

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
DIANA K. DAVIS,
Complainant

v.

DOCKET NO. 98-BEM-1217

GREAT AMERICAN PUB,
Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On April 17, 1998, the Complainant, Diana Davis, filed a complaint with this Commission alleging that she had been sexually harassed by two co-workers while employed at Respondent, Great American Pub, and subsequent to protesting the harassment to Respondent's owner, her employment was terminated in retaliation for having complained, in violation of G.L. c. 151B s. 4 pp. 1, 4 and 16A. Respondent alleged that Complainant never raised the issue of sexual harassment until after her termination and that she had been monitored and ultimately terminated for giving away free drinks to patrons. The Investigating Commissioner found probable cause to credit the allegations of the Complaint and efforts at conciliation were not successful. The matter was certified for a public hearing on June 7, 2001 and a public hearing was held before the undersigned hearing officer on July 25, 2002. The Complainant filed a post-hearing brief in November 2002. Respondent did not file a post-hearing brief.

Having reviewed the entire record before me and the Complainant's post-hearing submission, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. The Complainant, Diana Davis, began her employment as a bartender with Respondent, Great American Pub, in November of 1997. Complainant was an employee within the meaning of G.L. c. 151B s. 1 (6).
2. Respondent, Great American Pub, is a restaurant and bar located in Raynham, Massachusetts owned by three individuals. Kevin Skeiber is a part owner of Respondent. Respondent is an employer within the meaning of G.L. c. 151B s. 1 (5).
3. At all times relevant to this complaint David Menino was the General Manager of Respondent and Kyle Souza was an assistant manager who reported to Menino. Robert Nichols was a frequent customer of the bar and an independent contractor with Respondent who served as a D.J. at Respondent's Christmas parties.
4. Complainant generally worked as a bartender on Friday and Saturday from 11 a.m. to 6 or 7 p.m. and occasionally covered other shifts. She testified that her manager was Kyle Souza.
5. According to Complainant, in March of 1998 an incident occurred behind the bar with Souza where he rubbed his bottom up against her and smiled and then put his hands on her behind. She stated that she told him she was married and if he did that again she'd bring her husband in. Complainant also testified that Souza would buy her drinks, ask her to go out at the end of a shift and flirt with her. She claims to have rejected these

advances but that he persisted. I do not credit Complainant's testimony regarding Souza's conduct for a number of reasons.

6. Souza denied that he ever sexually harassed Complainant. He testified credibly that he and Complainant had a mutual flirtation and that she flirted with him constantly. According to Souza, Complainant frequently referred to him as a "boy toy," that she often initiated touching him and that this began to make him uncomfortable. He stated that she would talk to him about sexual matters and they would sometimes talk in his car for 10 or 15 minutes after they closed the bar. Souza testified that on one occasion she told him if she weren't married, she would "fuck the shit out of him," and on other occasions would look at him desirably and say "If I weren't married..." He stated that what seemed playful and harmless at first began to make him uncomfortable and he began to avoid Complainant. I credit Souza's testimony that Complainant initiated sexual contact with him and made sexually suggestive remarks to him.
7. Kelly Cataldo, another employee of Respondent who worked with both Complainant and Souza corroborated Souza's testimony that the Complainant referred to him as her "boy toy." On one occasion when Complainant sought to leave work early she told Cataldo, " Kyle's my 'boy toy'. All I have to do is grab his ass and he'll let me go." She testified that Complainant was very flirtatious with Kyle and with customers. Cataldo had worked with Souza at another restaurant and stated that he was a very genuine, nice guy and she had never witnessed any inappropriate behavior by him.
8. Another employee Sharon Nunes testified that she witnessed Complainant flirting and joking with Souza, and teasing him. Nunes observed that he would get "embarrassed" and "sheepish" and leave the bar area. When she asked another employee what was up

with Complainant's flirtations he responded that it goes on all the time. She also heard Complainant refer to Souza as her "boy toy," and said she was shocked by what she referred to as "Complainant's openly sexual provocative banter and behavior with customers." She thought Complainant's charge of sexual harassment was "ridiculous."

9. Nancy Barrows Whelan testified that she worked regularly with Complainant, that they got along well and that Complainant was a good bartender. She stated that Complainant was very flirtatious with the cooks and was extremely flirtatious with Souza. According to Whelan, Complainant flirted with Souza and made remarks with sexual overtones to him. Whelan noticed that this made Souza very uncomfortable and embarrassed and he would avoid the bar as much as possible. When Whelan heard that Complainant had filed a sexual harassment complaint against Souza she was shocked. Her thought when Menino told her about the complaint was, "Kyle never harassed her. It was the other way around." I found Whelan's testimony to be credible.
10. Complainant testified that the only other incident of sexual harassment occurred when the disc jockey, Robert Nichols, was sitting at the bar with Skeiber, one of the owners, and Nichols asked if he could kiss her hand and then proceeded to lick her hand and up her arm. She testified that she told Nichols in the owner's presence that she would appreciate it if he did not touch her like that again. Complainant believed that this occurred on the day her employment with Respondent was terminated, which was April 11, 1998. She stated that Kyle Souza terminated her employment approximately one hour later and told her she was stealing drinks.
11. Skeiber's testimony about the incident that occurred with Nichols was that Complainant and Nichols were conversing and laughing in a friendly manner when she

offered Nichols her hand. He observed that Nichols kissed and licked Complainant's hand. When Complainant appeared unhappy and walked away he asked Nichols "what was that?" and Nichols stated he was just joking around and that it was part of his "DJ routine." He asked Nichols to leave the bar and later agreed with Complainant that it was disgusting.

12. Skeiber testified that other than showing displeasure with this incident, Complainant never spoke to him about any sexual harassment by Souza or anyone else. Menino also confirmed that Complainant never spoke to him about any sexual harassment. He was unaware of any allegations against Souza until he received the MCAD complaint. A number of employees verified that sexual harassment was often the topic of discussion at bar meetings and employees knew it was prohibited and that they were to report inappropriate behavior by staff or customers. Nunes testified that she had experienced two incidents of sexual harassment by customers and the management responded aggressively to make sure it never happened again.

13. Skeiber stated that it had been brought to his attention that Complainant was suspected of stealing drinks and that his managers Menino and Souza wanted to confirm this. Complainant had been observed on a number of occasions not charging customers for drinks. Skeiber knew that the managers were observing Complainant on the day she was terminated. Skeiber testified that if drinks were given out and not paid for, this had to be recorded even if it was authorized by a manager.

14. Complainant testified that there was a policy regarding serving drinks to customers on the house. It required that the manager approve it and then the bartender would run a

“house tab.” She stated that she gave away drinks on the house, but that she always sought Souza’s approval before doing this.

15. Respondent’s General Manager, Menino, testified that he heard from bartender Kelly Cataldo and two other employees in late December of 1997 or early January of 1998, that Complainant was putting drinks on a “house tab” and giving free drinks to customers. Cataldo confirmed that she went to Menino to inform him that Complainant was giving away drinks on a “house tab” and that she appeared to be serving drinks to customers without running a customer tab. She also noted that a lot of Complainant’s friends starting coming in to the bar and that some of these unauthorized free drinks were going to those friends. Cataldo noticed a pattern of conduct that led her to become suspicious of Complainant and she reported her observations to the general manager.
16. Nunes testified that she had a vivid recollection of sitting around the bar after hours one Friday night with Complainant and another manager Archie Manoulos, when Complainant matter-of-factly admitted that she gave away drinks and acted as if everyone else did also. Nunes said “their jaws dropped open,” and they told Complainant that this was forbidden and that she could lose her job for it.
17. Whelan testified that she noticed Complainant giving free drinks to patrons and using a “house tab” under her name which was forbidden. On one occasion when she questioned Complainant about this, Complainant admitted giving her friends a drink and ringing them up under her name. Menino approached Whelan and asked about this and she told him what she had observed.

18. Menino stated that after hearing about these incidents, he began watching Complainant and spoke to her twice in January about cash shortages in her drawer at the end of her shift. Complainant told him that she thought the “house tab” meant that she could give a free drink from time to time. Menino told her she was not to be putting drinks on the “house tab” and that the “house tab” was not for customers but only for employee drinks.
19. According to Souza, he and Menino began watching Complainant and noted that she had a bunch of regular customers who only drank at the bar when she was working. On April 11, 1998, a bar meeting was held in the morning at which managers discussed not giving free drinks to customers. Complainant arrived 15 minutes late to that meeting. Prior to the meeting Menino and Souza made the decision to monitor Complainant that day for any infringement of the drink policy. Souza observed from one of the tables in the restaurant that Complainant did not charge for all the drinks she was serving. He also made a record of the drinks Complainant served to patrons and checked them against the bar tabs she rang up. A number of the bar tabs and Souza’s tally of his observations were admitted into evidence (R-7, R-8)
20. As a result of Souza’s observations, Menino decided to terminate Complainant’s employment later that day in his office with Souza present. According to Menino, Complainant stated she thought that termination was too harsh and that a written warning was sufficient. Complainant never raised the issue of sexual harassment at this meeting. Souza claimed that when confronted with the evidence Complainant asked for a second chance. He confirmed that she never once mentioned sexual

harassment or retaliation. Complainant then left through the kitchen said good-bye to the cooks and told them she enjoyed working with them.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B ss. 4 (1) and (16A) prohibit sex discrimination and sexual harassment in employment. Section 4 (4) prohibits retaliation against an employee who has engaged in protected activity. Sexual harassment is defined as “sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) 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; (b) such advances, requests or conduct 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.” M.G.L. c. 151B s. 1(18); College-Town Div. of Interco v. MCAD, 400 Mass. 156, 165 (1987).

Complainant has alleged that her supervisor Kyle Souza and a patron/independent contractor of Respondent created a sexually hostile work environment for her by touching her inappropriately. She also alleged that Souza flirted with her and repeatedly asked her to go out for drink. I did not find her allegations credible.

In order for Complainant to make out a prima facie case of hostile work environment sexual harassment, she must establish that the conduct of which she complains was unwelcome. College-Town, 400 Mass. at 162; Ramsdell v. Western Mass. Bus Lines, 415 Mass.672 (1993); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (“if the

victim does not subjectively perceive the environment to be abusive, the conduct had not actually altered the conditions of the victim's employment.”)

The weight of the evidence in this case established that Complainant did not find sexual banter and conduct in the workplace to be offensive or unwelcome. Souza and several of the other bartenders employed at Respondent who worked with Complainant during the relevant time period testified that Complainant regularly initiated sexual banter and conduct with Souza and with customers, that she flirted openly with Souza and called him her “boy- toy.” The evidence suggested overwhelmingly that Complainant caused Souza embarrassment, made him uncomfortable, and caused him to avoid the bar area when Complainant was working. While Souza admitted that he and Complainant initially had a mutual flirtation, there was no evidence that Complainant took any offense at, or that she declined to participate in, this conduct. In fact the evidence points to the fact that she willingly participated in and invited such conduct. See Ramsdell, 415 Mass. at 677 (upholding the Commission's ruling that an employee who invited and willingly participated in sexual conduct did not prove she was subjected to a hostile work environment).

While Complainant did protest the one incident when Nichols licked her hand in the presence of the owner, Skeiber, Skeiber testified that she was laughing and joking with Nichols and offered her hand to be kissed and that Nichols meant his actions to be a joke. I cannot conclude that this one episode which Complaint protested had the effect of unreasonably interfering with her ability to do her job. Conduct that creates a hostile work environment must be sufficiently severe or pervasive to alter her conditions of

employment. I find that Complainant has failed to establish a prima facie case of a sexually hostile work environment.

Complainant also alleges that she was terminated from her employment in retaliation for having protested Nichols' conduct and for complaining about Souza's conduct. Retaliation for engaging in protected activity is prohibited by G.L. c. 151B. 4 (4). Retaliation is a separate claim from discrimination, "motivated at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriffs Department, 22 MDLR 208 at 215, quoting, Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019,1040 (D. Mass. 1995). In the absence of any direct evidence of retaliatory motive, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972, (1973); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655, 665-666 (2000).

In order to establish a prima facie case of retaliation, Complainant must prove that: (1) she engaged in protected activity; (2) Respondent knew she engaged in protected activity; (3) Complainant was subjected to an adverse employment action; and (4) a causal connection existed between the protected activity and the adverse employment action. Kelley, 22 MDLR at 215. While Complainant alleges that she protested Souza's and Nichols' conduct, I find that only the latter proved to be true. Skeiber admitted that Complainant was disgusted by the hand-licking incident. Complainant suffered an adverse action in that she was terminated from Respondent. She alleges the causal connection is the proximity in time from her complaint to the termination. She was terminated the same day as the Nichols incident.

Once Complainant has made out a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence of a legitimate non-discriminatory reason for its action. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. Respondent's position is that it terminated Complainant for what it viewed as stealing, her repeated giving of unauthorized free drinks to patrons in violation of Respondent's express policy to the contrary. Respondent's managers and a number of bartenders testified credibly that Complainant violated the free drink policy despite being warned about this. They had consulted with each other and been suspicious of Complainant's activity for some time. The decision to monitor Complainant's shift was made prior to the Nichols incident and when her infractions were confirmed by Souza and relayed to Menino, he made the determination to terminate her that day. Both testified that when caught red-handed, Complainant did not deny that she was giving away drinks, but asked for a second chance. I conclude that Respondent has articulated a legitimate non-discriminatory reason for the termination that is supported by credible evidence. Complainant has failed to convince me that the timing of her termination is sufficient to support a conclusion that Respondent's reason is a pretext for unlawful retaliation. I conclude that retaliation was not the motivation for Respondent's action and therefore no violation of G.L. c.151B occurred.

IV. ORDER

For all of the forgoing reasons, I hereby Order that the Complaint in this matter be dismissed. This is the final Order of the Hearing Officer. Any party aggrieved by this decision may file an appeal to the Full Commission pursuant to 804 C.M R. 1.23 by filing

a notice of appeal with the Clerk of the Commission within 10 days of receipt of this decision and a petition for review within 30 days of receipt of this decision.

So Ordered this 8th day of September, 2003.

Eugenia M. Guastaferr
Hearing Officer