

# New Hampshire Commission for Human Rights



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Donald Lewis  
v.  
Eastern Air Devices

ES(H(R) 5695-96  
EEOC 16D960268  
DECISION OF THE COMMISSIONERS

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## I. Factual Background

Donald Lewis worked for the respondent employer, Eastern Air Devices from May 15, 1995 until October 17, 1995 when he was terminated. His tenure included periods of temporary and permanent but probationary employment, although the parties disagree about specific details of his status.

The respondent is a manufacturing company whose products include specialized electric motors. The complainant worked in an assembly department, doing simpler tasks on the so-called "stepper line" as well as the more detailed work of "hand inserting."

The parties describe a factory setting in which sexual joking and banter are commonplace, an atmosphere described by management as "raunchy." The complainant, the only male in the department, was known to participate in the joking and banter.

On October 12, 1995, the complainant reported to management that a co-worker had started a rumor that he had a "hard-on," slang for an erection, while talking with another co-worker.

The complainant was interviewed by management and asked what he wanted done about the incident. He was told that management could stop all sexual joking on the factory floor. He did not give an immediate response, but indicated that he wanted to consult with someone outside the company.

Mr. Lewis was fired a few days later, on October 17, 1995. He believes he was terminated in retaliation for making the sexual harassment complaint. He states that other probationary employees whose performance was similar to his own were retained.

Eastern Air Devices acknowledges that Mr. Lewis complained twice about alleged sexual harassment, including the report on October 12, 1995. The respondent states that Mr. Lewis was fired because he failed to show progress toward meeting production standards during his probation period. He exhibited poor work habits and complained about his job. His firing was precipitated when the company's then-chief executive officer walked by the department and observed the complainant "goofing off."

The commission held a public hearing on the case on October 17 and 20, 2000 and November 16, 2000.

#### ii. Legal Standard

The New Hampshire Law Against Discrimination, RSA 354-A, prohibits retaliation under Section 19. It reads: "It shall be an unlawful discriminatory practice for any person engaged in any activity to which this chapter applies to discharge, expel, or otherwise retaliate or discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under this chapter."

Mr. Lewis's complaint alleges that he made a complaint of sexual harassment against a co-worker and was fired a few days later in retaliation for making the complaint. (The complaint before the commission does not allege that the underlying behavior that led to Mr. Lewis' charge is a violation of the New Hampshire Law Against Discrimination.)

Mr. Lewis further alleges that similarly situated co-workers with similar performance records were not terminated.

Complainant has established a prima facie complaint of discrimination in that he engaged in an activity protected under 354-A, complaining of what he perceived as sexual harassment, and was fired shortly thereafter despite a performance record comparable to other probationary employees.

If the complainant can establish the elements of the prima facie case, a rebuttable presumption that discrimination caused the adverse employment action is raised. The burden then shifts to the employer to articulate a legitimate, non-discriminatory defense to the action. If the employer does so, the employee must then prove that the stated reason is a pretext for discrimination. The employee retains the ultimate burden of persuasion on the issue of discriminatory motive.

#### iii. Analysis

Mr. Lewis establishes a prima facie case of retaliation in that: 1) He made a complaint to management alleging what he perceived as sexual harassment. This activity is protected under the retaliation provisions of New Hampshire Law Against Discrimination. 2) He was fired a few days later.

This leaves a key contested issue: Would Mr. Lewis have been fired had he not complained of sexual harassment?

Mr. Lewis testified during the hearing that he believed his performance was adequate in comparison with that of other new employees.

He testified that he accepted the atmosphere of sexual joking and banter, but objected when he learned of talk among employees that he had an erection when talking to a co-worker. He described those comments as "malicious, slanderous and defamation of character." He said the comment was not made to his face, but that he learned of it. He said he believed the comment was made to hurt him.

Mr. Lewis said that when he reported the incident to management, he hoped the company would do something about it. Instead, he said he felt that Lavona Snyder, director of human resources at the time, was not listening to his complaint and that the situation was "turned around" on him. "They were mad at me right off the bat," he said.

His perception was that if management would address his problem, all joking and banter would have to be banned in the workplace. He testified that he did not feel that specific comments about his alleged erection were the same as the sexual joking.

Attorney Brian Stern, representing Mr. Lewis, introduced exhibit R-N, a summary of the meeting among Mr. Lewis, Ms. Snyder, and a third individual. He described Ms. Snyder's interview with Ms. Lewis as an attack on him. It reads in part:

"LS [Lavona Snyder]: I'm aware of the issues you've raised regarding sexual harassment and I want you to be aware that the Company has an obligation to investigate and take action when any one person states that sexual harassment has occurred. Have you ever engaged in conversations of a sexual nature with any members of your department before this incident.

"DL [Donald Lewis]: Yes but there was a difference. I've joked with other about it before but this was malicious. This person was not joking it was done to be malicious.

. . .

"LS: Don, I understand what your [sic] saying you feel there was a difference because it was done in a malicious way but both have to stop. The Company has been very clear about Sexual Harassment have you read the Policy that's

posted.

. . .

"DL: Your [sic] turning this whole thing around I want to talk with somebody about this. I'd like to say what I want to say about this."

"LS: Go ahead. This is your opportunity."

. . .

"DL: I need to speak with someone. I don't understand right now what I want. I'd better not lose my job because of this."

"LS: Well let me make this very clear. No retaliation against any one can happen as a result of this incident. You can't treat the person differently in any way no ostracizing, no threats. Nothing."

Attorney Stern also introduced summaries of "utilization" and "efficiency" reports which indicate that other probationary employees with records similar to Mr. Lewis's were not terminated. Attorney Stern asserted that the scores were the only objective criteria available for assessing an employee's performance.

Ms. Snyder testified extensively on the first and third day of the hearing.

Ms. Snyder said employees may work for up to four calendar months as temporary workers. If they are hired as permanent employees, they must pass a probationary period of 60 working days. Employees work under extra scrutiny during the probationary period because they are entitled to protection under a collective bargaining agreement after they complete probation. Terminating permanent non-probationary employees becomes much more difficult due to the union contract.

Ms. Snyder said that Mr. Lewis was watched closely after he was hired as a permanent employee because the company had significant reservations about him during his temporary period. She said the complainant often left work early and complained about the difficulty of the job.

Ms. Snyder's testimony confirmed that utilization and efficiency reports are factors used in evaluating probationary employees. She said such new employees are also evaluated after every 10 days of employment. In assessing probationary employees, Snyder said management looks for progress from

evaluation to evaluation. She testified that Mr. Lewis did not demonstrate such progress. She acknowledged that the calculations submitted by Attorney Stern demonstrated that Mr. Lewis' scores were better than some employees who were retained. She also said that the company did not create a summary of scores when comparing employees.

Eight of Mr. Lewis's co-workers testified during the hearing. They indicated that the hand-inserting job to which Mr. Lewis was assigned required an employee to sit up straight and pay close attention to the intricate work. These witnesses generally described Mr. Lewis as a very "laid back" employee. They said he tended to spend much of his time looking around at what other employees were doing instead of focusing on his own work.

Witnesses described Mr. Lewis as an individual who told them he did not trust banks. He was known to carry a rolled up "wad" of cash in his pocket.

Beverly Dandourant, a co-worker, testified that she saw what she thought was an erection when she observed a bulge in Mr. Lewis pants as he talked to another female employee. She said she remarked to another employee that she thought a male employee should have more control over his "body parts" if he worked in the department. She said she did not realize at the time that her comment was overheard, apparently leading to the rumors about Mr. Lewis.

Ms. Snyder testified that Mr. Lewis was vague when asked what he wanted the company to do about his allegation of sexual harassment. She also said that if an investigation determined that Mr. Lewis truly had a "hard-on" that she planned to find out if he had psychological problems.

Regardless of what Mr. Lewis wanted, she said she made plans to meet with the department to deal with sexual harassment issue and to get the department "under control."

Ms. Snyder described the factory floor as "tough" and "raunchy" and said it was difficult for her to differentiate between sexual joking and the complaint made by Mr. Lewis. She said that Mr. Lewis participated in the culture of joking. She said she did not believe that the joking and banter rose to the level of sexual harassment.

Snyder said that the decision to terminate the complainant was made after Lee Pearlman, the chief executive officer of Eastern Air Devices at the time, told her he went by the complainant's work area and saw "that guy" goofing off and working at arm's length from his product.

When Pearlman made that comment, Ms. Snyder said she decided to fire the complainant because of his record of poor performance.

IV. Conclusion

The evidence in this case is closely balanced. The hearing commissioners regard the strong temporal connection between Mr. Lewis's report to management of alleged sexual harassment and his subsequent termination as very suspicious.

However, a majority of the hearing commissioners finds that Mr. Lewis's performance and attitude were poor. His productivity, as measured by efficiency and utilization reports and his evaluations, was poor. The majority of the hearing commissioners give less weight to evidence that other employees with similar records were retained.

A majority of the hearing commissioners finds that Mr. Lewis would have been fired at or before the end of his probation period for legitimate performance reasons. Commissioners Arthur Hilson and Elizabeth Lown find that Mr. Lewis was not fired in retaliation for complaining about sexual harassment.

Commissioner Maureen Raiche Manning, presiding officer, finds that Mr. Lewis would have been employed for a longer period -- and may have met the respondent's productivity standards -- had he not complained about what he perceived as sexual harassment.

By majority vote, the hearing commissioners therefore rule that Mr. Lewis has not met his burden of proof, and dismiss the complaint.

The commission notes that Eastern Air Devices tolerated an atmosphere of frequent sexual joking and banter, a condition management recognizes as "raunchy." The evidence further indicates that when management met with Mr. Lewis regarding his allegations, his own participation in the sexual joking seemed to become the focus of the inquiry. Management's response to Mr. Lewis's allegation does not reflect a commitment to take "immediate and effective" actions to end sexual harassment in the workplace. Eastern Air Devices is warned that similar responses to future internal complaints could result in additional complaints.

So ordered

Elizabeth D. Lown  
Commissioner Elizabeth Lown

1-5-01  
Date

Arthur H. Hilson  
Commissioner Arthur Hilson

1/6/01  
Date

JAN 09 2001

FINDINGS OF FACT  
AND  
RULINGS OF LAW

A. Complainant's Request for Findings of Fact

1. Granted
2. Granted
3. Granted
4. Granted
5. Granted
6. Granted
7. Denied
8. Denied
9. Granted, but changed to read: "On October 13, 1995, during the interview/investigation, the tone of the interaction was accusatory of Donald Lewis in addition to being investigatory."
10. Granted
11. Denied
12. Granted
13. Denied
14. Denied
15. Granted
16. Granted
17. Denied
18. Denied
19. Denied
20. Denied

21. Denied

22. Denied

23. Denied

24. Denied

25. Denied

26. Denied

27. Denied

28. Denied

29. Denied

30. Granted, but changed to read: "Donald Lewis' efficiency percentage was better than some employees [who were] terminated."

31. Denied

32. Denied

33. Denied

34. Denied

35. Granted

36. Denied

37. Denied

38. Denied

39. Denied

[40. Not listed]

41. Denied

42. Denied

43. Denied

44. Denied

45. Denied

B. Respondent's Proposed Findings of Fact and Conclusions of Law.

The proposed findings and conclusions submitted by Attorney Daniel Bates, representing respondent Eastern Air Devices, does not follow a standard format and the paragraphs are not numbered.

In general, the commission grants the respondent's proposals. However, the following paragraph is denied because the hearing commissioners find that it does not meet the legal standard:

"Second, the complaint Mr. Lewis made to management, which he alleges is the reason he was discharged, turned out not to be 'opposing a forbidden practice.' He cannot prove what, if anything, actually occurred or what was said about him. Further, when asked by management if he wanted the Company to take remedial action to address any alleged 'forbidden practices,' he could articulate to management neither the 'practice' to be forbidden or what reasonable action should be taken to 'forbid' it, whatever 'it' was. For these reasons, we find as a fact that Complainant did not oppose any practice forbidden by Chapter 354-A. His retaliation claim therefore fails."