

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

GAIL COLAIACOMO AND MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

Complainants,

v.

Docket No. 97-BEM- 1519

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER OF THE HEARING OFFICER**

I. PROCEDURAL HISTORY

On May 2, 1997, Complainant Gail Colaiacomo filed a complaint with the Massachusetts Commission Against Discrimination (the "Commission") against her employer, the Massachusetts Department of Environmental Protection ("Respondent" or "DEP"). In her complaint, Complainant alleged that Respondent unlawfully demoted her based on her pregnancy in violation of M.G.L. c. 151B, § 4(1).

On May 18, 2000, the Commission found probable cause to credit Complainant's allegations. On or about July 2, 2004, the Commission certified the case for Public Hearing. A Public Hearing was held before me on June 13-14, 2005, in Boston, MA. In deciding this matter, I have considered the entire record, including the testimony and exhibits introduced at the public hearing, and the stipulations of the parties. I have likewise considered the Proposed Findings of Fact and Conclusions of Law submitted by the parties after the public hearing. To the extent that the proposed findings and

conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

II. FINDINGS OF FACT

1. Complainant Gail Colaiacomo is a woman who resides in Sharon, MA. From April 1989 to the present time, Complainant has worked for the DEP as an Environmental Analyst II within the Bureau of Waste Site Cleanup (“the Bureau”). Complainant is an employee within the meaning of G.L. c. 151B, § 1(6).
2. Respondent, DEP, is a Massachusetts state agency with its main office located at 1 Winter Street in Boston, MA. The DEP employs more than six persons and is therefore an employer within the meaning of G.L. c. 151B, § 1(5).
3. The Bureau of Waste Site Cleanup is responsible for overseeing the cleanup of environmental waste sites in Massachusetts. Complainant worked in the Emergency Response and Remediation division of the Bureau as an analyst. Complainant’s duties included implementing new OSHA health and safety standards and providing guidance on these standards; selecting safety equipment and training staff in the use of this equipment; and, drafting standard operating procedures for the use of safety equipment. Complainant worked on a full-time (37.5 hours per week) basis until 1993 when she went out on maternity leave.¹ Complainant remained at work until one or two weeks prior to her due date and did not suffer any physical complications during her pregnancy. At the conclusion of her maternity leave, Complainant returned to her position as an Analyst II.

¹ Complainant’s allegations of discrimination regard her subsequent pregnancy in 1996. The Complainant does not allege that any discrimination occurred in connection with her 1993 pregnancy.

At her request, DEP allowed Complainant to work 22.5 hours per week, which was subsequently increased to 30 hours per week.

4. Complainant continued to work as an Analyst II in the Emergency Response and Remediation division through 1994. In January 1995, Complainant requested a transfer under the DEP's Temporary Reassignment Incentive Program ("TRIP"). The TRIP program allowed employees within DEP to request six month reassignments to other positions in DEP. Complainant requested that DEP reassign her through TRIP to its Federal Facilities Program, which oversees the cleanup of sites under the control of the federal government such as military bases. The Federal Facilities Program was also within the Bureau of Waste Site Cleanup. Complainant testified that she requested this transfer because she wanted to make better use of her extensive site investigation experience from prior employment in the private sector and felt the new position would offer her greater opportunities for advancement. I credit Complainant's testimony.

5. Pursuant to her request, in April 1995, DEP transferred Complainant to the Federal Facilities Program, where she held the position of project manager. Anne Malewicz served as Complainant's immediate supervisor. Malewicz held the position of branch chief. Malewicz in turn reported to Jay Naparstek, who held the position of section chief. Naparstek testified that he did not directly supervise project managers and relied on the branch chiefs to supervise the day-to-day activities of the managers. Complainant acknowledged that she did not meet regularly with Naparstek, but worked closely with Malewicz, who sat in an adjoining cubicle in the office.

5. At Federal Facilities, Complainant worked at two sites as a project site manager: The South Weymouth Naval Air Station and the Hingham Annex. South Weymouth was an active site with a good deal of involvement with a number of federal agencies as well as significant public interest in the site from the adjacent towns. Complainant testified she spent 75-85% of her work time on South Weymouth, and 15-25% of her work time on Hingham. I credit Complainant's testimony.

6. In August 1995, Complainant received her Employee Performance Review System ("EPRS") review for the 1995 Fiscal Year. This review included a grading by Malewicz of Complainant's performance at Federal Facilities from April 1995 through July 1995. Malewicz gave Complainant an "annual review summary rating of "meets" expectations.² In July 1996, Complainant received her EPRS for the 1996 fiscal year. For this year, Malewicz indicated that Complainant's performance had improved in most areas from the prior year and she gave her an "annual review summary rating" of "meets ++." Complainant emphasized that at no point prior to January 1997 had Malewicz or anyone else at DEP mentioned to her that she had any performance issues or communicated any unhappiness with her job performance. I credit Complainant's testimony.

7. Complainant testified that in autumn of 1996, she learned that she was pregnant. She claimed she told a co-worker of her pregnancy in late November 1996. Several weeks later, at an office Christmas party in mid-December, Malewicz approached Complainant and indicated that she knew about Complainant's pregnancy. Complainant

² The EPRS provides three possible performance grades – meets expectations, exceeds expectations or below expectations. Malewicz also graded employees as "meets +" or "meets ++" to recognize quality work.

claimed she told Malewicz that she intended to work until a couple of weeks before delivery. According to Complainant, Malewicz advised her to exercise caution while doing field work. I credit Complainant's testimony.

8. During the week of January 13, 1997, DEP removed Complainant from her position as site manager of the South Weymouth Naval Air Station project. According to Complainant, after being informed of the decision, Malewicz told her, "You would be going out on maternity leave anyway and the project would have to be reassigned to someone else." Malewicz admitted to making this comment, but denied that Complainant's pregnancy had anything to do with the reassignment. Moreover, Malewicz denied having any authority to transfer any project managers and claimed that only Naparstek had the authority to make such changes. Naparstek acknowledged that Malewicz did not have any authority to make any such decisions. I credit Malewicz and Naparstek's testimony.

9. Naparstek testified that he made the decision to remove Complainant from the South Weymouth site, with input from Malewicz, and he denied that Complainant's pregnancy had anything to do with his decision. In particular, Naparstek claimed that for a number of reasons, he decided to reassign the South Weymouth site to Albe Simenas, another project manager, and keep Complainant as the project manager for the Hingham Annex. Naparstek outlined his reasons for the decision in a memo to Complainant dated February 24, 1997. Specifically, he claimed that the South Weymouth site was considerably complex and necessitated a more experienced project manager. Naparstek testified that Simenas had considerably more experience with these issues than Complainant. Naparstek further stated that the South Weymouth site required

increasingly greater time demands for on-site meetings, oversight of field work, and evening meetings. He noted that Complainant was still working on a part-time schedule and she had recently requested that her hours be reduced from 22.5 hours to 20.5 hours. In addition, Naparstek testified that the Federal Facilities branch had recently lost a project manager, which meant that a substantial amount of work had to be absorbed by the remaining staff, including some non-site specific program work that could be done in the office. According to Naparstek, he felt the best way to utilize remaining staff, “given their capabilities, experience and work schedules”, was to reassign Complainant solely to the Hingham Annex. Moreover, Naparstek noted that Complainant had become a source of conflict and contention between members of the work groups at the South Weymouth site and was no longer considered objective by all the parties involved. In particular, he referred to a recent meeting of the South Weymouth work groups chaired by Complainant in which she purportedly verbally attacked some elected representatives.³ I credit Naparstek’s testimony. Complainant also did not present any credible evidence to rebut Naparstek’s testimony regarding the reasons for his decision for the reassignment.

10. On March 21, 1997, Naparstek gave Complainant another draft of his February 24 memo. The memos were identical, except that the March 21 memo had deleted the section pertaining to Complainant’s ability to effectively represent the DEP in an objective manner as a result of becoming a source of conflict at the South Weymouth site. Naparstek testified that he deleted this particular section after Complainant raised objections about this matter. I credit Naparstek’s testimony.

³ Complainant testified that she acted in a polite manner throughout the meeting. However, she acknowledged that some of the participants at the meeting became very angry and agitated.

11. After being removed from the South Weymouth site, Complainant returned to her prior Environmental Analyst II position. Complainant testified that after being reassigned from the South Weymouth site, her job changed dramatically. She claimed DEP took away her field duties, confined her to desk duties, and placed her in a job with greatly reduced career promotion opportunities. In addition, she claimed that after the reassignment, the work environment turned “hostile.” Specifically, Complainant testified that Malewicz began scrutinizing her work and co-workers refused to communicate with her.

12. Complainant continued to work at DEP and receive the same wages and benefits as before the reassignment. However, she testified that she suffered emotional distress as a result of the reassignment. She claimed that she experienced a loss of self esteem and a loss of professional standing with persons in her profession both inside and outside of DEP. She also stated that she suffered intense stress on her job after the reassignment. Additionally, Complainant testified that she brought the stress home from work, which affected her marriage and her relationship with her children. In particular, she claimed she became short-tempered and pre-occupied with her situation at work. Moreover, Complainant testified that she experienced daily headaches, stomach aches, and high blood pressure, which she directly attributed to DEP’s actions. She noted that during her two previous pregnancies she did not experience any such emotional and physical suffering. Complainant claimed she discussed these symptoms with her midwife in March 1997, who advised her to leave work early if possible. Complainant did not receive any medications for these symptoms. Complainant testified that she expected to work to within a few weeks of her scheduled due date, but went out on leave earlier than

anticipated. She claimed that that once she went out on her maternity leave, she ceased experiencing the symptoms that she associated with her emotional distress.

13. Complainant returned to work after her pregnancy in September 1997. Upon her return, she was placed in Audits and Enforcement.⁴ She described her work in Audits and Enforcement as “bean counting” and report writing, with no opportunity for any field work. She claimed the reassignment constituted a “de facto demotion” since she lost promotional opportunities as a result of her removal from doing field work. She also believed the reassignment was an insult to her integrity.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, § 4(1) prohibits public and private employers from discriminating on the basis of sex. This prohibition against sex discrimination extends to pregnancy and, therefore, any action that unduly burdens an employee because of her pregnancy is considered discrimination on the basis of sex. Massachusetts Electric Company v. MCAD, 375 Mass. 160, 168-69 (1978); White v. Michaud Bus Lines, Inc., 19 MDLR 18, 20 (1997). In the case at bar, Complainant claimed that Respondent, after learning of her pregnancy, effectively demoted her from a field position job with significant responsibility and promotional career path opportunities to a desk job with greatly reduced promotional opportunities. Complainant has asserted that both direct and indirect evidence exists of Respondent’s unlawful discrimination.

⁴ Complainant’s claim pertains solely to her reassignment from the South Weymouth site in January 1997.

A. Direct Evidence.

"Direct evidence" is evidence that "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present..." Wynn & Wynn, PC v. MCAD, 431 Mass. 655, 665 (2000); Fountas v. Medford Public Schools, 22 MDLR 264, 269 (2000). In a direct evidence case, a complainant does not have to adhere to the three stage burden shifting paradigm set forth in McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1972). Rather, a mixed motive analysis is applied to Complainant's allegation of discrimination. Pursuant to this analysis, Complainant must first prove by a preponderance of the evidence that a proscribed factor played a motivating part in the challenged employment decision. Fountas, 22 MDLR at 269. If Complainant meets her initial burden, then burden of persuasion shifts to Respondent, "who may avoid a finding of liability only by proving that it would have made the same decision even without the illegitimate motive." Wynn & Wynn, 431 Mass. at 667, *quoting*, Price Waterhouse v. Hopkins, 490 U.S. 228, 244-245, 109 S. Ct. 1775 (1989); Fountas, 22 MDLR at 269.

In the case at bar, Complainant has failed to establish direct evidence of discrimination. Complainant testified that at the time she was informed of the decision to remove her as the project manager of the South Weymouth site, Malewicz told her, "You would be going out on maternity leave anyway and the project would have to be reassigned to someone else." Malewicz admitted to making this comment, but I credited her and Naparstek's testimony that Complainant's pregnancy had nothing to do with the reassignment. Thus, I do not believe Malewicz's comment was evidence of an intent to discriminate. Moreover, I credited Respondent's witnesses' testimony that Malewicz had no authority to demote or transfer any project managers and only Naparstek could

authorize such personnel decisions. I also credited Naparstek's testimony that he made the decision to reassign Complainant. Although Naparstek sought input from Malewicz regarding this matter, there is no evidence that Malewicz made or influenced Naparstek's decision to take Complainant off the South Weymouth site. *See, Cariglia v. Hertz Equip. Rental Corp.*, 363 F.3d 77, 85 (1st Cir. 2004) (the "biases of one who neither makes nor influences the challenged ... decision are not probative in [a] ... discrimination case"). Absent credible evidence that Malewicz had any real influence on the decision, her statement cannot form the basis of a discrimination claim.

Furthermore, even assuming arguendo that Malewicz's comment could be construed as direct evidence of discriminatory animus, Respondent has established that it would have made the same decision even without the illegitimate motive. Specifically, I credited Naparstek's testimony that he decided to reassign the South Weymouth site to another project manager due to the complexity and increasing time demands of the project, Complainant's lack of experience with this type of project and her part-time schedule, and the loss of staff in the office. Moreover, Naparstek testified credibly that Complainant had apparently become unable to effectively represent the DEP in an objective manner since she had become a source of conflict and contention between a number of groups involved with the project. Consequently, even if Malewicz's comment did constitute "an inescapable, or at least highly probable, inference that a forbidden bias was present", Respondent has proven that it would have reassigned Complainant even if she had not been pregnant.

B. Indirect Evidence

Where no direct evidence of discrimination exists, as in the present matter, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp., 411 U.S. at 802. Lipchitz v. Raytheon Co., 434 Mass. 493, 503 (2001); Abramian v. President and Fellows of Harvard College, 432 Mass. 104, 116 (2000); Wheelock College v. MCAD, 371 Mass. 130, 137-138 (1976). In order to establish a prima facie case of sex/pregnancy discrimination, Complainant must show that: (1) she is a member of a protected class; (2) she was capably performing her job duties; (3) she suffered an adverse employment action; and (4) she suffered this adverse action under circumstances giving rise to an inference of discrimination.

Once Complainant has established a prima facie case of discrimination, an inference or presumption of discrimination arises. The burden of production then shifts to Respondent to rebut the presumption of discrimination by presenting credible evidence of a legitimate, non-discriminatory reason for its adverse employment action. Abramian, 432 Mass. at 116-17, Wheelock College, 371 Mass. at 136. If Respondent meets its burden of production, then Complainant must show by a preponderance of the evidence that Respondent's employment decision was the product of discrimination based on Complainant's membership in a protected group. Abramian, 432 Mass. at 116-118. Because proof of unlawful discrimination can rarely be established by direct evidence, Complainant may prove that Respondent's discriminatory animus was the determinative cause by establishing that one or more of Respondent's stated non-discriminatory reasons were false or not the real reasons for its action. Lipchitz, 434 Mass. at 499, 504-505; *see*, Abramian, 432 Mass. at 118 (finding by jury that at least one of the reasons

advanced by defendant was false, in addition to proof of prima facie case, sufficient to permit inference that real reason for defendant's action was discrimination). However, Complainant retains the ultimate burden of proving that Respondent's decision to reassign her was the result of discriminatory animus. Lipchitz, 434 Mass at 504; Abramian, 432 Mass at 117.

I find that Complainant has established a prima facie case of pregnancy discrimination. First, it is undisputed that she is a member of a protected class by virtue of her pregnancy, which was known to Respondent before it made the decision to take her off the South Weymouth project. Second, as exemplified by her performance appraisals, Complainant was capably performing her job duties. Third, Respondent's reassignment did constitute an adverse employment action. Lastly, the fact that the reassignment came within a month of Respondent becoming aware of her pregnancy under these circumstances gives rise to an inference of discrimination.

However, Respondent has presented credible evidence of legitimate, non-discriminatory reasons for its adverse employment action. As discussed in detail above, I credited Naparstek's testimony regarding his reasons for his decision to remove Complainant as the project manager of the South Weymouth site. Consequently, Complainant has the burden of establishing that Respondent's employment decision was the product of discriminatory animus by showing that one or more of Respondent's stated non-discriminatory reasons were false, or not the real reasons for the its action.

I concluded that Complainant has failed to meet this burden. Although Complainant may disagree with the reasons put forth by Naparstek in support of his decision, she has failed to show by credible evidence that his reasons were false or not

the real reasons for her being taken off the South Weymouth project. In particular, I credited Naparstek's rationale that he did not reassign Complainant as a result of her pregnancy; rather, he made the decision based on the undisputed fact that she had less experience in comparison to another project manager and she became involved in a personality dispute with parties involved in the South Weymouth site. While Complainant emphasized that Respondent's decision is inconsistent with her outstanding performance reviews, I don't believe her prior work experience played any role in Respondent's decision. Absent any credible evidence that Naparstek's articulated non-discriminatory reasons were false or not the real reasons for her reassignment, Complainant has failed to establish that Respondent engaged in unlawful discrimination in violation of M.G.L. c. 151B, § 4(1).

IV. ORDER

For the reasons set forth above, the complaint in this matter 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 17th day of January, 2007

EDWARD R. MITNICK
Hearing Officer

