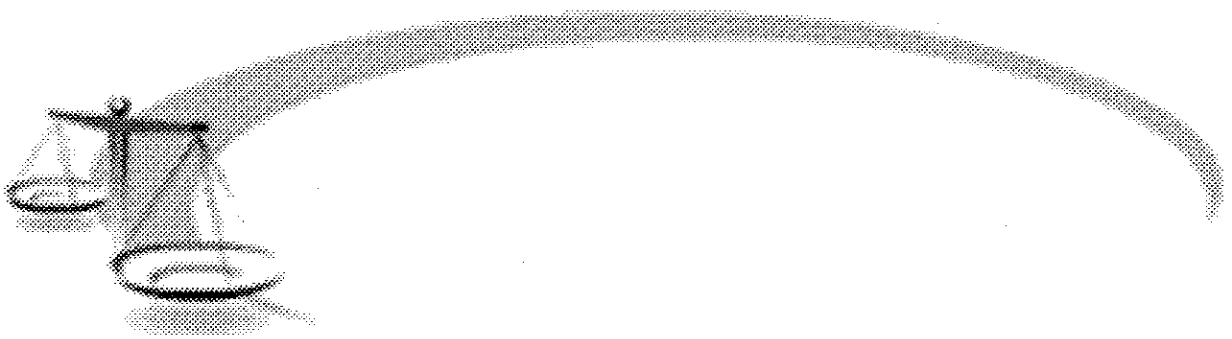

#123567-EM06 JoAnn Beard
vs. Highland Beach Inn, Inc.

Order
Nanette L. Reynolds, Director

STATE OF MICHIGAN
CIVIL RIGHTS COMMISSION
State of Michigan Plaza Building
1200 Sixth Street
Detroit, Michigan 48226

MICHIGAN DEPARTMENT OF CIVIL RIGHTS,
ex rel JoAnn Beard,

Claimant,

v

Case No. ~~12357~~ 123567-EM06

HIGHLAND BEACH INN, INC.,

Respondent.
_____/

## ORDER

At a meeting of the Michigan Civil Rights Commission
held in Mt. Pleasant, Michigan on the 30th of October, 2000.

In accordance with the Rules of the Michigan Civil Rights Commission, a Referee heard proofs and arguments and made proposed Findings of Fact and Recommendations regarding the issues involved in this case. The parties had an opportunity to make presentations in support of or in objection to the Referee's recommendations at a public meeting of the Commission. Commissioner Villarruel has issued an Opinion adopted by a majority of the Commission, adopting in part and modifying in part the recommendations. That Opinion shall be made part of this Order. The Commission therefore makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. Respondent Highland Beach Inn, Inc. (hereafter HBI), is a Michigan corporation. Richard Crup is president and owner; his wife, Betty Crup, is vice president, secretary, and treasurer.

2. Claimant JoAnn Beard was employed as a cook at the Highland Beach Inn from 1978 until November 17, 1991.

3. Mr. Crup is Claimant's supervisor. He controlled all of her terms and conditions of employment.

4. Richard Crup directed repeated instances of offensive and demeaning conduct and communication toward Ms. Beard and other female staff in private and in front of customers.

5. Often when Claimant or another female employee were down on their knees at the cooler, Mr. Crup would make a hand gesture near his penis and say, "while you're down there . . .", meaning, "while you're down there, what about a blow job."

6. When Claimant came to work in a good mood after a day off, Mr. Crup would inquire, "did you get any strange", meaning "did Claimant have sexual relations with anyone out of the ordinary."

7. Mr. Crup used derogatory nicknames for his female staff. Claimant was "blubber butt." The other three female wait staff were "mouse butt 1, 2, or 3" depending on the size of their buttocks.

8. On another occasion Claimant was on her hands and knees cleaning the cooler and Mr. Crup came up from behind and rubbed an empty paper towel roll between her legs.

9. Mr. Crup performed the same prank on his wife who screamed at him, "don't you ever do that to me again."

10. Another time, Mr. Crup opened the door for Claimant to take out the garbage, and then grabbed her breast as she walked through the door. Claimant told him to take his hands off her.

11. In front of customers, Mr. Crup tore the smock Claimant was wearing, causing her to cover her breasts with her hands and run into the kitchen.

12. Mr. Crup wrote his female staffs' names on zucchini and cucumber and told the women to take the vegetables home [for play].

13. Mr. Crup brought a cattle prod on the premises and used it to intimidate staff. Once, while holding the prod, he told a waitress, "get your ass moving."

14. If female staff got cold during trips into the freezer, Mr. Crup would comment on their erect nipples. He would say, "she's ready" or "she's hot to trot."

15. Pornographic magazines of women were on the premises and brought out to the bar to amuse patrons.

16. In an effort to stop Mr. Crup's harassing behavior, Claimant made herself personally unattractive - - she dressed less attractively, did not comb her hair, stopped wearing makeup, etc.

17. Claimant was embarrassed, intimidated, angry and victimized by Mr. Crup's behavior which she found crude, offensive and abusive.

18. Mr. Crup did not direct similar conduct to his male staff.

19. On separate occasions, Claimant unsuccessfully tried to discuss Mr. Crup's behavior with both Mr. and Mrs. Crup.

20. Claimant's testimony, and that of Ms. Gestwite and Ms. Palmer, is credible.

21. The testimony of Richard Crup, Betty Crup, and witness Kathy Corbin, is incredible.

22. On November 17, 1991 Claimant arrived at work to discover that she had been removed from the work schedule for Tuesday, a normal work day for her.

23. Claimant phoned Mr. Crup to discuss the matter. He would not discuss the matter over the phone but told her to wait until she returned to work.

24. Claimant hung up the phone emotionally distraught and said "I'm not taking this shit anymore," and immediately left the premises, resigning her position.

25. Claimant was depressed for the next four months and unable to function on a daily basis.

26. Claimant had no income from November 17, 1991 until January, 1992.

27. Claimant lost her home and had difficulty finding employment.

28. In 1990 Claimant earned $12,995 while employed at HBI, at an hourly rate of $6.00.

29. In 1991 Claimant earned $11,443 while employed at HBI, at an hourly rate of $6.70.

30. In 1992 Claimant found employment, but earned less than she had at HBI, making $6,929.

31. In 1993 Claimant earned less than she had at HBI, making $8,780.

32. In 1994 Claimant earned $9,278.

33. In 1995 Claimant earned $9,677.

34. In 1996 Claimant earned $11,827.

35. In 1997, Claimant earned as much or more than she was earning at HBI at the time of her termination.

## CONCLUSIONS OF LAW

1. Claimant JoAnn Beard is a member of a protected group. She is a female employee who has been the object of unwelcomed sexual conduct.

2. Claimant was subjected to unwelcome verbal and physical conduct and communication of a sexual nature, by Richard Crup her supervisor. Mr. Crup is also owner of the Highland Beach Inn and president of Highland Beach Inn, Inc.

3. Mr. Crup's conduct and communication had the purpose or effect of substantially interfering with Claimant's employment and created an intimidating, hostile and offensive employment environment.

4. The workplace at HBI was permeated with discrimination, intimidation and insult, sufficient to create a hostile environment under an objective reasonableness standard.

5. HBI Inc., through its agents, created a sex-based hostile work environment, and discriminated against Claimant in violation of the Elliott-Larsen Civil Rights Act.

6. Respondent HBI Inc., a Michigan corporation, is vicariously liable for Mr. Crup's sexual harassment of Ms. Beard.

7. Any prior determination by the MESC as to Claimant and Respondent HBI was not a factor in this decision.

8. Claimant suffered a constructive discharge because Mr. Crup created a working environment so intimidating, hostile and offensive that a reasonable person would have felt compelled to resign.

9. Claimant is entitled to compensatory and emotional distress from Respondent HBI Inc., as a result of the unlawful acts of its agent, Richard Crup.

**WHEREFORE, IT IS HEREBY ORDERED That:**

A. Respondent cease and desist from unlawfully discriminating against any employee by creation of a hostile work environment.

B. Respondent compensate Claimant for lost wages from the date of discharge through December 31, 1996 in the amount of $20,564, plus statutory interest calculated from the date the complaint was filed to the date the judgement is satisfied in full.

C. Respondent compensate Claimant $ 100,000 for emotional distress damages, plus statutory interest calculated from the date the complaint was filed to the date the judgement is satisfied in full.

D. Respondent pay $20,000 in attorney fees, plus $375 in costs.

**MICHIGAN CIVIL RIGHTS COMMISSION**

**Dated:** 10.30.96

**Nanette Lee Reynolds, Ed.D., Director**

NOTICE OF RIGHT TO APPEAL

You are hereby notified of your right to appeal within thirty (30) days to the Circuit Court of the State of Michigan having jurisdiction provided by law. MCLA 37.2606

#123567-EM06 JoAnn Beard
vs. Highland Beach Inn, Inc.

Opinion
Francisco J. Villarruel, Commissioner

STATE OF MICHIGAN
CIVIL RIGHTS COMMISSION
State of Michigan Plaza Building
1200 Sixth Street
Detroit, Michigan 48226

MICHIGAN DEPARTMENT OF CIVIL RIGHTS
ex rel JoAnn Beard,

Claimant,

v

Case No. 12357-EM06

HIGHLAND BEACH INN, INC.,

Respondent.
_____/

## OPINION

**Francisco J. Villarruel, Commissioner**

JoAnn Beard (hereafter Claimant) worked as a full-time cook at Highland Beach Inn, Inc. (hereafter HBI or Respondent) for fourteen years beginning November 1977 until November 17, 1991 when she quit her position because of numerous incidents of sexual harassment by Richard Owen Crup, the owner, manager and president of the Highland Beach Inn, Inc. Claimant filed a timely complaint with the Michigan Department of Civil Rights (hereafter MDCR) alleging that Respondent, a Michigan corporation, through its owner had subjected her to hostile work environment sexual harassment which caused her to quit her employment (constructive discharge). The MDCR investigated the complaint and found probable cause of discrimination based on sex. Conciliation was unsuccessful and a Charge was issued. Respondent timely answered the Charge and denied Claimant's allegations of hostile work environment sexual harassment and constructive

discharge.

A Rule 12 civil rights hearing was scheduled and conducted before a Referee. The Referee issued a Report and Recommendations finding: 1) Claimant was subjected to both discriminatory communication and conduct on the basis of sex by Richard Crup, owner and president of HBI, 2) Claimant was constructively discharged by Respondent Highland Beach Inn, and 3) Claimant is entitled to damages. Respondent filed Exceptions to the recommendations and both parties presented oral argument before the Michigan Civil Rights Commission (hereafter MCRC or Commission). Post oral argument, Respondent submitted a Motion for Continuance until such time as the Federal Court of Appeals for the Sixth Circuit, *en banc*, reconsiders *Williams v General Motors,* 1999 US App, LEXIS 19232 (6th Cir, August 5, 1999) and other future cases pending in the federal courts. After thoughtful consideration, Respondent's Motion for a Continuance is denied.

In this Opinion, the Commission will decide: 1) whether Claimant was subjected to hostile work environment sexual harassment, within the meaning of the Elliott-Larsen Civil Rights Act and relevant case law; 2) if yes, what is Respondent's liability. After reviewing the record, we adopt the credibility findings of the referee. We further affirm in part and modify in part the Referee's Recommendations. Our reasons appear below.

## I

## Factual Background

Ms. Beard worked as a cook, one of sixteen staff persons employed at Highland Beach Inn by owner and president Richard Crup and his wife Betty Crup. Mrs. Crup was the vice-president, secretary/treasurer, and kitchen supervisor and assisted Respondent in personnel matters.

The majority of the incidents leading to the filing of this complaint occurred within the last five of the fourteen years Claimant worked at HBI. Most of the incidents of hostile work environment sexual harassment are undisputed.

Respondent admits directing sexually oriented comments to his female employees including Claimant. The comments were often said in front of male customers. For

example, when Claimant or another female employee was down on her knees at the cooler, Mr. Crup, while standing facing Claimant, would make a hand gesture near his penis and say, "while you're down there. . . ", meaning, "while you're down there, what about a blow job"[1]. This happened on eight to ten occasions, each time causing the male customers at the bar to erupt in laughter.

Mr. Crup also routinely questioned Claimant and other employees about their personal sexual lives. Frequently, when Claimant came to work in a good mood after a day off, he would catch her in the hall or out in the bar area in front of male customers and say, " did you get any strange", meaning did she, "have sexual relationships with anybody out of the ordinary."[2] The entire scenario would evoke laughter from the men at the bar. Respondent testified that these statements were routine, everyday stuff, said not as a joke but as his way of loosening everyone up and having them relax or something. . .[3].

Richard Crup also had derogatory nicknames for his female staff. His name for Claimant was "blubber butt." He referred to the other three female waitresses as "mouse butt," numbers 1, 2, and 3 depending on the size of their buttocks.

On one occasion when Claimant was on her hands and knees cleaning the cooler, Mr. Crup came up behind her and rubbed an empty paper towel roll between her legs. The men at the end of the bar laughed. Mr. Crup also performed this antic on his wife who screamed at him, "don't you ever do that to me again."

Other examples of Respondent's offensive environment and Mr. Crup's offensive conduct and comments :

1. One evening as Claimant was going out the door with the garbage, Mr. Crup opened the door for her, and as she started through he firmly grabbed her left breast. She could smell beer on him. Claimant told him to take his hands off her.

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[1]Crup Deposition at p 22.

[2]Crup Deposition at 70.

[3]Crup Deposition at 82.

2. In front of patrons, Mr. Crup tore up the smock Claimant was wearing, causing Ms. Beard to cover her breasts with her hands and run into the kitchen. Again the patrons laughed.

3. Mr. Crup wrote the female employees' names on fresh vegetables, such as zucchini and cucumber, and told the women to take the vegetables home.

4. Mr. Crup brought a cattle prod onto the premises, and, while holding the cattle prod, told a waitress, "get your ass moving".

5. If the female employees got cold during errands into the freezer, Mr. Crup would comment on their erect nipples, saying, "she's ready" or "she's hot to trot."

6. Pornographic magazines were on the premises, and brought out to the bar to amuse patrons.

During her last year of employment, Claimant made several attempts to discuss Mr. Crup's treatment of the female employees, and herself in particular. On one occasion Claimant approached Mrs. Crup and attempted to talk to her about her husbands behavior and comments. Claimant said, "I need to talk to you," to which Mrs. Crup replied, "If it's about Dick, I don't want to hear it." When she spoke to Mr. Crup he just laughed at her.

Mr. Crup's displays left Claimant feeling intimidated, angry and embarrassed. Although Claimant loved her job, the environment took its toll. Claimant did not see any humor in Mr. Crup's comments or actions. She found him crude and offensive. She began to lose her self esteem and felt trapped, as if she were in servitude to the Highland Beach Inn. In an effort to dissuade Mr. Crup's harassment, Claimant intentionally made herself look unattractive, i.e. she stopped wearing make-up and allowed her clothing and physical appearance to deteriorate. Claimant also lost her appetite and her desire to go out socially.

On Monday night November 17, 1991 Claimant came to work and saw that she had been taken off the schedule for Tuesday, a normal work day for her. She called Mr. Crup from the phone at the bar and asked why. He said he would talk to her about it when she came back to work. Claimant was emotionally distraught. After she hung up she said, "I'm

not taking this shit no more." Claimant did not return to work at the Highland Beach Inn.

Claimant was depressed for the next four months and unable to function on a daily basis. She did not find new employment until January, 1992. During the years 1992-1996 she earned less money than she had earned at HBI. She was unsuccessful in finding a second job and lost her home when she was unable to make payments.

II

**Analysis**

Under the Michigan Elliott-Larsen Civil Rights Act (ELCRA), an employer violates the law by discriminating "against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . sex . . ." MCL § 37.2202 (1)(a). The ELCRA broadly defines sexual discrimination to include sexual harassment, and means:

> unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
>
> *(i)* Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment.
>
> *(ii)* Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment.
>
> *(iii)* Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment or creating an intimidating, hostile, or offensive employment environment.

MCLA 37.2103(i), MSA 3.548(103) (i) (references to non-employment discrimination omitted).

The Claimant contends Mr. Crup, through numerous acts of unsolicited and unwanted conduct and communication based on sex, created a hostile work environment. In *Radtke v Everett,* 442 Mich 368, 501 NW2d 155 (1993), the Michigan Supreme Court held that the following five elements are necessary for a plaintiff to establish a prima facie case of hostile work environment sexual harassment under the ELCRA:

*(1) The employee belongs to a protected group.*

Claimant meets this first element because she is a member of a protected group

and she is an employee who has been the object of unwelcomed sexual conduct. In hostile work environment sexual harassment cases, "all employees are inherently members of a protected class because all persons may be discriminated against on the basis of sex." *Id.* at 383.

*(2) The employee was subjected to communication or conduct on the basis of sex.*

Claimant also meets this second element because the record established that she was subjected to harassment on the basis of sex. Respondents' argument that the conduct at issue while crude and offensive was not overtly sexual or intrusive, that such behavior could not be seriously considered as a request for sexual favors, and that Mr. Crup did not carry any expectation of fulfillment, is not persuasive.

Under this element, Claimant need only show that "but for the fact of her sex, she would not have been the object of harassment." *Henson v Dundee,* 682 F2d 897, 904 (CA 11, 1982). The evidence shows that Mr. Crup's offensive and harassing behavior was directed toward his predominately female staff. Mr. Crup's comments about Ms. Beard's breasts, her butt, "while you're down there", etc., were only directed toward his female employees. There is no evidence that male employees were similarly treated. Clearly, Claimant's gender was a factor motivating Mr. Crup's conduct.

*(3) The employee was subject to unwelcome sexual conduct or communication.*

Claimant also meets this third element because the record established that she was subjected to unwelcomed sexual conduct or communication. Not unlike Title VII, the gravamen of a Michigan Civil Rights Act sexual harassment claim is that the alleged sexual conduct was unwelcomed. *Vinson, supra* at 68. "The threshold for determining whether conduct is unwelcome is "that the *employee* did not solicit or incite it, and that the *employee* regarded the conduct as undesirable or offensive." (emphasis added) *Radtke,* 442 Mich at 384, citing *Burns v McGregor Elec Indus, Inc,* 955 F2d 559, 565 (8th Cir 1993), quoting *Hall v Gus Construction Co., Inc.,* 842 F2d 1010, 1014 (8th Cir 1988).

In this case, both Mr. and Mrs. Crup rebuffed Claimant's attempts to verbalize to them that she found Mr. Crup's behavior undesirable and offensive. Mr. Crup ignored Claimant's verbal and facial expressions of disgust, displeasure and embarrassment, and

her changes in physical appearance designed to make her less attractive.

Likewise, there is no evidence that Claimant solicited or encouraged Mr. Crup's responses. Ms. Beard and others testified, including Mr. Crup, that his conduct or slurs usually occurred while Ms. Beard was performing her job duties and without provocation on her part. For example, Mr. Crup's remarks about Claimant's breasts occurred when Claimant exited the freezer. His placement of the paper towel roll between her legs and his comment, "while you're down there" occurred while Claimant was on her hands and knees at the bar refrigerator. His references to her "blubber butt" occurred whenever she passed him. He touched her breast when she walked past him while taking out the trash.

*(4) The unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment.*

A key issue in the instant case is whether the unwelcomed sexual conduct or communication was intended to or in fact did substantially interfere with Claimant's employment or created an intimidating, hostile, or offensive work environment. The standard for determining whether a hostile work environment exists is whether, under the totality of the circumstances, the employer's conduct was "severe *or* pervasive" enough to create an objectively hostile or abusive work environment - - an environment that a reasonable person would find hostile or abusive." *Harris v Forklift Sys., Inc.,* 510 US 17, 21 (1993) (emphasis added); *Radtke,* 442 Mich at 378. Generally, the "pervasive" requirement means that more than a couple of isolated incidents of offensive conduct are necessary, *Meritor Sav Bank v Vinson,* 477 US 57, 67 (1986). Although the Michigan Supreme Court has held that even one severe isolated incident may be sufficient to create a hostile work environment, the "severe" requirement has been described as a workplace "permeated with discriminatory intimidation, ridicule, and insult." *Radtke* at 442.

The evidence that the employer's conduct was "severe and pervasive" enough to create an objectively hostile or abusive work environment is overwhelming, as shown in part by these examples, all of which occurred while Claimant was performing her job duties: (1) Mr. Crup repeatedly and implicitly requested "oral sex", from Claimant and the

other female employees, while they were working[4] ; 2) Mr. Crup regularly questioned Claimant and her female coworkers about their intimate sex lives[5]; 3) he condoned pornographic materials on or near the bar[6]; 4) Mr. Crup used derogatory terms when referring to his female employees, e.g., "blubber butt" to describe Claimant[7] and "mouse butt" to describe another female staff member; 5) he observed female employees' breasts as they exited the freezer and would comment "are you ready"[8]; and 6) he welded an electric-current cattle prod to make his female employees work faster.[9] Mr. Crup not only admits to perpetrating such acts, he further acknowledges that his offending behavior was "routine, everyday stuff."[10]

The evidence overwhelmingly reflects a work environment that a reasonable person would find hostile or abusive. This is especially true in this case because the harrasser is both the supervisor and employer.

*(5) respondeat superior.*

The final element is met by Claimant because the perpetrator is her employer and supervisor. Under the Michigan Civil Rights Act, an employer may avoid liability "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Downer v Detroit Receiving Hosp,* 191 Mich App 232, 234; 477 NW2d 146 (1991). Such prompt and appropriate remedial action will permit an employer to avoid liability if the plaintiff accuses either a co-worker *McCarthy v State Farm Ins Co*, 170 Mich App 451, 457; 428 NW2d 692 (1988), or a supervisor of sexual

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[4]Crup Deposition, p 22.

[5]Crup Deposition, p 69.

[6]Crup Deposition, p 37.

[7]Crup Deposition, p 42.

[8]Crup Deposition, p 36.

[9]Crup Deposition, p 23.

[10]Crup Deposition, p 71.

harassment. *McCalla v Ellis,* 180 Mich App 372, 380; 446 NW2d 904 (1989), citing *Vinson supra* at 72; *Downer, supra* at 234. An employer, of course, must have notice of alleged harassment before being held liable for not implementing action. *Katz v Dole,* 709 F2d 251, 255 (CA 4, 1983); *Henson, supra* at 905. However, when, as here, the *employer* is accused of sexual harassment, then the respondeat superior inquiry is unnecessary because holding an employer liable for personal actions is not unfair.

Our review of the record shows Claimant has satisfied the elements necessary to establish a prima facie case of hostile work environment sexual harassment.

## III

## Adverse Employment Action

In the majority of hostile work environment sexual harassment cases filed under the ELCRA, the discussion would now shift to an analysis of whether the employee suffered an adverse employment action for which the Respondent should be held liable. However, the particular facts of this case make that analysis unnecessary.

When the conduct complained of is perpetuated by the employer who is also the supervisor, the harassment itself affects the terms and conditions of employment, and a loss of job benefit is not necessary" [ in order to determine liability]. *Radtke* at 385, citing *King v Bd of Regents of Univ of Wisconsin System,* 898 F2d 533, 537 (CA 7, 1990). The terms and conditions of employment are altered because "[t]he employer [and supervisor] implicitly and explicitly make the employee's endurance of sexual intimidation a 'condition' of her employment." *Radtke* at 385, citing *Bundy v Jackson,* 205 US App DC 444, 456; 641 F2d 934 (1981). Under these conditions, it is proper to hold Respondent HBI liable.

It is also appropriate under these facts to hold Respondent liable for Claimant's resignation or constructive discharge. In *Jenkins v Southeastern Michigan Chapter, American Red Cross,* 141 Mich App 785, 796; 369 NW2d 223 (1985), the Michigan Court of Appeals said:

> Constructive discharge may be found where working conditions would have been so difficult or unpleasant that a reasonable person in the

employee's shoes would have felt compelled to resign. *Held v Gulf Oil Co,* 684 F2d 427, 432 (CA 6, 1982); *Clark v Marsh,* 214 US App DC 350, 355, 665 F2d 1168, 1173 (1981); *Jacobs v Martin Sweets Co* 550 F2d 364 (CA 6, 1977), *cert den* 431 US 917, 97 Sct 2180, 53 LEd2d 227 (1977); *LeGalley v Bronson Community Schools,* 127 Mich App 482, 487, 339 NW2d 223 (1983). A finding of constructive discharge depends on the facts of each case. *Held, supra; Jacobs, supra.* Constructive discharge requires inquiry into the intent of the employer and the reasonably foreseeable impact of the employer's conduct on the employee. *Held , supra.* An employer is held to intend the reasonably foreseeable consequences of his conduct. *Id.* Plaintiff can make a jury-submissible case for constructive discharge by showing discrimination plus aggravating circumstances. See *Bourque v Powell Electrical Manufacturing Co,* 617 F2d 61 (CA 5, 1980), *Clark v Marsh, supra,* 214 US App DC 350, 355-356, 665 F2d 1168, 1173-1174.

The facts of the instant case provide a classic example of constructive discharge: discrimination based on sex with aggravating circumstances, harassment by the Claimant's supervisor who is also the employer, and the absence of a workplace sexual harassment policy. Accordingly, we find that Claimant was constructively discharged from her employment.

## IV

## Relief

In determining the specific damages to which Claimant is entitled, we affirm the Referee award of wage loss in the amount of $20,564. Under Michigan law, Claimant has a duty to mitigate damages; however, as recent case law makes clear, she "is only required to make efforts that are reasonable under the circumstances." *Morris v Clawson Tank Co,* 459 Mich 256, 264; 587 NW2d 253 (1998). Claimant testified that she attempted unsuccessfully to obtain a second job. According to *Morris,* Claimant was not required to be successful in mitigation. The defendant has the burden of proving that the course of conduct plaintiff followed was so deficient as to constitute an unreasonable failure to seek employment. *Id* at 267-268. The record is void of any evidence that Claimant did not mitigate her damages. The Referee's Report is also void of any basis for the award of emotional distress damages equal to that of mitigated lost wages.

Under the Elliott-Larsen Civil Rights Act, Claimant is entitled to damages for mental distress. *Department of Civil Rights ex rel Johnson v Silver Dollar Café,* 198 Mich App 547, 459; 499 NW2d 409 (1992). Victims of discrimination may also recover for humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish that result from discrimination. *Silver Dollar Café; Howard v Canteen Corp,* 192 Mich App 427, 481 NW2d 718 (1991); *Jenkins v Southeastern Michigan Chapter, Am Red Cross,* 141 Mich App 785, 799, 369 NW2d 223 (1985). These types of injuries are the kind that the Elliott-Larsen Civil Rights Act was designed to protect against and to hold otherwise would undercut the legislative scheme to remedy discriminatory wrongs. *Slayton v Michigan Host, Inc,* 122 Mich App 411, 417, 332 NW2d 498 (1983).

Michigan law allows recovery for mental distress based on Claimant's own testimony, provided there is "specified and definite evidence of her mental anguish, anxiety or distress." *Wiskotoni v Michigan National Bank-West,* 716 F2d 378, 389 (6th Cir 1983). Medical testimony supporting such claims is not required. *Howard, supra.* In *Wilson v General Motors Corp,* 183 Mich App 21, 454 NW2d 405 (1990), the Court of Appeals upheld the lower Court's remitted award of $375,000.00 in non-economic damages based only upon Plaintiff's testimony regarding her own subjective feelings. In *Moore v KUKA Welding Sys,* 171 F3d 1073, 1082 (6th Cir 1999), the employer argued that the jury's award of $50,000 for emotional distress was excessive because there was insufficient proof that the plaintiff suffered an injury. The court held that plaintiff's testimony that he was "angry" and "upset" about the racial jokes and slurs in his workplace that he "just couldn't take it anymore," and that he complained to his supervisors and started looking for a new job was sufficient evidence to support the award.

In the instant case, the record established Claimant sustained emotional distress for a substantial number of months prior to her involuntary termination and for several months thereafter. In fact, testimony established that in the last five (5) years of her fourteen (14) years of employment, the harassment escalated as her complaints fell on deaf ears. Economic necessity forced Ms. Beard to continue employment at HBI, even as the daily incidents of harassment impacted her physical and mental health. Claimant's

physical appearance deteriorated - - initially in an attempt to discourage Mr. Crup's harassment, and later as an effect of her lowered self-esteem and depressed emotional state. Socially and physically Claimant became a shadow of her former self. She stopped eating, socializing with friends and participating in her favorite activities, golf and fishing. When Claimant wasn't at work, she slept; her friends had to drag her out of bed and out of the home.

Other employment was not immediately available following Claimant's termination. As a consequence, Claimant was unable to pay her utilities and suffered through days without heat and/or electricity. Eventually Claimant lost her home. Moving day was another in a continuing series of traumatic occurrences. Unable to afford movers, Claimant utilized some men from the local shelter and was forced to distribute some of her belongings to them as payment in lieu of money. On that day, Claimant remained in bed until the movers took the bed. Based on our review of the record, Claimant is entitled to emotional distress damages of $100,000.

Claimant is also entitled to costs and attorney fees. *McCalla v Ellis,* 180 Mich App 372; 446 NW2d 904 (1989) lv den, 434 Mich 893. In a post Oral Argument Notice to File Supplemental Pleadings regarding attorney fees, the parties were provided the opportunity to address this issue. Claimant responded timely with a request for attorney fees and costs in a specific amount. Respondent did not respond or otherwise object to an award of attorney fees and costs. Based on our review of the record, we award $20,000 in attorney fees, and $375 in costs.

Accordingly we award $20,564 for wage loss, $20,000 in attorney fees, $375 in costs, and $100,000 in emotional distress damages.

Date Oct. 30, 2000

Francisco J. Villarruel

Francisco J. Villarruel

## Concurring and Dissenting Opinion

**Albert Calille, Commissioner**

I respectfully concur in part and dissent in part from the Commission's Opinion and Order entered in this case.

### Concurring

I concur in that part of the Commission's Opinion and Order that finds Respondent discriminated against Claimant and that Claimant is entitled to back pay damages.

### Dissenting

I dissent from that part of the Commission's Opinion and Order that finds Claimant is entitled to emotional damages in the amount of $100,000.00.

In modifying the Referee's Report for emotional distress damages in the amount of $20,564.00, the Commission's majority opinion states as follows:

> "Claimant sustained emotional distress for a number of months prior to her involuntary termination, which was manifest by her change in appearance and life style. This emotional distress continued for several months thereafter, during which time Claimant was severely depressed. Claimant sustained lost wages and lost her home as a result of the unlawful discrimination and constructive discharge."

I do not believe that the record in this case supports an award for $100,000.00 in emotional distress damages.

First, as already noted, the Referee Report in this matter recommended $20,564.00 in emotional distress damages. Nothing in the Commission's majority opinion explains why the majority did not follow the Referee's Report in this regard.

Second, Claimant in her Post-Trial Brief before the Referee

requested emotional distress damages of $45,000.00[11]. Nothing in the Commission's majority opinion explains why Claimant should be awarded more in emotional distress damages than the Claimant requested.

Third, Respondent in its Exceptions To Hearing Referee's Report and Recommendations, pages 17 and 18, objects to the Referee's recommendation for emotional damages for two reasons. Respondent argues that the record supports that Claimant's depression had an onset about 18-20 months before she quit her employment. Respondent argues that the Respondent's alleged sexual harassment was constant during Claimant's entire employment, and therefore, nothing changed in the employment condition before Claimant's termination that would have caused her depression. In addition, Respondent argues that the likely triggering event for Claimant's depression was when Claimant's son moved out of Claimant's home. Respondent argues that there was support in the record that Claimant was distraught regarding this event, which occurred in 1989, approximately two years before Claimant terminated her employment with Respondent.

The record does not establish the cause of Claimant's depression, change in her appearance, or the loss of her home. The record, through lay testimony, only establishes that these events occurred. Claimant did not present expert testimony regarding causation. Claimant has the burden to establish that her emotional distress damages were caused by Respondent's sexual harassment.

In the Referee's Report, no mention is made of Claimant's son moving out of Claimant's home, even though there is support in the record that this event was stressful to the Claimant and occurred around the time when Claimant's appearance and demeanor started to change.

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[11]Page 11, Claimant's Closing Argument and Post-Trial Brief.

Based on the record in this case, I cannot determine what caused Claimant's emotional distress, depression, change in appearance, or the loss of her home. Claimant has failed to satisfy her burden of proof in establishing emotional distress damages caused by Respondent's conduct. As a result, I respectfully dissent from this part of the Commission's Opinion and Order.

Of course, this is not to diminish my concern regarding Respondent's behavior in this case. The law clearly prohibits the sexual and crass comments that Respondent admittedly made over an extended period of time. For this unacceptable behavior, Respondent is in violation of Michigan law and is responsible for back pay damages. However, it is not appropriate to award emotional distress damages for the purpose of punishing Respondent where Claimant has failed to satisfy her burden of proof that these damages were caused by Respondent's illegal conduct.

Date: 10-30-00 Albert Cadille