dr. Corp informed Complainant that he had missed his return flight to Detroit. Dr. Corp told Complainant that he needed her to pick him up at the airport at midnight. Complainant indicated that he could reach her at home or on her car phone. Dr. Corp told Complainant that he loved her. Complainant hung up on him.

23. Early the next morning, Complainant picked Dr. Corp up at the airport. Dr. Corp “hardly” talked to Complainant during the drive back. (R.Ex. M, p.13) This behavior continued upon Dr. Corp’s return to work; he rarely talked to Complainant during the remainder of the month and into early June.⁶ (R.Ex. M, p.14)

⁶ Prior to his trip, Dr. Corp regularly conversed with Complainant at work about business and personal matters. Both smoked cigarettes at work. (Tr. 124) They often chatted outside during smoke breaks. (Tr. 83) They stopped taking smoke breaks together at this point.

24. In early June 1997, Dr. Corp asked Complainant to arrange lawn care for Respondent's place of business. On June 6, 1997, Complainant mulched the front lawn by herself. Afterwards, Complainant took a shower in an office bathroom.⁷ While Complainant was getting out of the shower and drying off with a towel, Dr. Corp unlocked one of the doors and entered the bathroom. Complainant asked Dr. Corp to leave; he left without further incident.

25. On June 9, 1997, Complainant went to the office to speak with Dr. Corp. Robinson was there so Complainant left. Complainant then paged Dr. Corp. Complainant complained about how he was treating her. Dr. Corp told Complainant that it was not a "good time to talk." *Id.* Dr. Corp also told Complainant that Robinson wanted to go to Florida with him and, she requested that Complainant arrange a trip for them. Dr. Corp hung up on Complainant.

26. Over the next few weeks, Dr. Corp rarely talked to Complainant. Dr. Corp also asked Complainant to sign a promissory note for \$5,000 that he loaned her in mid-May. Complainant feared that Robinson

⁷ The bathroom was apparently used by both male and female employees. It was located between Dr. Corp's and Complainant's offices. (R.Ex. K)

would persuade Dr. Corp to fire her.⁸ (R.Ex. M, p. 14) Complainant began looking for another job.

27. On June 23, 1997, Complainant asked Dr. Corp in writing to amend her employment contract “to show fair compensation for her services.” (R.Ex. F) The letter proposed two options: switch Complainant from salary to hourly with overtime available, or increase her salary commensurate with her work hours. The letter requested a reply within “the next couple of days.” *Id.* Dr. Corp did not respond to the letter.

28. On June 26, 1997, Dr. Corp called Complainant at home and asked if she was talking to a former employee about “confidential business information.” (R.Ex. M, p. 15) Complainant denied having such discussions and asked Dr. Corp if he was going to fire her. Dr. Corp replied, “Never.” (Tr. 96, Comm.Ex. 2)

⁸ Dr. Corp and Robinson had an “off and on” relationship. (R.Ex. L, p.66) Dr. Corp apparently resumed his relationship with Robinson in late May 1997. (Tr. 124) Dr. Corp earlier confided in Complainant that Robinson hated her and did not want her working for Respondent because of Dr. Corp’s feelings toward her. (Tr. 96)

29. On July 1, 1997, Complainant accepted a job with Children's Resource Center; her starting salary was \$35,000 per year. The following day, Complainant submitted a letter of resignation to Dr. Corp. (Comm.Ex. 3) Complainant informed Dr. Corp that she intended to work for two more weeks.

30. Complainant worked for Respondent through Thursday, July 10, 1997. Dr. Corp called Complainant at home that evening and accused her of embezzlement. Complainant denied the accusation.⁹ Complainant did not report to work the next day, which was supposed to be her last day with Respondent.

⁹ Dr. Corp later filed criminal charges against Complainant for embezzlement. A grand jury indicted Complainant on the charges, but the state elected not to prosecute her. A judge subsequently issued an order of *nolle prosequi*, and the charges were dismissed. (R.Ex. U)

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.

1. The Commission alleged in the Complaint that Respondent's president, Dr. Patrick Corp, subjected Complainant to a hostile work environment and constructively discharged her because of her sex.

2. These allegations, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the . . . sex, . . . of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Sexual harassment is sex discrimination and prohibited by R.C. Chapter 4112. Ohio Administrative Code (Adm. Code) 4112-5-05(J)(1); *Cf. Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment is sex discrimination under Title VII). There are two forms of

sexual harassment: *quid pro quo* and hostile work environment. *Id.*, at 65.

The Commission alleges the latter form in this case, e.g., Dr. Corp's sexual advances toward Complainant created a hostile work environment for her.

6. Adm.Code 4112-5-05 defines sexual harassment based on a hostile work environment, in pertinent part:

(J) Sexual harassment.

(1) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Whether the alleged conduct constitutes sexual harassment is determined on a case-by-case basis by examining the record as a whole and the totality of the circumstances. Adm.Code 4112-5-05(J)(2).

[T]he issue is not whether each incident of harassment standing alone is sufficient to sustain a cause of action in a hostile environment case, but whether -- taken together -- the reported incidents make out such a case.

Williams v. General Motors Corp., 187 F.3d 553, 562 (6th Cir. 1999).

7. In order to create a hostile work environment, the conduct must be “sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), *quoting Meritor, supra* at 67. The conduct must be unwelcome and because of the victim's sex. The victim must perceive the work environment to be hostile or abusive, and the work environment must be one that a reasonable person would find hostile or abusive. *Harris, supra* at 21-22.

8. In examining the work environment from both subjective and objective viewpoints, the factfinder must examine “all the circumstances” including the employee's psychological harm and other relevant factors, such as:

. . . the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Id., at 23.

This inquiry also requires “careful consideration of the social context” in which the particular behavior occurred since the “real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships.” *Oncale v. Sundowner Offshores Services, Inc.*, 118 S.Ct. 998 (1998).

9. In this case, the testimony of the two main witnesses, Dr. Corp and Complainant, is diametrically opposed. Dr. Corp not only denies Complainant’s testimony about the occurrence of the kissing incidents, the breast grabbing incident, and the shower incident, but he also asserts, at least in regard to the first two, that he neither went to the Distillery with Complainant in late March 1997 nor met her at Don Pablo’s on May 14, 1997. Respondent contends that Complainant’s testimony about these events, as well as her detailed written account of them in July 1997, are entirely fabricated.¹⁰

¹⁰ Given this position, Respondent does not suggest that Complainant welcomed the alleged sexual harassment.

10. Respondent also contends that the Commission failed to present sufficient corroboration to support Complainant's sexual harassment allegations against Dr. Corp. Although the existence of corroborative evidence is often crucial in sexual harassment cases, there is no explicit corroboration requirement in either R.C. Chapter 4112 or Title VII. See *Durham Life Insurance Co. v. Evans*, 78 FEP Cases 1434, 1440 (3d Cir. 1999) (Title VII does not have a corroboration requirement in sexual harassment cases). Credibility determinations are the province of the factfinder. When there are two competing versions of disputed facts, the factfinder may credit either side's version without corroboration from other witnesses.

11. While it is true that the majority of Complainant's sexual harassment allegations against Dr. Corp were uncorroborated by witness testimony, the Commission did provide one witness who corroborated Complainant's testimony about Dr. Corp kissing her in late March 1997. Complainant's sister, Jemelle Sintobin, testified about receiving an apologetic call from Dr. Corp at Complainant's residence while babysitting for her. Sintobin testified that once she informed Dr. Corp that he had her confused with her sister, he asked her to tell Complainant that he called. Sintobin testified that Complainant told her shortly after the call that

Dr. Corp had kissed her earlier that evening. The Hearing Examiner found Sintobin's testimony, which withstood cross-examination, credible.

12. The Hearing Examiner also credited Complainant's testimony about the breast grabbing incident and the shower incident. The Hearing Examiner found Complainant's testimony about these incidents more credible than Dr. Corp's denial of the shower incident and his claim that he never met Complainant at Don Pablo's for a business dinner.

13. Having resolved the factual disputes in Complainant's favor, the inquiry turns to whether the alleged sexually harassing behavior created a hostile work environment as a matter of law. This inquiry, particularly the question of what act or combinations of actions may "objectively" create a hostile work environment, is "a rather gray area." *Fall v. Indiana University Bd. of Trustees*, 12 F.Supp. 2d 870, 877 (N.D. Ind. 1998). A delicate balance must be struck between "the line that separates the merely vulgar and mildly offensive from the deeply offensive and sexually harassing." *Baskerville v. Culligan International Co.*, 50 F.3d 428, 431 (7th Cir. 1995). As Judge Posner explained in *Baskerville*:

On the [sexual harassment] side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures . . .

On the other side [of the line] lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.

Id., (citations omitted).

Wherever the line is drawn, it must be “sufficiently demanding” to heed the Supreme Court’s admonition that civil rights statutes do not become general civility codes and only prohibit harassment that alters the victim’s work environment in a hostile manner. *Faragher v. City of Boca Rotan*, 118 S.Ct. 2275, 2283 (1998).

14. In recent cases, the Sixth Circuit has adopted the recurring notion in Supreme Court opinions that isolated incidents of harassment, unless extremely severe, rarely amount to discriminatory changes in the terms or conditions of employment. *Bowman v. Shawnee State University*, 220 F.3d 456 (6th Cir. 2000); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784 (6th Cir. 2000); *Burnett v. Tyco Corporation*, 203 F.3d 980 (6th Cir. 2000). None of these cases, except for *Bowman*, involved unwanted touching or groping of the victim’s intimate body parts. One of the allegations in *Bowman* was the intentional grabbing of plaintiff’s buttocks by

a dean of the University at a Christmas Party. This incident occurred at the dean's house after work hours where he was her guest.¹¹

15. Other courts have recognized that a single act of sexual assault may create a work environment that the reasonable person would find hostile. See *DiCenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996) (single incident of harassment may support an actionable hostile work environment claim); *Tomka v. Seiler*, 66 F.3d 1295 (2d Cir. 1995) (“even a single incident of sexual assault sufficiently alters the conditions of the victim’s employment and clearly creates an abusive environment for purposes of Title VII liability”); *Fall, supra*.¹²

¹¹ Although neither the Commission nor Respondent addressed the issue, the Hearing Examiner considered that two of the incidents occurred outside of the workplace after business meetings. In *Bowman*, the court considered the Christmas Party incident in deciding whether it and other incidents created a hostile environment at the workplace. Other courts have ruled that alleged incidents of harassment that occur outside of the workplace are relevant in determining whether a hostile work environment existed. See *McGuinn-Rowe v. Foster’s Daily Democrat*, 74 FEP Cases 1566 (D.N.H. 1997) (sexual assault of plaintiff by supervisor at a bar was relevant to whether she later experienced a hostile environment at their workplace). The facts in this case are even stronger than *Bowman* and *McGuinn-Rowe* in favor of relevancy because the kissing incidents and breast grabbing incident occurred immediately after required business meetings.

¹² In *Fall*, the alleged sexual harassment involved one incident where the victim was forcibly grabbed and kissed while being groped inside her blouse. This incident occurred inside the perpetrator’s private office. The court concluded that a reasonable jury could find that the plaintiff was the victim of a sexual assault actionable under Title VII.

A single sexual assault has far greater potential to adversely alter the work environment, and with greater permanence, than would an offensive verbal remark, or a series of such remarks.

Grozdanich v. Leisure Hills Health Center, Inc., 25 F.Supp. 2d 953, 970 (D.Minn. 1998).

These cases are consistent with the EEOC's presumption that the unwelcome, intentional touching of an intimate body part is sufficiently offensive to alter the victim's work conditions and create a hostile work environment under Title VII. See *EEOC Policy Guidance on Sexual Harassment*, 8 Fair Emp. Prac. Man. (BNA) 405:6691 (March 19, 1990).

16. Although this presumption of sexual harassment is inconsistent with the Commission's and the Supreme Court's totality of the circumstances approach, the reasoning that a single, unwelcome touching of an intimate body part, more so than verbal advances or remarks, can "seriously poison the victim's working environment" is sound. *Id.* Such reasoning is not incompatible with the totality of the circumstances approach. The presence of single or isolated acts of intentional touching of intimate body parts should be viewed as strong evidence of the existence of an objectively hostile work environment when considering the totality of the circumstances on a case-by-case basis.

17. This case involves incidents of forcible kissing and the intentional grabbing of Complainant's breast, a very private and intimate part of woman's body. The evidence also shows that Dr. Corp invaded Complainant's privacy on one occasion while she was in a state of undress. The severity of these incidents, when viewed together, cannot be overlooked. The Hearing Examiner concludes that these incidents, if not sufficiently pervasive, were severe enough to create a work environment that the reasonable person would find hostile or abusive.

18. The Commission having established the objective component of a sexually hostile work environment claim, it must also provide sufficient evidence that Complainant actually perceived her work environment to be hostile. The Commission cannot prove that Complainant was the victim of a hostile work environment without such evidence.

. . . if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

Harris, supra at 21-22.

A key element of a hostile environment claim is that the hostile environment must have changed the working conditions for the party bringing the claim.

Sheffield Village, Ohio v. Ohio Civ. Rights Comm., 2000 WL 727551 (Ohio App., 9th Dist., 2000).

19. During the hearing, the Commission failed to present sufficient evidence to show that Complainant actually perceived her work environment to be hostile *because of* the alleged incidents of sexual harassment. While the Hearing Examiner credited Complainant's testimony that she was upset immediately after the kissing incidents in late March 1997, Complainant had no difficulty working closely with Dr. Corp upon her return to work. In fact, they often discussed personal and business matters while taking smoke breaks together. They engaged in discussions with each other after work hours. Complainant still considered Dr. Corp to be a "good friend" and a "father-figure" to her. (Tr. 19-20)

20. Similarly, the Commission failed to present evidence that Complainant's work conditions or perception of her job changed after the breast grabbing incident. Complainant's diary and other evidence show that Complainant became concerned about her work environment and future employment with Respondent only after Dr. Corp distanced himself from her in late May 1997. This was also the time when Dr. Corp apparently resumed a personal relationship with his former girlfriend, Suzanne Robinson. The most likely reason that Complainant began looking for another job in June 1997 was not the alleged sexual harassment, but her fear that Robinson would convince Dr. Corp to fire her.

Certain portions of the June 12 entry in Complainant's diary support this conclusion:

I'm just going to find another job. Pat gave me a promissory note, I think she [Robinson] wants him to fire me.

(Comm.Ex. 2)

21. The record is also void of any evidence that the three incidents of objectionable behavior had the effect, either individually or jointly, of unreasonably interfering with Complainant's work performance or altering her working conditions. Complainant gave the following testimony on this issue:

Q: To what extent if any, did either the kissing incident or breast touching incident, or the shower incident, affect your ability to perform your job duties?

A: At Goodlife?

Q: Right.

A: I don't think it had any impact on my actually duties. I've always tried to do a good job . . . I've always tried to not let things get in the way of that.

(Tr. 88)

22. The Commission argues that it is not required to prove that Complainant's "tangible productivity declined because of the harassment"; the inquiry is simply whether the alleged sexual harassment made it more difficult for Complainant to perform her job. This is correct. However, even Complainant's testimony does not support the Commission's argument. Complainant acknowledged that the alleged sexual harassment did not "make doing the tasks harder." (Tr. 98) While Complainant also testified that it got to the point where she dreaded going into work and did not want to be there, the Commission failed to tie this testimony to any of the three incidents of alleged sexual harassment. If Complainant reached this point, the more likely reasons stemmed from the breakdown in communication between her and Dr. Corp, and his resumption of a personal relationship with Robinson.

23. Other evidence supports the conclusion that Complainant did not perceive her work environment to be hostile. As late as June 23, 1997, Complainant asked Dr. Corp to switch her from salary to hourly or increase her salary because she was working more than she expected to. (R.Ex. F) When Dr. Corp refused to acquiesce to these demands, Complainant accepted a higher paying job (\$10,000 increase) with Children's Resource

Center approximately one week later. Complainant testified that she had been negotiating with Children's Resource Center the entire week before she accepted the job on July 1, 1997. (Tr. 84) This testimony, along with the June 23 letter, suggests that Respondent was in competition with Children's Resource Center for Complainant's services in late June 1997, and she might have stayed with Respondent if Dr. Corp had acquiesced to her demands and closed the salary gap between the two jobs. If Complainant truly perceived her work environment to be hostile, why did she submit this letter to Dr. Corp shortly before negotiating with another employer for a potentially higher paying job?

24. In summary, although the alleged sexually harassing behavior was sufficiently severe to create an objectively hostile work environment, the Commission failed to prove that Complainant actually perceived her work environment to be hostile because of this behavior. Further, there is no evidence that this behavior unreasonably interfered with Complainant's work performance or altered her working conditions. The Commission's inability to establish the subjective component of a hostile work environment claim prevents it from proving the higher standard for a

constructive discharge, e.g., Complainant's working conditions were so intolerable that a reasonable person would have been compelled to resign.¹³ *Brooks v. City of San Mateo*, 214 F.3d 1082 (9th Cir. 2000).

To prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile working environment.

Landgraf v. USI Film Prods., 59 FEP Cases 897, 899 (5th Cir. 1992) (citations omitted).

¹³ Even if the Commission proved both components of a hostile work environment claim, there is insufficient evidence to prove a constructive discharge. The evidence shows, if anything, that Complainant ultimately left her employment with Respondent for monetary reasons. (See Conclusions of Law, ¶ 23) Thus, there was no causal connection between the alleged sexual harassment and Complainant's resignation.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8355.¹⁴

TODD W. EVANS
HEARING EXAMINER

November 3, 2000

¹⁴ The Commission's rules state that "[p]revention is the best tool for the elimination of sexual harassment." Adm.Code 4112-5-05(J)(6). It would be in Respondent's best interest to adopt a sexual harassment policy that gives employees internal reporting options. This policy should be posted conspicuously in the workplace. Sexual harassment training of all employees, supervisory and non-supervisory alike, is another method of prevention.