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 Office Hours:
 8:45 a.m. to 5:00 p.m.

DECISION OF BOARD OF REVIEW

In the matter of:

Appeal number: **BR-77278**

EMPLOYEE APPELLANT:

[REDACTED]

Office #01

EMPLOYING UNIT:

Share Systems, Inc.
 99 Dover Street
 Somerville, MA 02144

On September 14, 1998, in Boston, Massachusetts, the Board reviewed the written record and a recording of the testimony presented at the hearing held by the Deputy Director's representative on July 9, 1998.

On August 26, 1998, the Board allowed the claimant's application for review of the Deputy Director's decision in accordance with the provisions of Section 41 of M.G.L. c. 151A, the Massachusetts Employment and Training Law. The Board remanded the case to the Deputy Director for further review and to make subsidiary findings of fact from the record. The Deputy Director returned the case to the Board on September 8, 1998.

The Board has reviewed the entire case to determine whether the Deputy Director's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights.

The claimant's appeal is from the Deputy Director's decision which concluded that:

The claimant was not discharged from her employment. Therefore, Section 25(e)(2) does not apply to this matter.

In accordance with Section 25(e)(1), the burden of proof is upon the claimant to establish by substantial and credible evidence that she left for good cause attributable to the employer or its agent, or for urgent, compelling and necessitous reasons. The claimant contended that she left the job for good cause attributable to the employer, and for urgent, compelling and necessitous reasons. Yet, given the facts as stated above, the claimant failed to meet her burden of proof in establishing such. In all past incidents, the claimant had prevailed, with the help of the union and higher management in some cases. Most of the incidents indicated that [sic] occurred many months prior to the claimant's leaving. The only incident which had occurred in 1998 was shortly before the claimant requested a leave of absence that was granted based solely for personal reasons which were not indicated to the employer. The claimant had only made known to the employer a situation involving others and not affecting her or her work, and they had taken action on that situation although not reporting the action to her as she was not a party. The claimant was aware



that she could get help through the union and higher management regarding any problem of harassment as shown by her earlier use of those options but decided not to do so. Further, she was on a leave of absence at the time of her resignation and could have had [sic] informed the employer of the problem while on such making her leaving at this point not urgent nor necessitous. Instead, she resigned prior to allowing the employer any chance to correct the situation. Even then, after the employer learned of the alleged verbal sexual innuendos, they still investigated and warned the individual involved although the events were not confirmed.

In view of the facts, the claimant is subject to disqualification and is denied benefits.

The claimant is denied benefits from the week ending May 16, 1998 until she has worked eight weeks and in each week has earned an amount that is equal to or in excess of her weekly benefit amount.

M.G.L.c. 151A, § 25(e), in part, and 430 CMR 4.04(5)(a)(b)(c)1 and 2 are pertinent and provide as follows:

Section 25. No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for -

(e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of the individual's weekly benefit amount after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . .

An individual shall not be disqualified under the provisions of this subsection from receiving benefits if it is established to the satisfaction of the commissioner that the reason for leaving work and that such individual became separated from employment due to sexual, racial or other unreasonable harassment where the employer, its supervisory personnel or agent knew or should have known of such harassment.

For the purposes of this paragraph, the term "sexual harassment" shall mean 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, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of creating an intimidating, hostile, humiliating or sexually offensive work environment. The department shall promulgate regulations necessary to carry out the provisions of this paragraph.

430 CMR 4.04:

Disqualification for Benefits(5) Harassment.

- (a) Definitions. The following words and phrases shall have the following meanings:
1. Racial harassment-conduct with racial content which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment.
 2. Sexual harassment-sexual advances, requests for sexual favors, and other physical conduct of a sexual nature when
 - a. submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions;
 - b. such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance; or
 - c. such advances, requests or conduct have the purpose or effect of creating an intimidating, hostile, humiliating or sexually offensive work environment.
 3. Other unreasonable harassment-includes, but is not limited to, incidents of harassment related to age, religious creed, national origin, or handicap of any individual.
- (b) Sexual, racial or other unreasonable harassment may result from conduct by the employer or the employer's agents, supervisory employees, co-employees or non-employees. Such conduct may occur on or off the worksite and on or off company time.
- (c)1. A claimant shall not be disqualified from receiving benefits under M.G.L. c. 151A, Section 25(e)(1) for leaving work voluntarily without good cause attributable to the employing unit or its agent if he or she establishes to the satisfaction of the Commissioner that his or her reason for leaving work and separation from employment is due to:
- a. sexual, racial or other unreasonable harassment by an employer, its agents or supervisory employees and the employer, its agents or supervisory employees knew or should have known of such harassment.
 - b. In the case of a non-employee, the department will consider the extent of the employer's control over the non-employee's conduct.

2. For purposes of determining a claimant's eligibility for benefits under 430 CMR 4.04(7)(c) I.a., an employer is deemed to have knowledge of sexual, racial or other unreasonable harassment committed by its agents and supervisory employees in connection with the employment relationship regardless of whether the employer had actual knowledge of these acts.

The Deputy Director's representative held a hearing on July 9, 1998. Both parties appeared. The Board remanded the case to the Deputy Director for further review and to make additional findings of fact. Whereupon, the Deputy Director's representative consolidated his final findings of fact as follows:

The claimant worked as a fund raiser for the employer, a fund raising organization for [sic] non-profit agency, from October, 1994 until she separated from the employer.

The claimant quit her job on May 13, 1998 due to harassment and the work environment.

In 1996, the claimant had been having an intimate relationship with a co-worker and tried to separate their private lives from the workplace especially as they were having some personal problems. She tried to have him stop interfering with her at work on her own but was unable to do so. She requested help from management and although given a verbal warning, the co-worker continued to interfere with her at work over their personal problems. The claimant then sought help through the union. Management was approached again with possible grievance action indicated, and the co-worker was given a written warning and stopped his behavior toward the claimant.

Later in 1996, another co-worker indicated an interest in the claimant for a relationship and would not take no for an answer. After the claimant sought help from management, the co-worker was warned by management and stopped his behavior towards her. He was discharged later for arguing with management.

During the summer of 1996, the claimant was working when a co-worker standing near her started to yell indicating a desire to "let's take it outside". The claimant questioned him as she did not know whom he was speaking to and was told to "mind your own business". The claimant complained about the behavior to management, but after they took a statement, there appeared to be nothing done. Later in 1996, the co-worker was discharged for bring [sic] a gun to work.

The claimant was made uncomfortable by a coworker's staring and hearing him make statements to others over the telephone which she felt were sexually suggestive in early 1997. She confronted him and while not in agreement, he did stop doing so in her presence. She also avoided him afterwards.

The claimant co-ordinated a sexual harassment training seminar provided by the union in January 1997. The company sent all employees. During that training, the union requested that individuals bring problems to individuals involved not management. The policy on sexual harassment was part of the union contract and personnel handbook, and included the right to help from higher management.

The claimant had an incident with the director of the call center in July, 1997. During a discussion with a female co-worker regarding a bathing suit, it was indicated that padding was going to be removed. The director indicate that reminded him of a story and later told the claimant about an incident involving his wife in a bathing suit with the padding removed and the effect that it produced on her and a group of young men. The claimant later approached the director indicating that she was offended by the story, to which he indicated disagreement with her concerns. She sought union and higher corporate management help in resolving the issue, resulting in an investigation and the director's being put on notice and sent to further training.

During the fall of 1997, the claimant found that she was offended by some sexually oriented jokes from a co-worker. She confronted him and he stopped telling the jokes in her presence.

Also around this time, another co-worker asked the claimant about her plans for the week-end, and was told that it was none of his business. He responded to her indicating that he could take her over his knee and spank her, and did lightly hit her face with is hand. Confronting him later personally, the co-worker agreed to stop the behavior and did do so.

Another co-worker in 1997 was in the habit of staring and muttering sexual comments. The claimant became offended by his behavior and with a group of female co-workers, complained to management. With management's help the matter was resolved with the muttering stopped.

The company provided additional training on sexual harassment in January 1998 to all employees. During this training, it was stressed that individuals should notify higher management regarding all problems.

The claimant attended a meeting with a number of other workers at the beginning of May, 1998. During that meeting, a unit manager was heard by the claimant to have indicated to another worker in response to a question, "sometimes I can picture you (snicker) taking it (snicker) in the face (snicker)". After which he turned to the claimant and indicated that if she was offended, she could sue him. The unit manager did make the statements based on the direct testimony of the claimant.

The claimant later learned that this same manager was having a sexual relationship with one of her co-workers, the second such relationship.

The claimant did bring to the attention of higher management that the manager was engaged in relationships with a subordinate and they investigated. As the claimant was not directly involved in or affected by any behavior resulting from that relationship, and as it was found to be a mutually accepted relationship, the claimant was not informed of any action being taken against the manager.

The claimant requested a month leave of absence from work effective May 10, 1998 for personal reasons and that leave was granted to her under company policy. No reason for the leave other than personal was provided to the employer.

The claimant was seeking counseling on her own regarding her feeling about work and the environment created there.

The claimant resigned May 13, 1998 while on her leave of absence indicating personal reasons as the cause. She put that verbal resignation in writing also.

The claimant, after her resignation was accepted, told higher management about the incident with the manager in the May, 1998 meeting. They investigated the incident and found that others remembered the incident differently, including the union steward present at the meeting. While there was no proof of any actual wrong doing by the manager, a written warning being given to him about his involvement with subordinates in sexual relationships was expanded to include a warning about verbal comments.

The claimant did seek psychotherapy from a LICSW, EDD beginning on May 12, 1998 for four sessions which was what was covered by her insurance. She was diagnosed as suffering from Post-Traumatic Stress Disorder and it was felt that it was psychologically impossible for her to have followed company procedures regarding documentation. A letter from the LICSW, EDD dated July 6, 1998 regarding the claimant was submitted.

The claimant also spoke with a counselor with Everywomen's Center on May 13, 1998 (3 times), May 14, 1998, and May 19, 1998. That counselor did support her leaving the instant employer as indicated by a letter from another counselor/advocate at the center dated June 30, 1998.

After reviewing the record, the Board adopts the consolidated findings of fact made by the Deputy Director as being supported by substantial evidence. The Board concludes, however, that the Deputy Director's decision is based on an error of law and modifies that decision for the following reasons:

The claimant left her employment because of a hostile work environment created by the actions of co-workers and management personnel.

The findings reflect that since 1996 there were various incidents in the workplace suggestive of sexual harassment. In January 1997, the claimant, herself, coordinated for the employees of the company a sexual harassment training seminar which was provided by the union. During the fall of 1997, the claimant experienced several episodes in which either unwelcome sexual advances were made or sexually offensive remarks were uttered. In January 1998, the company provided additional training on sexual harassment issues to all employees.

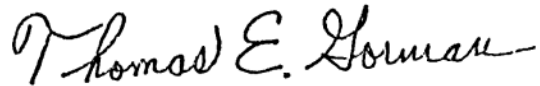
The catalyst for the claimant's decision to resign was an incident which occurred in early May 1998. At that time, the unit manager while speaking to another worker in the claimant's presence made a crude comment relative to an image he had of this co-worker engaging in a sex act. The claimant was offended by the remark and the subsequent comment by the manager to the effect that if she, the claimant, was offended by the conversation the claimant could sue him.

The work environment created psychological stress upon the claimant to the extent she requested a one month leave of absence as a means to deal with her inner crisis. After being granted the leave effective May 10, 1998, the claimant, in conjunction with suggestions from her counselor/therapist made the decision to sever her employment. She resigned effective May 13.

Pursuant to 430 CMR 4.04(5)(c)2, the employer is deemed to have knowledge of sexual harassment by its agents and supervisory employees in connection with an employment relationship regardless of whether the employer had actual knowledge of the on-going harassment. In the instant case, the unit manager in early May 1998 did engage in conduct which created an intimidating, hostile, humiliating and sexually offensive work environment as defined by 430 CMR 4.04(5)(a)2(c) .

The claimant has prevailed in her burden of proof to establish her leaving was with good cause attributable to the employer within the meaning of Section 25(e)(1) of the Law, cited above.

The Board modifies the Deputy Director's decision. The claimant is entitled to benefits for the week ending May 16, 1998 and subsequent weeks, if otherwise eligible.



Thomas E. Gorman
Member

BOSTON, MASSACHUSETTS
DATE OF MAILING - **SEP 22 1998**



Kevin P. Foley
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY -

OCT 22 1998

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