

**DISTRICT OF COLUMBIA  
COMMISSION ON HUMAN RIGHTS**

In the Matter of:

COMPLAINANT,  
Complainant,

v.

Docket Number 14-369-P (N)

BONNER DENTAL NETWORK,  
Respondent.

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**FINAL DECISION AND ORDER**

**I. STATEMENT OF THE CASE:**

Complainant alleges that Owner, the owner of Bonner Dental Network (“BDN” or “Respondent”), subjected him to sexual harassment/hostile work environment because of his sex (male) and sexual orientation (gay) during his employment with BDN. Complainant further alleges that due to the sexual harassment/hostile work environment, it became intolerable for him to continue working for BDN, and, as a result, he was constructively discharged from his job with the practice.

Owner denies that he ever subjected Complainant to sexual harassment/hostile work environment. BDN also denied that Complainant was constructively discharged from his position of employment with their practice. It was BDN’s position that Complainant stopped coming to work without notice or explanation. After missing work for three consecutive days without calling in, Complainant informed BDN he had quit his job with their practice and would be coming by the office to collect his personal belongings.

**Procedural History**

Complainant filed his complaint with the District of Columbia Office of Human Rights (“OHR” or “Office”) on March 31, 2014, alleging that Owner violated the District of Columbia Human Rights Act (“DCHRA”) when he subjected him to sexual harassment/hostile work environment based on his sex and sexual orientation. The Complainant further alleged that he was constructively discharged from his job because he could no longer tolerate the harassment or the hostile work environment to which he was being subjected.

The Office investigated Complainant’s complaint and issued a Letter of Determination (“LOD”) dated May 16, 2015, finding probable cause that Owner had subjected Complainant to sexual harassment/hostile work environment that caused him to be constructively discharged from his job with the practice. The case was referred to the Office’s Mediation Department for conciliation, to no avail.

On July 29, 2016, the Office certified the case to the District of Columbia Commission on Human Rights (“Commission”) for a public hearing and the case was assigned to the undersigned judicial officer for adjudication. A Notice of Assignment was sent to the parties, a scheduling teleconference was conducted on August 15, 2016, and a scheduling order was issued the same day. The parties requested discovery in the case at the scheduling teleconference, but later informed the Commission that they had elected not to pursue discovery in this matter. Dispositive motions were not filed. A Joint Pre-Hearing Statement was filed by the parties on June 8, 2017, and a Pre-Hearing teleconference was held July 14, 2017. On July 20 and 21, 2017, a hearing on the merits was held. The parties submitted Post Hearing Briefs. A Proposed Decision and Order was issued on May 21, 2018 and electronically mailed to the parties that same day. No exceptions or corrections were filed by the parties in this case.

## **II. ISSUES**

1. Whether Respondent subjected Complainant to sexual harassment/hostile work environment based on his sex (male) and sexual orientation (gay); and
2. Whether Complainant was constructively discharged from his job with Respondent because of sexual harassment/hostile work environment due to his sex (male) and sexual orientation (gay).

## **III. FINDINGS OF FACTS**

1. Owner is a dentist, who owns two dental practices operating under the name of Bonner Dental Practice; one is in Washington, D.C., and the other is in Greenbelt, Maryland. Transcript Volume 2 at 5:6–6:2; 7:15-16 [hereafter, e.g., “Tr. 2 at”].
2. Owner’s Washington, D.C. office has been in operation since 2003 and serves over 3,000 patients a year. Tr. 2 at 7:6; 19:20.
3. The office space at the District of Columbia location is comprised of 625 square feet and has a staff of seven to eight employees. Tr. 1 at 102:15-18. Due to the small size of the office, it is not uncommon for staff members to bump into one another as they carry out their duties. Tr. 1 at 268:3-15.
4. In December 2012, Complainant, who at the time was employed by Temp Agency, a temp agency, was sent on a temp assignment to work for BDN’s D.C. office as a dental hygienist. Tr. 1 at 25:18-19; 26:1.
5. On January 23, 2013, Complainant was hired by BDN to work for the practice as a permanent full-time dental hygienist at their D.C. office. Tr. 1 at 86:3-5; 39:8-9.

6. In keeping with BDN's personnel policy regarding new hires, Complainant was placed on probation for a period of six months. Tr. 1 at 46:5-12; Respondent's Exhibit [hereafter RX] 2-1.<sup>1</sup>
7. Complainant's work hours at BDN were Monday through Friday, from 8:30 a.m. to 5:00 p.m., and every second Saturday of the month, from 9:00 a.m. to 1:00 p.m. RX4-21.
8. Complainant identifies as a gay man. Tr. 1 at 21:9-21; 122:24-123:4.
9. BDN has an employee manual entitled "Team Member Handbook" that prohibits sexual harassment and discrimination due to gender or sexual orientation in the workplace. RX4-20; RX4-21; RX4-22
10. At the time Complainant was hired to work for BDN, the employer required all new hires to go through a new employee orientation conducted by Witness 1, the Human Resources Manager for the Respondent. Tr. 1 at 197:10-198:18.
11. Witness 1 was hired to work for BDN in August 2010, and he left his employment with the practice at the end of 2013. Two of his major objectives upon assuming the position of Human Resources Manager were to draft an employee handbook for the practice and institute and conduct employee orientation sessions for all new hires. Tr. 1 at 215:4-6; 216:19-217:12.
12. Witness 1 had a strong commitment as a human resources manager to insure all

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<sup>1</sup> Complainant disagrees with the employer's contention that his probationary period was for six months, stating it was for three months. Tr. 1 at 46:5-12. The Complainant's testimony is not supported by the evidence in the record. By his own admission, Complainant signed a form indicating his acceptance of BDN's employment offer and their stated terms of employment which stated he would be on probation for six months. *See* RX2-2.

new hires of BDN knew and understood the policies and procedures of the practice before they started working for the practice. Tr. 1 at 217:4-7.

13. During his orientation sessions with new hires, Witness 1 would personally review all the policies and procedures that appeared in the Team Member Handbook with each new employee and present him or her with their own copy of the employee handbook. Following the orientation session, Witness 1 would have new employees sign a form, entitled “Conditions of Employment Acknowledgment and Consent,” acknowledging that he or she had received, reviewed, and understood the policies and procedures set forth in the BDN employee handbook. Tr. 1 at 197:10-198:18.
14. Witness 1 personally conducted an employee orientation with Complainant after the Complainant was hired by BDN. During this orientation, Witness 1 reviewed the practice’s policies and procedures with Complainant and provided him with a copy of the BDN employee handbook. Tr. 1 at 230:1-231:5. Witness 1 also had Complainant sign a “Conditions of Employment Acknowledgment and Consent” form. Tr. 1 at 218:1-7; 227:2-8.<sup>2</sup>
15. BDN has a complaint procedure printed in its employee handbook for employees to follow who seek to complain of sexual harassment that occurred in the workplace. RX4-22.
16. The procedure requires the employee to report the complained of incident(s) to his

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<sup>2</sup> Complainant denied attending an employee orientation, receiving an employee handbook, or signing an acknowledgment of receipt form that he was given a copy of the employee handbook. Tr. 1 at 38:13-16; 39:21-40:10. However, the undersigned judicial officer determines that Witness 1’s testimony is highly credible based on his consistent statements and forthright demeanor at the hearing. This judicial officer also finds that Witness 1 gave Complainant a copy of the BDN employee handbook, went over the policies and procedures with him, and had him sign an acknowledgement for receiving the handbook.

or her immediate supervisor, a manager, or the BDN's Human Resources Department. RX4-22.

17. Witness 1 informed Complainant that if he felt he was being harassed or discriminated against, Complainant should let him know and that he would exercise due diligence to get to "the bottom" of situation. Tr. 1 at 244:1-8.
18. Shortly after Complainant was hired to work for BDN, he alleges that Owner began making inappropriate and nonconsensual sexual advances towards him while on the job and, as a result, it became an unbearable environment to work in. He further alleges that he had no other choice than to quit. Tr. 1 at 165:1-5.
19. Complainant admitted that neither during nor after the alleged incidents of sexual harassment, did he ever complain to Owner nor did he bring these allegations to the attention of Witness 1, BDN's Human Resources Department, or anyone in management at BDN while employed there. Tr. 1 at 91:3-9.
20. During Complainant's tenure with BDN Witness 1 came by the D.C. office once or twice a week. During his visits to the office he and the Complainant would engage in conversation and Witness 1 would ask him how he was doing. Complainant never brought up his allegations of Owner's alleged sexual harassment during his conversations with Witness 1. Tr. 1 at 44:22-45:19.
21. When questioned as to whether he had any hesitancy about discussing these allegations with Owner, Complainant stated, "Not really." Tr. 1 at 60:1-2. When asked why he did not complain, he responded that he was "too busy." Tr. 1 at 87:22-25.
22. By his own admission, Complainant acknowledged that he did not complain to

anyone regarding any alleged harassment. Tr. 1 at 90:20-92:16.

23. Complainant stopped coming to work on June 17, 2013. Tr. 1 at 103:7-9. Three days later, Complainant called BDN to inform the employer he had quit his job and that he was coming by the office to pick up his belongings. Tr. 1 at 104:15-19. Complainant did not make any mention of his sexual harassment complaints when he quit. Tr. 1 at 168:2-12.
24. After Complainant left BDN he worked for several employers, but was unable to recall their names, the dates he worked for them, or the earnings he received. Complainant does receive \$800 a month in disability, but he did not specify who was his provider. He also earns \$200 a week as an Uber and Lyft driver. Tr. 1 at 110:8-115:14.

#### **IV. DISCUSSION**

##### **A. Sexual Harassment/Hostile Work Environment Claim**

Complainant alleges that BDN discriminated against him because of his sex (male) and sexual orientation by subjecting him to sexual harassment/hostile work environment in violation of the DCHRA. Specifically, Complainant alleges the following seven discrete acts of sexual harassment:

1. The first incident of alleged sexual harassment took place when Owner and Complainant were returning to the D.C. office in a vehicle driven by Owner after a work-related training session conducted at the Greenbelt office. Complainant was seated in the front passenger seat. Tr. 1 at 174:4-7. Complainant claims that while he and Owner were engaged in casual conversation, Owner extended his pinky finger toward Complainant's thigh, but did not

actually make physical contact with him. Tr. 1 at 50:15-51:1. Owner denied the allegations. Tr. 2 at 52:6-12.

2. The second episode of sexual harassment that Complainant alleges took place in BDN's Treatment Room 3, as he was bent over a crown making machine assisting a patient who was seated in the room during the alleged incident. Complainant testified that Owner walked up behind him and placed his groin against his backside for a second. Tr. 1 at 55:1-56:21; Complainant's Exhibit [hereafter Compl. Ex.] 10. Owner denied the allegation. Tr. 2 at 44:17-45:9.
3. Complainant alleges that on another occasion, Owner rubbed his leg against Complainant's leg as he was assisting him with a patient. Tr. 1 at 61:2-62:20. Owner denied the allegation. Tr. 2 at 54:10-15.
4. Complainant claims a fourth incident of sexual harassment occurred while he was trying to log patient information into an office computer and the mouse he was using malfunctioned. Tr. 1 at 67:15-19. Complainant alleges Owner approached him, placed his hand on his arm, removed the mouse from his grasp and pressed the front part of his body against the Complainant's back. Tr. 1 at 68:8-69:16. According to Complainant, this episode lasted for a few seconds. *Id.* Owner denied Complainant's allegations. Tr. 2 at 53:7-17.
5. Complainant alleges a fifth incident of sexual harassment took place when he was putting away a CERC machine in the office. He claims Owner walked up to him and pressed his groin against the Complainant's backside for a split second. Tr. 1 at 82:10-83:1. Owner denied the allegation. Tr. 2 at 45:7-9.
6. The sixth incident of sexual harassment that Complainant alleges occurred when he was attempting to walk by Owner, who was working in a confined space in the office,

polishing a set of dentures. According to Complainant, as he attempted to squeeze by Owner, he deliberately pressed his pelvic area against the Complainant's backside. Tr. I at 84:3-86:2. Owner denied the allegation. Tr. 2 at 58:12-24.

7. Complainant also alleges that, on at least five occasions while standing in the BDN office hallway conversing with Owner, his employer moved close to him and bumped Complainant's hip with his own hip. Tr. 1 at 89:7-22. Owner denies ever touching Complainant inappropriately.

The DCHRA makes it unlawful to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment, because of such individual's sex or sexual orientation, among other protected categories. D.C. CODE § 2-1402.11 (a)(1). The DCHRA is comparable to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, which prohibits an employer from discrimination against individuals for the above stated reasons. *Motley-Ivey v. District of Columbia*, 923 F. Supp. 222, 223 (D.D.C. 2013) (*citing Elhusseini v. Compass Group USA Inc.*, 578 F. Supp. 2d 6, 18 (D.D.C. 2008)); *Howard University v. Best*, 484 A.2d 958, 977 (D.C. 1984). The District of Columbia Court of Appeals looks to cases from the Federal courts involving claims brought under the Title VII for guidance. *Wallace v. Skadden, Arps, Slate, Meagher & Flom, et al.* 715 A.2d 873, n.31 (D.C. 1988).

Because the DCHRA is not a "general civility code for the American workplace," *see Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (describing Title VII), not all workplace harassment constitutes a hostile work environment under the DCHRA. Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998). A close reading of D.C. Court of Appeals caselaw can be synthesized so as to suggest that the following four elements are essential to establishing a *prima facie* case of

harassment under the DCHRA: conduct that is (1) severe or pervasive; (2) abusive and hostile; (3) unwelcome; and (4) because of the protected trait. *See Daka, Inc. v. Breiner*, 711 A.2d 86, 92 (D.C. 1998); *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993).

The first element of the *prima facie* case involves conduct that is “severe or pervasive.” This element should be understood to be read in the disjunctive; that is to say, one incident that is particularly severe, or several incidents of less severe conduct over a period of time, can constitute actionable harassment. *See Akonji v. Unity Healthcare, Inc.*, 517 F. Supp. 2d 83, 98-99 (D.D.C. 2007). With respect to the second element, harassment is actionable only if the complainant can demonstrate that it is both objectively and subjectively abusive and hostile; that is to say, a reasonable person in the victim’s position would find the conduct to be abusive and hostile and the victim found it to be such. *Daka*, 711 A.2d at 93. This element requires examination of “[t]he totality of the circumstances,” which may include “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.” *Akonji*, 517 F. Supp. 2d at 93 (citing *Harris*, 510 U.S. at 23). The third element of the *prima facie* case is that the conduct is subjectively “unwelcome.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986). The last element concerns whether the conduct occurred because of a protected trait. Comments or actions that “expressly focus” on a protected trait or traits satisfy this element. *Peters v. District of Columbia*, 873 F. Supp. 2d 158, 189 (D.D.C. 2012).

Complainant has failed to sufficiently state a *prima facie* case for sexual harassment. The undersigned judicial officer cannot find, by the preponderance of the evidence, that Owner’s alleged misdeeds took place; accordingly, Complainant has not shown that Owner’s alleged misconduct was severe or pervasive, the first prong of the *prima facie* case.

In three of the alleged episodes of unwelcome harassment, Owner successfully established that Complainant's allegations could not be supported by the evidence. Specifically, with respect to the second alleged episode, the undersigned judicial officer finds based on the photograph of Treatment Room 3 (Compl. Ex. 10) and Owner's undisputed testimony, the incident complained of could not have occurred in the manner Complainant recounted it. The room was small and cluttered and contained a patient's chair, a dentist's chair and a dental hygienist's chair. The crown making machine was in the corner of the room next to an electrical outlet and behind the patient's chair. If Complainant was bending over the crown making machine as he testified, there would not be enough space for anyone to come from behind him as he alleges. Tr. 2 at 44:18-46:5; RX8-15.

Turning to the third alleged episode, the undersigned judicial officer finds Owner's undisputed testimony highly credible in determining that the incident could not have happened as related by Complainant. Owner testified that whenever he works on a patient, he always sits on the right-hand side of the patient's chair and the dental hygienist sits on the left-hand side of the patient. He noted that the dental hygienist's chair was 16 to 18 inches higher than his chair, making it virtually impossible for the two men's legs to have physical contact with one another. Tr. 2 at 54:16-56:19; 57:2-3.; RX8-12; RX8-17.

With respect to the sixth episode, the undersigned judicial officer finds Owner's undisputed testimony to be highly credible in determining that the incident could not have happened. The equipment that Owner was using to polish the dentures rested on the top of a cabinet next to a wall. Owner was facing the cabinet and the denture polishing machine, which was plugged into an electrical wall socket. Tr. 2 at 59:5-60:16; RX8-13. Owner testified credibly that the only way someone could pass him would be for them to walk behind him, because the wires attached to the denture polisher he was using would block the person from being able to pass in front of him. *Id.*

Concerning the four remaining discrete episodes of alleged unwelcome harassment, the undersigned judicial officer finds that they cannot be established because Complainant was unable to prove by preponderance of the evidence that unwelcome harassment took place. Both Complainant and Owner's testimony were determined to be equally credible as to whether the alleged incidents of inappropriate touching took place or not. In order "to prove sex or gender discrimination under the DCHRA, the complainant must make a *prima facie* case showing by a preponderance of the evidence." *Purcell v. Thomas*, 928 A.2d 699, 710 (D.C. 2007) (citing *United Mine Workers, Int'l Union v. Moore*, 717 A.2d. 332, 338 (D.C. 1998) quoting *Arthur Young & Co. v. Sutherland*, 631 A.2d 354, 363 (D.C. 1993)). Because Complainant failed to make the requisite showing, the undersigned judicial officer cannot find, as a matter of law, that these incidents occurred.

#### **B. Complainant's Remaining Claims.**

Complainant also alleges he was constructively discharged when he resigned from his job with BDN because he could no longer tolerate the sexual harassment/hostile work environment he was being subjected to. The test for determining if an employee was constructively discharged from a position of employment is set forth in *Sutherland*, 631 A.2d at 364 and states that a constructive discharge is a set of "aggravating conditions in the workplace which would lead a reasonable person to resign." The aggravating conditions on which Complainant relies to justify his resignation have not been established by a preponderance of the evidence. Accordingly, the undersigned cannot make a finding that Complainant was constructively discharged.

Last, Complainant has raised the issue of Owner owing him money for installing

shelves as the BDN location in D.C. This matter arises out of a dispute the parties have that is unrelated to the issues of sexual harassment and hostile work environment that are before the Commission. Accordingly, it cannot not be addressed in this forum.

**V. CONCLUSIONS OF LAW**

The undersigned judicial officer makes the following conclusions of law:

1. Complainant has not established by a preponderance of the evidence that Bonner Dental Network subjected him to sexual harassment/hostile environment that was based on his sex (male) and sexual orientation (gay); and
2. Complainant has not established by a preponderance of the evidence that he was constructively discharged from his job with Bonner Dental Network because of sexual harassment/hostile work environment due to his sex (male) and sexual orientation (gay).

**So Ordered this 30<sup>th</sup> day of July 2018.**

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Commissioner

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Commissioner

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Commissioner