State of Wisconsin
Labor and Industry Review Commission

Brenda Lamont, Complainant **Nelson Global Products**, Respondent 915 Red Iron Rd. Black River Falls, WI 54615 ERD Case Nos. CR201302178 and CR201401347 EEOC Case Nos. 443201300432C and 443201301351C	**Fair Employment Decision**[1] **Dated and Mailed:** June 10, 2019

The decision of the administrative law judge is modified and, as modified, is **affirmed in part** and **reversed in part**. Accordingly, the commission issues the following:

Order

1. *Time within which respondent must comply with Order.* The respondent shall comply with all of the terms of this Order within 30 days of the date on which this decision becomes final. This decision will become final if it is not timely appealed, or, if it is timely appealed, it will become final if it is affirmed by a reviewing court and the decision of that court is not timely appealed.

2. That the respondent shall cease and desist from discriminating against the complainant based upon her sex.

3. That the respondent shall pay to the complainant reasonable attorney's fees and costs incurred representing the complainant in this matter up until the issuance of the administrative law judge's decision, in the amount of $36,583, and for the proceedings before the commission, in the amount of $4,712, for a total of $41,295. A check in that amount shall be made payable jointly to the complainant and her attorney, Colin Good, and delivered to Mr. Good.

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[1] **Appeal Rights**: See the green enclosure for the time limit and procedures for obtaining judicial review of this decision. If you seek judicial review, you must name the Labor and Industry Review Commission as a respondent in the petition for judicial review. Appeal rights and answers to frequently asked questions about appealing a fair employment decision to circuit court are also available on the commission's website, http://lirc.wisconsin.gov.

4. That within 30 days of the date on which this decision becomes final, the respondent shall file with the commission a Compliance Report detailing the specific actions it has taken to comply with this Order. The Compliance Report shall be prepared using the Compliance Report form which has been provided with this decision. The respondent shall submit a copy of the Compliance Report to the complainant at the same time that it is submitted to the commission. Within 10 days from the date the copy of the Compliance Report is submitted to the complainant, the complainant shall file with the commission and serve on the respondent a response to the Compliance Report.

Notwithstanding any other actions a respondent may take in compliance with this Order, a failure to timely submit the Compliance Report required by this paragraph is a separate and distinct violation of this Order. The statutes provide that every day during which an employer fails to observe and comply with any order of the commission shall constitute a separate and distinct violation of the order and that, for each such violation, the employer shall forfeit not less than $10 nor more than $100 for each offense. *See*, Wis. Stat. §§ 111.395, 103.005(11) and (12).

By the Commission:

/s/
Michael H. Gillick, Chairperson

/s/
David B. Falstad, Commissioner

/s/
Georgia E. Maxwell, Commissioner

Procedural Posture

This case is before the commission to consider the complainant's allegations that the respondent discriminated against her in the terms and conditions of her employment based upon her sex, and in retaliation for having engaged in protected conduct, and that it constructively discharged her, all in violation of the Wisconsin Fair Employment Act (hereafter "Act"). An administrative law judge for the Equal Rights Division of the Department of Workforce Development held a hearing and issued a decision finding that the complainant was subjected to unlawful sexual harassment and was transferred to a different job within the plant because of her sex and in retaliation for her protected conduct, but was not subjected to discriminatory discipline or denied a pay raise for discriminatory reasons and was not constructively discharged. Both parties filed timely petitions for commission review of those aspects of the decision that were adverse to them.

The commission has considered the petition and the positions of the parties, and it has reviewed the evidence submitted at the hearing. Based on its review, the commission makes the following:

Findings of Fact

1. The respondent, Nelson Global Products (hereinafter "respondent"), is a business that manufactures custom exhaust tubing for vehicles.

2. The complainant, Brenda Lamont (hereinafter "complainant"), a female, began working for the respondent in 2011 as a bender operator on first shift.

3. During her employment the complainant was involved in a romantic relationship with another employee, Tony Mouridian. Mouridian was married at the time.

4. Beginning in October of 2011, a co-worker by the name of Grant Vranish, began making unwelcome comments about the complainant. Vranish disapproved of the fact that the complainant was involved in a relationship with a married man and made his disapproval known by calling the complainant a "whore," a "filthy whore," and a "homewrecker."

5. In late 2011 the complainant attended a company party, after which another co-worker gave the complainant and Vranish a ride home. During the car ride Vranish argued with the complainant and called her names. He asked her repeatedly why she was cheating with a married man. At one point Vranish grabbed the complainant by the shoulders. The complainant was in tears and the co-worker turned the car around and dropped Vranish off at his at home. At work the following Monday Vranish approached the complainant and called her a "lying whore."

6. In February of 2012 the complainant was hospitalized for diverticulitis, which she believed was caused by stress related to Vranish's treatment of her at the work place. When the complainant returned to work she notified the respondent's human resource manager, Corrine Simonson, about the names Vranish was calling her. The complainant also told Simonson that Vranish had referred to her as a "whore" over the plant radio, which was audible throughout the plant. Simonson responded that the complainant should be an adult and ignore Vranish's behavior.

7. In March of 2012 Vranish began sending text messages to Mouridian that contained insulting and offensive comments about the complainant. Mouridian showed some of the text messages to the complainant, including but not limited to one asking, "Are you really fucking that whore?" and one containing a photograph of a woman's breast with the caption, "Brenda's breast."

8. When the complainant became aware of the first text, she reported it to Simonson, who indicated that if it was not sent during work time she did not want to hear about it. The complainant made a second report to Simonson after Mouridian received additional text messages from Vranish including an offensive picture, but was told by Simonson to ignore it.

9. At some point in April of 2012 the complainant made a third complaint to Simonson regarding offensive and graphic text messages Mouridian was receiving. Simonson told the complainant that since the texts were not sent to her personally, she did not want to hear about it. The complainant then brought her concerns to the plant manager, Gary Buell. Buell told the complainant that if she continued creating drama and friction on the shop floor he would begin disciplinary action against her.

10. On April 2, 2012, Vranish and Mouradian got into a physical altercation at the work place, after which they met with Buell. Mouradian told Buell that he was being harassed by Vranish and that management was doing nothing to stop it. Mouradian mentioned the text messages he was receiving. Buell asked Mouradian if he received the texts at work, and Mouradian said no. Buell responded that, in that case, there was nothing he could do.

11. On or about April 5, 2012, the complainant contacted Joseph Freeman, the respondent's vice president of human resources, and told him that she was being sexually harassed at work and that her complaints were being ignored. The complainant described the text messages that Mouridian was receiving. Freeman told her that if the texts were not sent during work time, she should get a restraining order. After that conversation, Freeman sent an email to John Madden, the respondent's director of human resources for North America, and Corrine Simonson, in which he stated he believed the complainant was being sexually harassed and that her concerns were being ignored. Freeman requested background information on the conflict between the complainant and Vranish.

12. On April 10, Simonson sent an email to Freeman, with a copy to Buell. In her email Simonson stated, among other things, that Mouridian had reported he was receiving text messages using very vulgar and threatening language that were targeting his children and the complainant, but that she saw no reason for management to get involved because they were taking place outside of working hours. Simonson also indicated that she discussed transferring the complainant to a different department because of her romantic relationship with Mouridian, which she considered to be in violation of company policy. She concluded the email by stating that neither she nor Buell knew what to do because "the 'drama' doesn't stop."

13. That day Buell sent an email to Freeman with a copy to Madden, in which he stated, "I truly believe Grant is the instigator and both Tony and Brenda are being harassed. I would like to take action on this but need your guidance. . ."

14. The respondent took no further action to investigate or address the complainant's allegations of sexual harassment.

15. On April 10, 2012, the complainant filed for a temporary restraining order against Vranish. The restraining order was granted on April 11, 2012.

16. On April 13, 2012, the complainant was informed that she would be reporting to the shipping department effective April 16. The complainant indicated that this felt like a demotion and she did not want the transfer. She was told it was not a demotion and that there would be no loss of pay. The complainant was informed that she could not continue to work in the bending department because of her relationship with Mouridian.

17. On April 16, 2012, the day on which the complainant was scheduled to begin working in the shipping department, she presented the respondent with a doctor's note excusing her from work for the next two days "due to emotional distress caused by a co-worker." The complainant returned to work on April 18. However, that day she was sent home for making faces at the co-worker who took over her machine in the bending department.

18. On April 24, 2012, the complainant attended a court hearing to have her temporary restraining order against Vranish extended. Vranish brought two of his co-workers, Jeffrey McCormick and Brad Zipfel, to the hearing for support. Another co-worker, Kyle Gomer, waited outside the court house; when the complainant exited the court house Gomer spat at her feet.

19. The court granted the restraining order which required, among other things, that Vranish have no contact with the complainant at the work place. In order to comply with the restraining order the respondent moved Vranish from first shift to third shift. The respondent did not talk to the complainant about the matter; it did

not notify her of the steps it was undertaking to comply with the restraining order or advise her to notify it if Vranish made any further contact with her.

20. After Vranish was moved to third shift, he would linger at the time clock when his shift was over and smirk at the complainant when she signed in for her shift.

21. On one occasion after the restraining order was granted Kyle Gomer entered the complainant's work area and extended his middle finger at her. On another occasion Gomer stared at the complainant and stated, "Hey, it's the whore Brenda," and then followed up with "Flood," the last name of another individual named Brenda who also worked for the respondent.

22. The complainant received discipline or coaching on several occasions during the spring and fall of 2012. On May 1, 2012, the complainant received a warning for using her cell phone on the shop floor. On August 23, 2012, the complainant received a warning for five unexcused absences between September of 2011 and July 24, 2012. On September 4, 2012, the complainant was given a coaching for habitually failing to report on time to the employer's "safety huddle."

23. In October of 2012 the complainant received a performance review that included unsatisfactory ratings in the areas of "attendance" and "cooperation." As a result, the complainant did not get a wage increase.

24. On February 2, 2013, the complainant received a coaching for yelling and swearing repeatedly at co-workers. The complainant was not subject to any disciplinary action by the respondent thereafter.

25. On February 27, 2013, the complainant filed a discrimination complaint with the Equal Employment Opportunity Commission.

26. In April of 2013, the complainant was again denied a wage increase.

27. The complainant's supervisor, Bruce Bue, was responsible for the various disciplinary warnings and coachings the complainant received, as well as for her performance evaluations and wage increases. Bue was generally aware that the complainant had sought a restraining order against Vranish, but did not know that she was claiming she had been subjected to sexual harassment in the work place.

28. On August 6, 2013, the complainant began a leave of absence due to stress and anxiety she was experiencing at work. During her leave of absence, Nicole Laufenberg, the respondent's new human resources coordinator (who replaced Corrine Simonson), spoke to the complainant several times and encouraged her to return to work. Laufenberg was aware of the prior incidents and advised the complainant that the harassment would stop.

29. On March 3, 2014, the complainant resigned her position with the respondent. She had not returned to the work place since beginning her leave of absence seven months earlier.

Based upon the Findings of Fact above, the commission makes the following:

Conclusions of Law

1. That the respondent discriminated against the complainant because of sex, within the meaning of the Act, by permitting harassment to have the purpose or effect of substantially interfering with the complainant's work performance or of creating an intimidating, hostile or offensive work environment.

2. That the respondent did not discriminate against the complainant in the terms, conditions or privileges of her employment on the basis of sex or because she opposed a discriminatory practice under the Act, within the meaning of the Act, by transferring her to a different position, subjecting her to discipline, or denying her a pay raise.

3. That the respondent did not discriminate against the complainant on the basis of sex or because she opposed a discriminatory practice under the Act, within the meaning of the Act, by terminating her employment.

Memorandum Opinion

A. Sexual harassment

The respondent argues that the complainant's sexual harassment claim is untimely, and maintains that all of the allegedly harassing conduct occurred more than 300 days before she filed her complaint.[2] The commission disagrees and concurs with the administrative law judge that the complainant's claims are timely under a continuing violation theory.

It is well established law that, where an employee has been the victim of unlawful harassment within the 300-day period before the complaint was filed, she may bring suit challenging all related harassing conduct, including that occurring outside the limitations period. In a case involving a series of harassing work place incidents aimed at a worker based upon his sexual orientation, the Wisconsin Court of Appeals described the analysis thusly:

[2] Wis. Stat. § 111.39(1) requires that a complaint of discrimination be filed no more than 300 days after the alleged discrimination occurred. The complaint in this matter was filed on February 27, 2013. Thus, any discriminatory conduct taking place prior to May 3, 2012 (300 days before the complainant was filed) would not be considered timely.

> . . . Hostile environment claims by their very nature involve conduct which occurs over a series of days, or perhaps years. Such claims are based on the cumulative effect of individual acts. A Complainant may show a series of related acts, one or more of which are within the limitations period. A serial violation is established if the evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period. In this case, only one of the alleged incidents which the Complainant alleged created a hostile work environment occurred within the 300 days prior to the filing of his complaint. This did not, however, make his hostile work environment claim untimely.

Bowen v. LIRC, 2007 WI App 45, 299 Wis. 2d 800, 730 N.W.2d 164.

In this case, the complainant testified that, prior to the limitations period, Grant Vranish, one of the complainant's co-workers, called the complainant a "whore," a "filthy whore," a "lying whore," and a "homewrecker," based upon her relationship with another co-worker, who happened to be married. This primarily occurred between October and December of 2011. In one instance the complainant heard Vranish refer to her as a "whore" over the plant radio, which was audible in various locations throughout the plant. Vranish also sent offensive text messages to the co-worker the complainant was dating, which were clearly referencing his relationship with the complainant. The complainant additionally alleged that at one point Vranish kicked the back of her feet while she was walking past him in the workplace. The complainant complained to the respondent about Vranish's conduct in February of 2012 and on several occasions thereafter, but was essentially told to cut the drama and be an adult. The respondent also indicated that since the text messages were not sent to her directly and/or were sent off of work time, it did not want to hear about them. Ultimately the complainant secured a restraining order against Vranish, which prevented him from having any contact with her in the plant. The respondent transferred Vranish to third shift to keep him away from the complainant, in compliance with the restraining order, but did not communicate this decision to the complainant and took no other action to ensure that she would not be subject to further harassment in the work place.

All of the incidents described above took place more than 300 days prior to the complainant's having filed her complaint. However, the complainant testified that the harassment did not end there. Rather, she stated that after Vranish was transferred to third shift, he would be leaning on the time clock when she came in to report for her shift and would smirk at her. The complainant indicated that this occurred on a daily basis.[3] The commission believes that Vranish's standing at the

[3] The complainant also testified that when she walked away she would hear other people talking and would hear the word "whore." She did not elaborate on this assertion or explain how often it occurred.

time clock and smirking at the complainant after she obtained a restraining order against him because he was harassing her could reasonably be viewed as hostile and harassing behavior that was part of the entire course of harassing conduct. Vranish did not appear at the hearing to contradict the complainant's testimony or to offer any explanation for his actions that would cast them in a more favorable light. In addition, the complainant also testified that during the limitations period (described by the complainant as "a while" after the restraining order was issued) there was an occasion when another co-worker, Kyle Gomer, walked around her work area and "flipped her off" and that on another occasion Gomer referred to the complainant as "the whore." In her testimony the complainant suggested that Gomer engaged in other similar conduct on an ongoing basis, but provided no specifics. Although Gomer did not participate in the earlier incidents of workplace harassment alleged by the complainant, he attended the restraining order hearing on behalf of Vranish and, when the complainant exited the court house, he spat at her feet. Based on the foregoing, the commission is satisfied that the complainant alleged an ongoing course of harassing conduct which began in October of 2011 and continued after the court issued a restraining order against Vranish on April 24, 2012, such that at least some of it took place within the limitations period.

In its brief to the commission the respondent argues that Vranish's and Gomer's conduct was not "sexual in nature" and therefore cannot form the basis for applying a continuing violation theory to a claim of sexual harassment. The commission does not find this argument persuasive. To begin with, the term "whore" may reasonably be considered "sexual in nature," rendering at least one of the incidents occurring during the limitations period an act of sexual harassment. *See*, *Vervoort v. Central Paper Company*, ERD Case No. 8055411 (LIRC Jan. 25, 1989). Moreover, the commission is not persuaded that each incident contributing to a hostile environment sexual harassment claim must be specifically "sexual in nature" in order to be part of a course of conduct of sexual harassment. For instance, in *Bowen v. Stroh Die Casting Co. Inc.*, ERD Case No. 200301568 (LIRC Oct. 28, 2011), the commission found that conduct which was not sexual in nature, but which, in the context of other acts of harassment had a "sexual connotation," could be considered. In addition, it must be noted that the Act also prohibits harassment that is "because of an individual's gender." Wis. Stat. § 111.36(1)(br). Thus, even if it could be found that the complainant was not subjected to conduct that was sexual in nature during the limitations period and that this affected her ability to establish a claim for hostile environment sexual harassment, the conduct to which she was subjected can certainly be characterized as harassment because of her gender, for which the respondent may also be liable under the Act.

Next, the respondent makes an argument that intervening actions by the employer will sever the actions that preceded it, precluding liability for preceding acts outside the limitations period, and maintains that its actions in moving Vranish to third shift broke the continuity of the complainant's claim. The commission disagrees.

The respondent told the complainant that she would be disciplined if she kept bringing "drama" to its attention, demonstrating a clear lack of interest in addressing the situation. While the respondent subsequently transferred Vranish to third shift, it did so only as a means of complying with a restraining order and not in response to the complainant's complaint. There is no evidence to suggest that the respondent counseled Vranish about avoiding contact with the complainant thereafter, nor did it notify the complainant of the shift change or check in with her to ensure that the situation had improved. Consequently, the respondent's argument that it took appropriate remedial action regarding the incidents occurring outside the limitations period fails, and does not defeat the continuing violation analysis.

The commission agrees with the administrative law judge that Vranish's conduct--whether characterized as sexual harassment or harassment based upon sex--was sufficiently egregious as to create a hostile working environment for the complainant. A reasonable person would find that being called a "whore" by a co-worker repeatedly, including once over the respondent's radio for all to hear, interfered with her work performance and/or created a hostile environment. In addition, Vranish's conduct in sending offensive text messages to Mouradian (which were clearly meant to reference the complainant) contributed to creating a hostile work environment for the complainant, even though they were not sent to her directly.[4] Nor does the fact the text messages were sent outside of work time prevent them from being considered as part of the complainant's hostile work environment claim. The text messages came from Vranish, who was harassing both the complainant and Mouridian at the work place, and they were connected to a course of harassing conduct that affected the work environment. Moreover, the complainant testified that at the restraining order hearing Vranish admitted to showing people the texts at the workplace and laughing about them. Considering all the circumstances, the commission sees no basis to dismiss the text messages as something separate and apart from the other harassment the complainant was experiencing at the work place, and it believes that those messages were part and parcel of the entire course of conduct that created a hostile working environment for the complainant.

Finally, the respondent makes an argument that Vranish's conduct was motivated by his dislike of the fact that the complainant was involved in a relationship with a married man, that it was directed at both the complainant and Mouridian and that,

[4] In its brief the respondent argues that the text messages were excluded from the record on the ground that they lacked foundation and that, therefore, they were improperly considered by the administrative law judge. However, the administrative law judge's ruling on this point was that, while the text messages themselves were excluded, the complainant's testimony was not. Although the complainant did not testify as to the specific content of each of the text messages at issue, her testimony is sufficient to warrant a conclusion that Vranish sent Mouridian offensive and graphic text messages that were in reference to his relationship with the complainant.

therefore, it was not undertaken based upon the complainant's sex. The commission disagrees. Vranish did not call the male employee involved in the relationship a "whore"--that was a term specifically addressed to the complainant because she is female. Nor did Vranish's text messages contain pictures of male body parts. That Vranish also harassed Mouridian does not change the fact that he subjected the complainant to harassment in ways that were specifically related to her sex.

An employer is liable for the harassing acts of its employees if it knew about the harassment but failed to take adequate measures to prevent or eradicate it. *See*, *Guerrero v. University of Wisconsin Hospital & Clinics*, ERD Case No. 200702599 (LIRC June 4, 2010), *and cases cited therein*. The complainant complained to the respondent about harassing conduct on several occasions--including conduct that unquestionably took place at the work place and was addressed to the complainant personally--and it is undisputed that the respondent was aware of the conduct. However, rather than step in and take action to resolve the issue and eradicate the unacceptable conduct, the respondent told the complainant to be an adult and cut the drama, and threatened her with disciplinary action if she brought more problems to the respondent's attention. Although the respondent ultimately separated the complainant from Vranish, it did so only because there was a restraining order in place that would have otherwise prevented Vranish from working. While the respondent was surely aware that the complainant's and Vranish's paths might cross between shifts, it did not take steps to ensure that Vranish would have no contact with the complainant during those times and did nothing to put the complainant on notice that it had attempted to resolve the problem or that she could feel free to bring further concerns to its attention. Under all the circumstances, the commission agrees with administrative law judge that the respondent knew about the harassment, but failed to take adequate measures to prevent or eradicate it, as required under the Act.

Terms and Conditions Claims

A. Transfer

In her decision, the administrative law judge held that the complainant was transferred from the bending department to the shipping department in retaliation for having complained of sexual harassment. However, the transfer at issue took place on April 13, 2012, more than 300 days before the complaint was filed. While the complainant suggests that the transfer was part of an ongoing pattern of harassment and therefore subject to the continuing violation theory, it is a well established principle that the continuing violation doctrine does not apply to discrete personnel actions, such as the denial of a promotion or the imposition of discipline. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2002). *See*, *also*, *Wodack v. Evangelical Lutheran Good Samaritan Soc.*

(LIRC Aug. 5, 2005); *Koenigsaecker v. City of Madison* (LIRC March 11, 2005); *Kanter v. Ariens Co.* (LIRC Sept. 23, 2005); *Josellis v. Pace Inds.* (LIRC Aug. 31, 2004); *Jackson v. Aurora Health Care* (LIRC Aug. 24, 2004).

In her brief the complainant also argues that her claim of retaliatory transfer is not time barred because, after she was transferred, her work was assigned in a random manner that varied from day to day. The complainant maintains that each day she was assigned unfavorable tasks constitutes a discrete act of discrimination. The commission does not find this argument persuasive. The complainant's allegation, and the finding made by the administrative law judge in her decision, was that the job transfer itself was discriminatory. Because an involuntary transfer from one work assignment to another is clearly a discrete personnel action which is not considered a proper subject of the continuing violation theory, the commission concludes that the administrative law judge erred in finding that the complainant established discrimination with respect to a transfer that took place more than 300 days before she filed her complaint.[5]

B. Discipline

The complainant contends that she was subjected to discriminatory discipline on the following occasions: 1) on April 18, 2012, the complainant was sent home for glaring at the co-worker who took over her machine in the bending department; 2) on May 1, 2012, the complainant received a warning for using her cell phone on the shop floor; 3) on August 23, 2012, the complainant received a written warning for five unexcused absences between September of 2011 and July 24, 2012; 4) on September 4, 2012, the complainant was given a coaching for habitually failing to report on time to the employer's "safety huddle;" and 5) on February 2, 2013, the complainant received a coaching for yelling and swearing repeatedly at co-workers. The complainant additionally maintained that she did not receive a wage increase in October of 2012 and April 2013 because of low rankings on her evaluation. The complainant maintains that this was also in retaliation for her protected conduct.

As an initial note, the alleged acts of discrimination occurring prior to May 3, 2012 were not raised in a timely manner, and the complainant's claims can be dismissed on that basis. Regarding those claims that were timely filed, the commission agrees with the administrative law judge that the evidence does not support a finding of discrimination. Bruce Bue, the complainant's supervisor, was the individual who prepared the performance evaluations and who was responsible for the disciplinary actions discussed above. However, while Bue knew that the complainant had filed a restraining order against Vranish in April of 2012, he testified that he was not

[5] Even assuming that the individual job assignments given the complainant thereafter can be analyzed as separate acts of discrimination, for the reasons explained in the section of this Memorandum Opinion entitled "Discipline," there is no basis to conclude that the complainant's supervisor was motivated to retaliate against her for having engaged in protected conduct.

aware she had made a complaint she was being harassed in the work place. Rather, Bue stated that he first learned of the complainant's harassment complaint a month before the hearing.[6] Although the complainant argues that Bue's testimony on this point is not credible, it went unchallenged and the commission can see no basis to disregard it.

It is an essential element of a claim of retaliation that the complainant establish the employer was aware of the complainant's protected conduct. *Cangelosi v. Robert E. Larson & Associates*, ERD Case No. 8821554 (LIRC Nov. 9, 1990)(If an employer does not know that an employee has made a complaint of discrimination it obviously cannot be motivated by such knowledge in the conduct it undertakes). Where it was not established that Bue knew the complainant had engaged in conduct that was protected under the Act, there is no basis to conclude that the disciplinary actions he imposed were undertaken in retaliation for that conduct.

B. Constructive discharge

In order to establish a constructive discharge, the complainant must demonstrate that her working conditions were so intolerable due to a discriminatory reason that she was compelled to quit. *Powell v. Salter*, ERD Case No. 199601071 (LIRC July 11, 1997). In this case, the complainant alleged that she was harassed by Vranish for months and that the respondent did nothing about it, before ultimately moving Vranish to third shift to comply with a restraining order in April of 2012. The only objectionable conduct that occurred thereafter was that Vranish stood at the timeclock and smirked at the complainant. The complainant did not explain how long that conduct went on. The complainant began a leave of absence over a year later, on August 6, 2013. Although the complainant testified that the leave of absence was related to the stress she was feeling about the workplace, there is nothing in the record to indicate that any harassment was occurring at the time the complainant began her leave. Seven months later, during which time no harassment had occurred and the respondent's new human resources representative gave the complainant assurances that none would be permitted if she returned to work, the complainant tendered her resignation because, as she testified at the hearing, she "couldn't take the. . . constant abuse." However, the commission believes that the length of time between the most recent instances of harassment and the date on which the complainant quit, combined with the fact that she was provided assurances that there would be no further incidents of harassment should she return to work, militate against finding that the complainant's separation from employment amounted to a constructive discharge.

[6] In her decision the administrative law judge found that the complainant talked to Bue about harassment in April of 2012. However, this appears to be a typographical error. The complainant testified that the individual who threatened her with disciplinary action if she continued to create drama was not Bruce Bue, but Gary Buell. (TR, at 115).

Attorney's Fees

The administrative law judge reduced the complainant's attorney fee request by 33 percent to reflect the fact that she did not prevail on the most significant issue of her complaint--the constructive discharge issue. Both parties disagree with this resolution; the respondent contends that the complainant is entitled to no attorney fees, while the complainant contends that the amount of fees awarded was not big enough. The commission concludes that the complainant is entitled to attorney's fees and, further, based upon its experience evaluating claims for attorney's fees in cases involving partial success, it agrees with the administrative law judge that a one-third fee reduction was reasonable and appropriate here. *See*, for reference, *Harper v. Menard, Inc.*, ERD Case No. CR200602401 (LIRC Sept. 18, 2009)(commission awarded two-thirds of the fees requested where the complainant prevailed on her sexual harassment claim, but did not establish that she was constructively discharged).

The commission has considered whether a further fee reduction is warranted in this case, in light of the fact that it has reversed the administrative law judge's finding with regard to the transfer issue. While the transfer issue was relatively minor, and would not have entailed any additional back pay for the complainant had she prevailed, it did expand the amount of time devoted to the litigation as a whole. The commission therefore concludes that a slight additional fee reduction would be appropriate, and it has reduced the total fee award for work up to the point the administrative law judge issued her decision by 40 percent. This results in a total fee award of $31,771 in conjunction with the litigation prior to the filing of the petition for review.

The complainant's attorney is also entitled to fees related to the time spent successfully responding to the respondent's petition for review by the commission. The complainant has requested a total of $11,249, representing 45 hours of attorney time.[7] The complainant's attorney fee statement indicates that some of the items for which counsel requests reimbursement are unrelated to the proceedings before the commission. The items dated May 18, 2017 through October 11, 2017, have no connection to the time spent responding to the respondent's petition for review,

[7] The respondent argues that the commission should disregard the complainant's request for additional attorney's fees because it was not made with its initial brief, as ordered by the commission in its briefing schedule. However, where, as here, the complainant's attorney made his request for additional fees prior to the issuance of the commission decision, the commission does not regard the matter as having been waived, notwithstanding the failure to adhere to the directions set forth in the briefing schedule. The respondent submitted a letter brief arguing that the complainant should be permitted no additional fees because of the failure to comply with the directive in the briefing schedule, but did not make any substantive argument regarding the amount of attorney's fees requested, nor did it request additional time in which to do so.

which was not filed until October 19, 2017. Moreover, some of the items listed on the fee petition relate to the complainant's own petition for review, on which she did not prevail and for which she is therefore not entitled to reimbursement. Isolating only those expenditures of time that pertain to the complainant's attorney's efforts spent responding to the respondent's petition for review, the following compensable items remain:

10/19/2017	.5 hours	"Receive and review email correspondence from opposing counsel containing petition for review" (Attorney Good at $285/hour)
10/23/2017	.2 hours	"Review petition for review and confer with Attorney Good regarding same" (Attorney Kuklinski at $225/hour)[8]
11/02/2017	.3 hours	"Draft and send correspondence to LIRC regarding hearing transcript; draft and send email" (Attorney Good at $285/hour)
11/02/2017	.2 hours	"Receive and review email correspondence from Brenda regarding hearing transcript" (Attorney Good at $285/hour)
11/03/2017	.2 hours	"Receive and review email correspondence from Brenda regarding Joe Freeman and his testimony" (Attorney Good at $285/hour)
12/14/2017	2 hours	"Review initial briefs to LIRC; draft reply brief" (Attorney Kuklinski at $225/hour)
12/17/2017	5.5 hours	"Legal research regarding statute of limitations; draft reply brief to LIRC" (Attorney Kuklinski at $225/hour)
12/18/2017	4.5 hours	"Draft and edit reply brief" (Attorney Kuklinski at $225/hour)
12/18/2017	5.7 hours	"Review and edit reply brief; draft and file petition for additional attorney's fees"

[8] In the fee petition the complainant indicates that Attorney Kuklinski's time is coded as "10." However, there are no items in the fee statement coded as "10." By process of elimination, it appears that Attorney Kuklinski's time is coded as "#."

(Attorney Good at $285/hour)

The items above amount to 19.1 hours of total attorney time. Broken down by attorney, this comes to 6.9 hours of work for Attorney Good, and 12.2 hours of work for Attorney Kuklinski. At their respective hourly rates of $285 and $225, the total attorney fee request attributable to time spent responding to the respondent's petition for review is $4,712. The commission considers this to be a reasonable reflection of the time spent successfully responding to the respondent's petition for review.[9] It therefore orders that the respondent reimburse the complainant's attorney for fees in this amount, for a total award of $36,483 in reasonable attorney's fees related to the entire matter. Combined with the $4,812 in costs awarded by the administrative law judge, which the respondent does not specifically challenge, the total award for attorney's fees and costs associated with litigating this matter comes to $41,295.

NOTE: The commission did not confer with the administrative law judge before deciding to reverse in part. The commission's reversal of the finding that the respondent discriminated against the complainant when it transferred her to the shipping department was based upon a conclusion that the claim was untimely, and was not a matter of credibility.

cc: Attorney Colin Good
Attorney William Hughes

[9] Although a portion of the complainant's responsive brief was spent addressing the respondent's arguments with regard to the transfer issue, an issue on which the complainant did not prevail, this represented such a minimal portion of the complainant's brief that the commission does not consider it necessary to reduce the amount awarded further to reflect it.