

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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DEMETRIOS MIMINOS AND  
MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 96-BEM-3223

DEB'S LOUNGE,  
SCOTT EMMERTON,  
PAUL WASSER

Respondents

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Appearances: Karen M. Harbeck, Esq., for Complainant Mimos  
Robert H. Quinn, Esq., for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On December 6, 1996, Complainant Demetrios Mimos, filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") alleging Deb's Lounge, through its manager Scott Emmerton, unlawfully discriminated against him on

the basis of age and sex in violation of M.G.L.c.151B. The MCAD issued a probable cause finding and certified the case for public hearing on August 15, 2001.

The case was brought to public hearing on October 22, 2003. Six persons testified at the hearing: Complainant, Clifton Perkins, Theodore Myrkowski, Frank Cavaretta, Michael Priestman, and Robert Wightman. No exhibits were offered into evidence.

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

## II. FINDINGS OF FACT

1. Complainant, Demetrios Mimos, a fifty-nine year old gay male, was employed at Deb's Lounge from February 1994 through September 11, 1996. Complainant worked as a bartender. He also was required to perform the duties of assistant manager several nights per week, consisting of cleaning up and closing the business for the night. No extra compensation was given for these duties. Complainant generally worked as assistant manager on Monday and Tuesday evenings until closing time. He filled in on other nights as a bartender.
2. Respondent Deb's Lounge, a drinking establishment which closed in 2002, was

incorporated under the name of Mendel-Kern, Inc. It consisted of two bars, a larger one in the front and a smaller one in the rear. It was located at 119 Merrimack Street, Boston. During its existence, Deb's Lounge catered to a predominantly homosexual male clientele. Most of its employees were homosexual men.

3. Respondent Paul Wasser was president of Mendel-Kern, Inc. He was the principal owner and manager of Deb's lounge until his death in 1998.
4. Respondent Scott Emmerton, a gay male, was employed at Deb's Lounge as manager during the time of Complainant's employment at the bar. On occasion, he and several bartenders, not including Complainant, wore revealing clothing while tending bar. Emmerton's whereabouts are currently unknown.
5. Clifton Perkins is a former customer of Deb's Lounge. He had a personal relationship lasting twenty-one years with Ronnie Hudson, a former bartender at Deb's Lounge. Mr. Hudson was fired by Scott Emmerton. At the public hearing, Perkins described himself as a good friend of Complainant. Perkins testified that Emmerton talked about people behind their backs and once called Complainant a "fat, old ugly fuck." I credit the testimony about what Emmerton allegedly called Complainant.
6. Compensation for the bartenders at Deb's Lounge consisted of minimum wage augmented by tips. Tips were highest on Thursday nights and on weekends. During most of his employment at Deb's Lounge, Complainant worked at the rear bar, which was usually less busy than the front bar. The rear bar generated fewer tips. On a Monday night, the take-home pay from tending the rear bar would be

about \$125.00 to \$150.00 and on weekend nights, the take-home pay would be about \$250.00 to \$300.00.

7. The front bar was generally covered by Scott Emmerton and an individual named Seamus, both of whom had been at Deb's Lounge longer than Complainant.
8. Prior to his employment at Deb's Lounge, Complainant was a regular customer. One time when the Lounge was short-handed, Emmerton offered Complainant a job. Complainant had previously worked in the food service and bartending industry. He described himself at the public hearing as a "neat freak."
9. Complainant provided conflicting testimony about whether Scott Emmerton ever criticized his performance. Complainant testified credibly on direct examination that Emmerton criticized him a couple of times. Complainant did not testify credibly on redirect examination when he said that Emmerton never criticized his performance until the day Emmerton fired him.
10. After closing hours at Deb's Lounge, it was not unusual for employees to relax with a drink and some pizza or Chinese food before going home. On the night before his discharge, Complainant was working as assistant manager. He had a drink and pizza with his co-workers and did not clean up. The following morning, September 11, 1996, Paul Wasser came to the Lounge, saw litter from the night before, and ordered Emmerton to discharge Complainant.
11. Mike Markowski was a bartender at Deb's Lounge for about twenty-four years. He was fifty-nine years old at the public hearing. Markowski and Complainant worked together at Deb's Lounge. Markowski tended the front bar on Tuesday evenings and the back bar on Fridays and Sundays. He described Complainant as

“not fast enough . . . I wouldn’t do it that way and I know Scott wasn’t happy.”

He testified that Complainant didn’t adequately clean up the bar and didn’t pick up after customers as well as he should have. Markowski testified that Emmerton called Complainant lazy and a fat slob. Markowski acknowledged that there were several people who left the bar a mess and that such behavior was common.

12. Frank Cavaretta was an employee of Deb’s Lounge performing general maintenance and doorman duties for about twenty-four years. He was sixty years old at the public hearing. He testified that Paul Wasser was upset at the way the bar was maintained during the time that Complainant worked there. According to Cavaretta, Wasser blamed Complainant for dirty ashtrays and sticky counters.

13. Around the time Emmerton fired Complainant, he hired several bartenders. One was a gay male in his early twenties named Tim, with whom Emmerton was having a sexual relationship. Emmerton assigned Tim to the front bar. Emmerton and Tim tended the front bar together and, on occasion, dressed like twins. Emmerton also hired another young gay male in his early twenties, named Ryan, with whom he was having a sexual relationship.

14. Robert Wightman became manager of the business in February 1997, about six months after Emmerton’s departure. Wightman testified that the average age of the employees at the Lounge was about “fifty.”

15. Michael Priestman was a doorman and “bar back” at Deb’s Lounge for about fifteen years. He was in his late forties at the time of the public hearing. He testified that Complainant’s bartending was “okay” but that Complainant didn’t generate a lot of business. Priestman said that Complainant, on occasion, left the

bar littered with glasses and ashtrays.

## II. CONCLUSIONS OF LAW

### A. Age Discrimination

Pursuant to M.G. L. c. 151B, sec. 4 (1B), it is unlawful to discriminate in employment on the basis of age. The statute protects persons age forty and over. M.G.L. c.151B, sec. 1(8). At the time that Complainant first worked at Deb's Lounge, he was fifty years old, making him a member of the protected group based on age.

Complainant asserts that there is direct evidence of age discrimination consisting of Scott Emmerton making disparaging remarks about him which included age-related taunts. While I conclude that Emmerton may have made disparaging remarks about Complainant, the evidence is insufficient to establish direct evidence of age discrimination. There is credible evidence in the record that Emmerton called Complainant "lazy," a "fat slob" and a "fat, old ugly fuck," but such evidence is not sufficient to stand alone as direct proof of discrimination. See Wynn & Wynn v. MCAD, 431 Mass. 655 (2000); Rolanti v. Boston Edison Corp., 33 Mass. App. 516, 521 (1992); Poor v. Frasca, 25 MDLR 330 (2003) (making sarcastic remarks about Complainant's age, though inappropriate, does not support the charge that termination was motivated by age discrimination). Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace." Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655, 665 (2000). No such inescapable inference about age discrimination is

present in this case.

Turning to indirect evidence of age discrimination, Complainant may establish a prima facie case through the inferential method adopted by the Commission in Wheelock College v. MCAD, 371 Mass. 130 (1976). See Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 655-666 (2000); Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 444-445 (1995). To establish a prima facie case, Complainant must show that he was: 1) a member of a protected class; 2) adequately performing the duties of the job; 3) subjected to adverse treatment; and 4) treated differently from other employees who were substantially younger or worked in circumstances that give rise to an inference of age discrimination. See Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000) (elements of prima facie case vary depending on facts); Knight v. Avon Products, Inc., 438 Mass. 413 (2003) (where plaintiff has been terminated and replaced by another person, the replacement must be at least five years younger in order to establish a prima facie claim of age discrimination without other evidence of unlawful age discrimination).

Once a prima facie case is established, the burden shifts to the Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of

evidence, that the articulated justification is not the real reason, but a pretext. See Blare, 419 Mass. at 444-445. Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See Lipchitz v. Raytheon Co., 434 Mass. 493 (2001); Blare, 419 Mass. at 445. Even if the trier of fact finds that the reason for the adverse employment action is untrue, it is not required to find discrimination in the absence of the requisite intent. See Abramian v. President and Fellows of Harvard College, 432 Mass. at 117-118.

I conclude that Complainant was a member of a protected class by virtue his age, but that he was not adequately performing the duties of bartender. Complainant acknowledged that Scott Emmerton criticized his performance on several occasions. Mike Markowski, a bartender at Deb's Lounge for about twenty-four years, described Complainant as "not fast enough" and testified that Complainant didn't adequately clean up the bar or pick up after customers as well as he should have. Frank Cavaretta, an employee of Deb's Lounge performing general maintenance and doorman duties for about twenty-four years, testified that owner Paul Wasser was upset at the way the bar was kept during the time that Complainant worked there. According to Cavaretta, Wasser blamed dirty ashtrays and sticky counters on Complainant. Michael Priestman, a doorman and "bar back" at Deb's Lounge for about fifteen years, testified that Complainant's bartending was "okay" but that Complainant didn't generate a lot of business and that, at times, Complainant left the bar littered with glasses and ashtrays.

Since the bar closed several years ago, none of these individuals have had an ongoing employment relationship with Respondent and, thus, have no reason or motive to lie. I conclude that their cumulative appraisal of Complainant's performance is more convincing than the Complainant's own characterization of himself as a "neat freak."

Even if a prima facie case were made, Respondent has articulated a legitimate, nondiscriminatory reason for its action supported by credible evidence, to wit: Complainant's failure to adequately clean the bar at closing time. I reject Complainant's contention that the articulated justification for his termination is pretextual because of the fact that three witnesses, with no apparent motive to lie, all maintain that Complainant did not keep the bar clean.

Complainant emphasizes that at the time of his termination two bartenders in their early twenties were being trained. This assertion is correct but ignores the fact that Markowski, a bartender the same age as Complainant, continued to be employed. Frank Cavaretta, who was a fifty-three year old maintenance man and doorman in 1996, also continued to be employed. Robert Wightman, hired in February 1997 as Emmerton's successor, estimated that the average age of the bar's employees in 1997 was about "fifty." This testimony was not rebutted. These factors constitute corroborating evidence that age discrimination was not the motivation for Complainant's discharge.

## B. Sexual Harassment

Complainant attempts to distinguish himself from the other bartenders by

claiming that he was the only gay male bartender who did not have a sexual relationship with Scott Emmerton. This claim is not persuasive since there is no evidence that fellow bartenders Markowski or Seamus had a sexual relationship with Scott Emmerton, yet they continued to work at the Lounge and tend the front bar. Even if Complainant's situation is compared to the bartenders who had a sexual relationship with Emmerton and received preferential treatment, the evidence fails to support a claim of quid pro quo sexual harassment because Complainant's failure to clean the bar provides an independent, legitimate reason for terminating him.

Chapter 151B, sec. 1(18)(a) (1996) defines "quid pro quo" sexual harassment as:

Sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when . . . submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions . . . .

Under the Massachusetts Commission Against Discrimination Sexual Harassment in the Workplace Guidelines, II.B, an employer may be liable for quid pro quo sexual harassment if an employee loses an opportunity to another employee because of the other employee's submission to sexual advances or requests for sexual favors. The facts provide some support for the contention that Complainant lost the opportunity to work at the front bar when Emmerton gave that opportunity to Tim, a novice bartender with whom Emmerton was having a sexual relationship. Placement at the front bar was advantageous because the front bar was busier than the rear bar where Complainant worked and, as a result, the tips were better. Nonetheless, I conclude that Complainant has failed to make out a claim of quid pro quo sexual harassment because there is

convincing evidence in the record that Emmerton was dissatisfied with Complainant's performance as a bartender. I conclude that Emmerton's dissatisfaction with Complainant's performance, rather than his sexual relationship with another bartender, was the reason why Emmerton failed to give Complainant more favorable shifts and ultimately fired him.

The conclusion that Complainant's placement at the rear bar, the denial of extra shifts and his ultimate termination were due to performance deficiencies is buttressed by the fact that Seamus and Markowski were allowed to tend the front bar even though there is no evidence that they had a sexual relationship with Emmerton. Complainant acknowledged on direct examination that Emmerton criticized his performance prior to his termination. Markowski described Complainant as "not fast enough – he didn't clean up the bar enough. I wouldn't do it that way and I know Scott wasn't happy." Michael Priestman, the doorman and "bar back" at Deb's Lounge for about fifteen years, testified that Complainant's bartending was "okay" but that Complainant didn't generate a lot of business. Priestman said that Complainant, on occasion, left the bar littered with glasses and ashtrays. This evidence supports Respondents' position that performance deficiencies rather than quid pro quo sexual harassment accounted for Complainant's assignment to the rear bar and his eventual termination.

The facts similarly fail to support a claim of a sexually hostile work environment. Mass. Gen. Laws c. 151B, sec 1(18)(b) (1996) defines "hostile work environment" harassment as "sexual advances . . . when . . . such advances . . . have the purpose or

effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, humiliating or sexually offensive work environment." In order to establish such a claim, Complainant must prove he was subjected to conduct of a sexual nature, the conduct was unwelcome, the conduct was hostile, and the conduct unreasonably interfered with Complainant's work performance. See Ramsdell v. Western Massachusetts Bus Lines, Inc., 415 Mass. 673, 678-79 (1993); Lawless v. Northeast Battery & Alternator, Inc., 22 MDLR 138, 142 (2000).

Complainant cannot establish a hostile work environment because there is no evidence that Scott Emmerton made sexual advances to him or that Complainant found the general sexual atmosphere at the Lounge to be distasteful. While some bartenders may have worn, on occasion, only underwear or scanty shorts and customers may have worn an array of sexually explicit outfits, the environment was one that Complainant found to be appealing rather than offensive. He testified that the Lounge was a "friendly" place with "nice" people and that he "loved" working there. These sentiments are not consistent with a hostile work environment claim. See Ramsdell v. Western Massachusetts Bus Lines Inc., 415 Mass. 673 (1993) (an employee who does not subjectively perceive the behavior at issue as hostile, intimidating, humiliating or offensive is not a victim of sexual harassment).

IV. ORDER

Pursuant to the authority granted to the Commission under Massachusetts General Laws, chapter 151B, sec. 5, the complaint is dismissed.

Pursuant to 804 CMR 1.23, any party aggrieved by this decision may seek review by the full Commission by filing a notice seeking review within ten (10) days of receipt of this decision, and a petition for review within thirty (30) days of receipt of this decision.

SO ORDERED this 18<sup>th</sup> day of May, 2005.

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Betty E. Waxman  
Hearing Officer