

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

DARLENE HANEY AND
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 99-BPA-0463

FENWAY TEXACO and
TEXACO, INC.,

Respondents

Appearances: Tony V. Blaize, Esq., for Complainant;
Erik J. Frick, Esq. for Respondent Fenway Texaco;
Anne-Marie Gerber, Esq. and Michael A. Fitzhugh, Esq. for Texaco, Inc.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 18, 1999, the Complainant, Darlene Haney, filed a complaint with the Massachusetts Commission Against Discrimination charging that she was a victim of discrimination based on race, color and sex in a place of public accommodation. Complainant alleges that Arshad Aimara, a gas station attendant at Fenway Texaco, called her a “fucking black nigger bitch” and threw her to the floor

in connection with a dispute over the purchase of gas. Probable cause issued and the case was certified to public hearing on September 4, 2003.

During discovery, Complainant limited her claims of pain and suffering to the period between February 18, 1999 and December 2001. As a result, Respondents did not pursue discovery for the period following December 2001. Respondents moved in limine during the public hearing to exclude evidence related to alleged harm after December 2001. The motion was allowed.

A public hearing was conducted on November 3 and 12, 2004. Six joint exhibits were accepted into evidence. Complainant offered three additional exhibits and Respondent offered sixteen additional exhibits, all of which were accepted into evidence. Complainant testified on her own behalf. Ilias Gianakopoulos, the owner of Fenway Texaco, presented testimony on behalf of Respondents.

During the hearing, affidavits pertaining to Respondent Fenway Texaco's unsuccessful efforts to contact Arshad Aimara were allowed into evidence. The affidavits were accepted to rebut the inference that Aimara's non-appearance was due to Respondents' concern that he would testify contrary to Respondents' position.

To the extent the parties' proposed findings are not in accord with or irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or irrelevant to my findings, it is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. In 1999, Fenway Texaco was a gas station located at the corner of Boylston Street and Ipswich Street in Boston, Massachusetts. Ilias Gianakopoulos was the sole proprietor of Fenway Texaco. He paid rent to Texaco Inc. every month. He had the sole authority to hire and fire employees and supervised the daily operations of Fenway Texaco. He hired Arshad Aimara, the only Fenway Texaco employee who was working on January 10, 1999.
2. At all relevant times, Gianakopoulos instructed his employees not to confront customers in situations when they refused to pay for gas, but rather to write down their license plate numbers if possible.
3. In order to use a credit card to pay for fuel at Fenway Texaco, the credit card had to be swiped at the pump before the fuel was pumped. Once pumping commenced, a credit card had to be swiped through the credit card machine inside the Fenway Texaco office.
4. Gianakopoulos hired Aimara in 1998 to pump gas and to work in the convenience store that was part of the gas station. Aimara was referred by another employee. Aimara did not supervise anyone. He was paid by the hour and did not have check writing authority or any decision making authority. Aimara stopped working at Fenway Texaco in February or March 1999.
5. Gianakopoulos informed Aimara about the gas station's policy regarding non-paying customers as part of his interview and/or training.
6. Gianakopoulos never observed Aimara use force or racial or gender epithets, or yell at customers during the little more than one year that Aimara worked at

- Fenway Texaco.
7. On January 10, 1999, Gianakopoulos arrived at Fenway Texaco between 9:00 and 10:00 a.m. Aimara was already at work when Gianakopoulos arrived. At approximately 3:30 p.m., Complainant pulled into the gas station and asked Aimara to fill her car with gas. She was on her way to visit her husband at the Gardner Correctional Facility where he was incarcerated.
 8. Aimara asked Complainant whether she wanted to pay with cash or credit card. Complainant said cash.
 9. Aimara started filling up Complainant's car with gas and walked away from the pump.
 10. Complainant subsequently decided to use her credit card to pay and blew her horn to get Aimara's attention.
 11. According to the allegations in Complainant's complaint filed with the MCAD, Aimara returned to the car, took the card, and asked her why she didn't give him "the fucking card in the beginning." In response, Complainant said to Aimara, "Give me my card. I don't want to do business here." She got out of her car to remove the gas pump. Aimara then said, "Fuck you, you come to rob my gas." Complainant acknowledged in her complaint that she answered Aimara by saying, "Fuck you too." I credit these allegations.
 12. Aimara walked inside the gas station with Complainant following him. The parties offer different accounts about what transpired next. According to Complainant, Aimara turned around and said, "you fucking black nigger bitch" while he pointed his finger in her face. She testified that she responded, "You can

say what you want because this is America. As long as you don't put your hands on me, everything will be fine." Complainant contends that after she uttered these words, Aimara grabbed her in the chest area and threw her to the floor, tearing her bra strap and injuring her hand. I do not credit this version of the events.

13. According to Gianakopoulos, he noticed Complainant following Aimara into the convenience store as he stood behind the waist-high counter of the store. He estimates that Complainant was approximately four or five feet in front of the door to the convenience store when he noticed her. He heard Complainant demand her credit card back, saying that she was late to see her kids in the hospital. According to Gianakopoulos, Aimara continued to process the credit card transaction. Gianakopoulos testified that Complainant threw some plastic bottles from a shelf to the ground and then proceeded to stumble over the bottles and fall to the ground. I credit this testimony.
14. Gianakopoulos testified that he asked Aimara what had happened, and Aimara responded by saying that Complainant did not want to pay for the gas. According to Gianakopoulos, he took the credit card from Aimara, gave it to Complainant, and told her, "Lady, here's your card. You don't have to pay, just go." Gianakopoulos testified that the credit card was not damaged and that Complainant did not pay for gas. I credit this testimony.
15. Complainant went outside and asked a cab driver if she could use his cell phone to call 911. The police came and took statements from Complainant and Aimara. The police officer filed a report stating that an argument took place between Complainant and Aimara concerning the method of paying for gas after Aimara

- finished pumping the gas. According to the police report, Aimara said, “Why didn’t you tell me before that you were paying by credit?” The report states that Complainant charged Aimara with pushing her to the ground and that Complainant struck Aimara “about the face.”
16. After leaving Fenway Texaco, Complainant visited her husband at the Gardner Correctional Facility. Complainant placed money into his prison canteen account. Complainant was subsequently charged in July 2001 and pled guilty in September 2002 to a felony of conspiring to steal public money in the form of social security benefits by cashing her husband’s social security checks while he was in prison and depositing those funds into her husband’s canteen account.
17. Complainant went to Brigham & Women’s Hospital following her visit to Gardner, complaining of pain in her right hand. An x-ray revealed that there was no fracture.¹ Complainant received prescriptions for Tylenol with Codeine and for Valium. She filled the prescription for Valium on January 12, 1999 and the prescription for Tylenol with Codeine on January 15, 1999.
18. At the time of the incident at Fenway Texaco, Complainant was not working at either the Justice Resource Institute or Casa Myrna Vasquez, despite her testimony at the public hearing that she was so employed. Complainant began to work at Casa Myrna Vasquez in February 2000 and worked there until March 2001, when she was terminated for unexcused absences. Complainant did not start her employment at the Justice Resource Institute until March 13, 2001 and was terminated for falsifying time records on or around January 2002.

¹ Complainant responded to an interrogatory request by stating that she suffered a hairline fracture of the right hand as a result of the incident. That answer was not accurate.

19. On January 11, 1999, the day after the incident at Fenway Texaco, Complainant filed an application for a criminal complaint against Aimara, charging him with assault and battery and larceny. Complainant alleged in the application that Aimara grabbed her credit card, tore it up, pushed her, and threw her to the ground, injuring her right arm. Aimara filed a cross application for a criminal complaint against Complainant.
20. Aimara appeared at the first hearing on his application for a criminal complaint against Complainant. Complainant was also present. The Clerk Magistrate continued the matter. Aimara subsequently relocated to Detroit, Michigan. He traveled by bus from Detroit to Boston to attend the second hearing on his application for a criminal complaint. Complainant did not appear at the second hearing, but her attorney did appear. The cross applications were continued and ultimately dismissed.
21. Counsel for Fenway Texaco attempted to contact Aimara in order to arrange for him to participate in the MCAD's public hearing but was unable to locate him.

III. CONCLUSIONS OF LAW

A prima facie case of race or sex discrimination in violation of G.L. c. 272, sec. 98 requires a showing that: 1) a person is a member of protected class, 2) he/she was denied or restricted in access to a place of public accommodation, and 3) there is evidence from which it can be inferred that there is a causal connection between the person's protected class and the denial of access to the place of public accommodation. See Lumely v. Flynn, 5 MDLR 1031 (1983); Lewis v. McColgan, 4 MDLR 1125 (1982). Complainant

attempts to satisfy this burden by alleging that she is a Black female who was restricted in her attempt to purchase gas at Fenway Texaco, a place of public accommodation, by the hostile actions of employee Arshad Aimara. See id. I conclude that Complainant has failed to establish a prima facie case because she did not present credible testimony from which an inference of discrimination can be drawn.²

According to Complainant, she at first told Aimara that she wanted to pay for gas by cash but after Aimara started to fill her tank, she changed her mind and decided to pay by credit card. When she informed Aimara, he took her credit card and asked her why she didn't give him "the fucking card in the beginning." In response, Complainant said to Aimara, "Give me my card. I don't want to do business here." She got out of her car to remove the gas pump. Aimara then said, "Fuck you, you come to rob my gas." Complainant responded by saying, "Fuck you too." Aimara walked inside the gas station with Complainant following him.

As Complainant approached the door to the convenience store, she demanded her credit card back, but Aimara continued to process the credit card transaction. I find that Complainant threw some plastic bottles from a shelf to the ground and proceeded to stumble over the bottles and fall to the ground. According to the credible testimony of Gianakopoulos, he took the credit card from Aimara, gave it to Complainant, and told her, "Lady, here's your card. You don't have to pay, just go." The credit card was not damaged and Complainant left the station without paying for any gas.

I do not credit Complainant's allegations that Aimara that called her a "fucking

² Respondent's assertion that the Commission does not have jurisdiction over employers with fewer than six employees such as Fenway Texaco is incorrect in the context of a public accommodations claim. Pursuant to M. G. L. chapter 272, sec. 98, public accommodations claims are not limited to respondents who are "employers." The definitional section of Chapter 151B defines "person" separately from "employer."

black nigger bitch.” According to Complainant, she reacted to this grievous insult with the following response: “You can say what you want because this is America. As long as you don’t put your hands on me, everything will be fine.” Such a reaction is stilted and unconvincing. Moreover, the police report, taken just moments later, does not mention any racial or gender epithets. I find it inconceivable that such language, had it been uttered by Aimara, would not have been conveyed to the police and been included in the police report.

I also decline to credit Complainant’s allegation that Aimara grabbed her in the chest area, threw her to the floor, tore her bra strap, and injured her hand. It is difficult to imagine how Aimara could have grabbed her in the chest area, threw or pulled her to the ground, and tore her bra without damaging Complainant’s sweater and t-shirt which covered Complainant’s brassiere. I also find it incredible that Aimara would have assaulted a customer in plain view of his employer. Gianakopoulos, who witnessed this part of the interaction between Complainant and Aimara, testified credibly that he heard Complainant demand her credit card back and then saw Complainant throw some plastic bottles from a shelf to the ground, stumble over the bottles, and fall to the ground. He did not see Aimara attack Complainant. I find the account of the incident provided by Gianakopoulos to be more credible than the account provided by Complainant.

I also fail to credit Complainant’s allegation that Aimara tore her credit card with his bare hands. Since the credit card was laminated in plastic, tearing it up would have been difficult to accomplish in a matter of seconds without a scissors. Moreover, the allegation that Aimara tore up the card is not included in the police report. Complainant’s deposition testimony states that she did not see Aimara tear the card and,

thus, contradicts her direct testimony at the public hearing.

Certain ancillary matters are crucial in evaluating the parties' credibility. First, Complainant alleged in her interrogatory answers that she suffered a hairline fracture of her right hand as a result of the incident. At the public hearing, she admitted that there was no such fracture. Second, Complainant was convicted of conspiring with her husband to fraudulently cash social security benefits around the same time she made the allegations against Aimara. Third, Complainant falsely claimed during the incident at Fenway Texaco that she was going to the hospital to visit her children. Fourth, Complainant testified that she sustained a loss of income in regard to two jobs, but the evidence reveals that she did not hold the jobs until years after the incident. These matters render Complainant an untrustworthy witness. Gianakopoulos, by contrast, testified in a sincere and credible manner that Aimara did not commit the acts of racial and gender harassment of which he is accused.

The fact that Aimara's actions did not violate G.L. c. 272, sec. 98 or Chapter 151B does not mean that his behavior was above reproach. I do believe that Aimara provoked Complainant by swearing at her after she changed her mind about using her credit card. The situation deteriorated into mutual swearing and antagonism. Nonetheless, there is no credible evidence that the interaction was motivated by Complainant's race or gender or that a racial epithet was uttered by Aimara. Accordingly, neither Fenway Texaco nor Texaco Inc. is liable for Aimara's actions under G.L. c. 272, sec. 98, because those actions did not constitute discrimination.³

³ Fenway Texaco asserts that regardless of Aimara's conduct, it is not liable under Chapter 151B as the employer of Aimara because under G.L. c. 272, sec. 98, an employer may not be held liable for the acts of an employee. While an employer is not liable for the criminal act of its employee under c. 272, sec. 98, liability may be imputed to the employer under Chapter 151B for violations of c. 272, sec. 98 if the acts

IV. ORDER

For the reasons set forth in this decision, the Complaint is hereby dismissed.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 8th day of March, 2006.

Betty E. Waxman
Hearing Officer

constitute discrimination in a place of public accommodation. It is not necessary to reach this question, however, because the evidence establishes that Aimara did not engage in discriminatory conduct violative of c. 272, sec. 98. Likewise, it is not necessary to resolve the issue of Texaco Inc.'s potential liability under agency principles.