

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
JANET MCDONALD,

Complainant

v.

DOCKET NO. 00130627

P.A. LANDERS, INC.

Respondent

Appearances: Thomas J. Canavan, Esq. for Complainant
Robert Philip Hilson, Esq. and Jason A. Pithie, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 30, 2000, the Complainant, Janet MacDonald, filed a complaint of discrimination against her former employer, Respondent, P.A. Landers, Inc., alleging discrimination in the terms and conditions of her employment and termination on account of her sex. Specifically, Complainant alleged that as the sole female manager at Respondent, she was paid less than a similarly situated male counterpart, she was not included in managers meetings, and she was terminated from her employment because of her gender. The Investigating Commissioner found probable cause to credit the allegations of the complaint and after efforts to conciliate the matter proved unsuccessful, the case was certified for a Public Hearing. A hearing

was held before the undersigned hearing officer on May 19-22, 2003 and September 22-23, 2003. For legitimate reasons beyond the parties' control, enlargements of time for filing of post-hearing briefs were extended up to and including July of 2004. Having reviewed the entire record in this matter, including the post-hearing submissions of the parties, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Janet MacDonald, is female and a resident of Hanson, MA. She was hired by Respondent, P.A. Landers, Inc. on April 27, 1997, to the position of Finance and Information Systems Manager.

2. Respondent, P.A. Landers is a Massachusetts corporation engaged in the construction business with places of business in Hanover and Plymouth, Massachusetts. Respondent is an employer within the meaning of G.L. c. 151B.

3. Prior to her employment at Respondent Complainant worked at Neponset Valley Nursing Associates as the accounting supervisor and in-house information/technology person. Complainant has no professional degrees in accounting or computer technology and most of her training has been on-the-job.

4. Preston A. Landers, Jr. is the founder and owner of Respondent. Landers started the company in 1978 as a site work and small sand and gravel company with 5 employees. The company has grown steadily and by the mid-1990's it had a work force of approximately 300 employees.

5. Landers testified that he traditionally has focused on the company's operations and spends about 98% of his time in the field. He spends very little time in his office and relies on his department heads and chief financial officer to carry out the administration of the company.

6. In 1994, Landers asked Ronald Wuennemann, who was then married to Landers' sister Elizabeth, to evaluate the adequacy of the company's accounting and financial reporting services. Wuennemann concluded that these functions were inadequate given the significant growth in the company's operations. He recommended a re-structuring of the accounting and financial departments. Landers then hired Wuennemann as the Chief Financial Officer to reorganize and enhance the financial operations of the company.

7. When Wuennemann became CFO of Respondent, there were two department heads, one who handled accounts payable and payroll, and Steve Legare who was responsible for accounts receivables. Wuennemann made no immediate changes in personnel, but did oversee the installation of a new financial software package known as Timberline, specifically designed for the construction industry. In 1997, Wuennemann recommended the hiring of an accounting and finance manager.

8. Wuennemann sought to hire a finance manager with both IT and accounting skills to fill the new position. Complainant was hired to fill the position after an interview with Wuennemann and Michael Raymond, Respondent's CPA. She began work on April 17, 1997. Landers was not involved in the application process or the interview process, nor was he involved in the selection of Complainant as the finance/IT manager.

9. In her position as finance manager, Complainant had supervisory authority over the accounts payable and payroll functions, each of which had two employees, and she supervised the office receptionist. For a period of time Complainant also supervised the job cost employees. Complainant had no supervisory authority over the accounts receivable function, which continued to be managed by Steve Legare.

10. Complainant was also responsible for the management of the accounting operations of the company, with particular attention to cash management, balancing the general ledger, and overseeing accounts payable and payroll. Complainant testified that when she arrived at Respondent the general ledger was in complete disarray and proper financial statements were not being generated. She claimed that she re-structured the general ledger and worked to make information compatible with the new software package.

11. With respect to IT functions, Complainant acted as the systems administrator, and she performed the daily maintenance and repairs to user workstations. She initially handled all in-house IT problems and interfaced with the tech support people outside the company.

12. Complainant hired two employees to work under her whom she had known, and worked with, at her previous place of employment. One of these employees who worked in payroll ultimately left Respondent over an issue involving a duplicate check that was improperly issued to her son, who also worked for the company.

13. Complainant reported directly to Wuennemann who rated her job performance in April of 1999 as exceeding most of the job requirements and meeting others. (Ex. C-6). Wuenneman testified that he was not particularly knowledgeable

about IT, but that Complainant appeared to perform installations and upgrades satisfactorily.

14. In May of 1999, after engaging in discussions with a consultant hired by Landers to evaluate the company, Complainant wrote to Wuennemann that she felt she was being foreclosed from the opportunity for future growth at Respondent and felt she would remain primarily an accountant . She also complained that she was the only female manager, that she felt assertive females were viewed differently than assertive men in the workplace and that Landers would never be able to change his view of her because she was a woman. (Ex.C-9).

15. During Wuennemann's and Complainant's tenure Respondent was dealing with cash flow problems resulting from an ongoing eminent domain proceeding in which a portion of its Plymouth property had been taken by the State and final payment had not yet been made. During this time, Landers had to make determinations about which creditors to pay on a daily basis and this necessitated that he have accurate information about cash on hand and daily receivables. Landers testified that prior to Complainant's tenure, former accounts payable personnel provided him with a "tab every night." Landers testified that he was unhappy with how Complainant handled balancing the general ledger and felt that he did not have the immediate information he needed when cash flow was an issue. There was testimony that the employees in the accounts payable department were under a great deal of stress because there was often insufficient cash to pay bills and creditors called frequently inquiring about payments due.

16. One particularly stressful incident occurred in September of 1999 and involved the shut-off of electricity to Respondent's Plymouth asphalt plant. The shut-down caused plant operations to cease and a significant loss in productivity. Landers testified that he was extremely upset about this. While there was conflicting testimony about what actually happened, who was ultimately responsible for the incident, and its significance, Landers viewed it as a major problem for which Complainant failed to take responsibility. He believed Complainant was responsible for the failure to communicate with the utility company and to ensure that the bill was paid prior to a shut-off. The company lost thousands of dollars for the period of time the plant was shut down.

17. Landers testified about other operational difficulties relating to the company's finances including one occasion where he had to cash out a personal CD to fund the operational account which had a zero balance because the funds had been deposited to the wrong account. Landers testified he received numerous complaints from his managers that they had run-ins with Complainant and were frustrated with how their systems were being handled. He stated his accountant had concerns with her performance, including her failure to properly reconcile bank statements and failure to reconcile the general ledger on a monthly basis. His 1998 fiscal audit showed that there were poor internal fiscal controls. Landers testified that he communicated these concerns to Wuennemann, but he felt they fell on deaf ears. In September of 1999, he received a letter from a vendor to Respondent who was also a close personal friend of his wife, complaining that she had been treated very rudely by Complainant. (Ex. R-1).

18 . Complainant testified that after her son died in a drowning accident in September of 1998, she began to work long hours and was burying herself in her work. Landers testified that he was unhappy about Complainant's need to work long hours at the end of the day to accomplish the job. He stated that he needed her in the office during the day and was concerned that she was coming in late and staying very late in the evening with Weunnemann. Subsequent to her son's death Complainant also went through a divorce and her mother passed away. She claimed that she was working long hours as a way to distract herself from her grief and other difficulties. Landers stated he believed that it was not healthy for employees to work such long hours and believed his first marriage had failed because he worked too much. He had a policy that the office should close by 6:00 or 6:30 pm.

19. Landers became upset when he learned that Complainant had installed a computer at her home with access to Respondent's financial information. He testified that he had instructed Weunnemann that Landers' home should be the one to have remote access to the business computer information systems. Landers also testified that in 1999 he was particularly concerned about the computer system because of Y2K issues and he was uncertain Complainant had the knowledge and skills to handle these concerns. According to Landers, his department heads complained that the computer system was not running smoothly.

20. A number of employees testified about the improper manner in which Complainant dressed at work and that she frequently wore very short skirts and low cut tops. Landers testified that he was very uncomfortable with the way Complainant dressed. He thought her dress was very provocative and inappropriate for the

construction industry which, because of the nature of the work, is primarily male. He stated quite candidly that he thought she “dressed like a whore.” He stated that Complainant wore one outfit that everyone called her “cheerleading outfit” because the skirt was so short.

21. At some time prior to October of 1999, rumors began to surface that Complainant and Wuennemann had more than a business relationship. There was testimony that Complainant’s seemingly close relationship with Wuennemann was the source of much gossip and created considerable tension in the office. Some employees communicated these rumors to Landers and noted their dissatisfaction with the flirtatious manner in which Complainant and Wuennemann behaved towards one another.

22. Complainant and Wuennemann shared an office and often worked together until late at night. After one evening in October of 1999 when they were observed alone together at the office after hours by Landers’ wife, Respondent issued an edict that the offices were to be closed by 6:00 p.m. After this directive was issued, Wuennemann went to speak with Landers and his wife and basically accused Landers of putting out a notice that he and Complainant were having an affair. During this conversation, Landers asked Wuennemann to remove Complainant as an authorized signatory on company bank accounts. During that discussion Landers also informed Wuennemann that there was to be a meeting of managers at the Plymouth location later that week with the consultant Landers had hired.

23. Earlier in 1999 Landers had hired Dr. Anthony Costonis as a consultant who specializes in strategic planning services for the construction industry. Costonis was

hired to assist in developing a formal strategic business plan for Respondent in light of the financial difficulties and refinancing operations the company was undergoing. This process included re-defining the vision of the company and re-organizing its departments. Costonis met with Landers and other senior managers at Respondent a number of times to discuss proposed changes to the financial and management operations of the company. Landers testified that he paid Costonis consultant's fees in the area of \$300,000 over a period of years and was very frustrated because Costonis and his accountant spent an inordinate amount of time at meetings pointing out accounting errors made by Complainant, her failure to reconcile the general ledger on a monthly basis, and problems with financial statements prepared by Complainant and Weunnemann. He stated he was paying Costonis and his accountant a great deal of money to focus on the broader issues facing the company.

24. The group of managers that met with Dr. Costonis to evaluate the performance of the company, including marketing production and management was known as the steering committee. The steering committee was composed of Landers, Wuennemann, Greg Keelan, the Products Manager, Gil Amato, the Plant and Equipment Manager and Steve Legare, head of Credit Collections and Director of Administration. All these members were division managers and with the exception of Legare, all reported directly to Landers. Complainant alleged that the failure to include her as a member of this committee was discriminatory. She also alleged that she was paid less than Legare for doing more complicated work and that Landers did not value female employees. Legare had a bachelor's degree and had worked for Respondent for over ten years and was a trusted confidant of Landers. Weunnemann

testified that Complainant discussed her gender grievances with him, but he did not believe this was a battle worth fighting in part because he didn't think they could win it, and because he was not sure how much substance there was to the claim of gender bias. According to Weunemann, Complainant was not on the steering committee because she was not a department head. According to Landers, although Complainant sought the title of Comptroller, Weunemann refused to give her this title because she was not qualified for the position.

25. The Steering Committee met on October 29, 1999 and Landers discussed Complainant. Landers made reference to the rumors about Complainant and Wuennemann having an affair and stated that his first wife had run off with an employee of the company and taken a million dollars from the company and that he was not going to allow this to happen again. Landers' first wife had been a department head in the company and was responsible for receivables, payables and payroll. The members of the Committee concurred that the atmosphere at the workplace was very tense.

26. At the hearing, Landers testified that Wuennemann had had extra-marital affairs in the past and at one point had separated from his sister. They were separated again after the events in this case and ultimately divorced in 2001. It was clear from Landers' testimony that he had serious concerns that Complainant and Wuennemann were carrying on an illicit relationship and that he had lost trust and confidence in both of them. Landers testified that he had made the determination to terminate Wuennemann as well, but it was apparent that he felt more constrained from taking immediate action against Wuennemann because he was his brother-in-law.

27. At the October steering committee meeting, Dr. Costonis recommended to Landers that Complainant be terminated. He testified that he did so because, in his experience, once an employer loses confidence or trust in an employee, it is in everyone's best interests for that employee to be terminated. He made his views very clear that this was not a healthy situation for an organization and he focused on the well being of the organization. Landers testified that made the determination to fire Complainant because she was not well liked, he was not satisfied with her performance and because she was creating a lot of tension in the workplace. He stated that his managers and his accountant had lost confidence in her and it was his responsibility to make a change. He denied that he fired Complainant because he suspected she was having an affair with Weunnemann, however, I did not find this assertion credible.

28. At the October Steering Committee meeting Weunnemann rose to Complainant's defense and stated that he needed her to remain his assistant for the near future. It was agreed that Complainant would not be terminated immediately. Weunnemann told Complainant what had transpired at the meeting and that Landers believed they were having an affair. He also told her that she would no longer have signatory authority on the operational and payroll accounts and would be relieved of managerial duties. He communicated to Complainant that she remained valuable to the organization and he needed her assistance.

29. Complainant made attempts to communicate with Landers after she learned about what had transpired at the steering committee meeting, to no avail. When he did speak with her on the phone, Landers re-iterated that his first wife had run off with an

employee of the company and one million dollars and he was not going to let this happen again. It was apparent from his response to Complainant's overtures and his testimony at the hearing that he believed Complainant had betrayed his trust and that he harbored a great deal of anger and hostility toward her.

30. On November 11, 1999, Weunnemann issued a memo to all department managers and administrative employees stating the future direction of finance and administration was under discussion and that during the period of transition that all questions pertinent to daily administration were to be addressed to Steve Legare. (Ex. C-5). Complainant viewed this to be in complete derogation of her authority and believed that she was being marginalized and driven out.

31. Complainant testified that she began looking for a new job in November of 1999 as soon as she understood her days at Respondent were numbered. Although she continued to work at Respondent until January, 2000, she was relieved of her managerial authority. In late January of 2000 Complainant asked to be laid off, and she left Respondent's employ on January 27, 2000 with 5 weeks of severance pay. Wuennemann testified that given the circumstances, he knew he could not continue to work for Respondent, and he began looking for another job in 2000. He eventually reached a severance agreement with Landers and left the company in September of 2000. He was divorced from Lander's sister in 2001.

32. Subsequent to Complainant's departure from Respondent, Lander's accountant, Michael Raymond, took over her accounting functions temporarily. A male replacement who was a CPA was hired to perform the accounting functions and he ultimately took over Wuenneman's functions as well. Complainant's IT functions

were assumed by a female employee. There was testimony that the tension in the office dissipated considerably after Complainant left and Landers testified that the operation ran more smoothly.

33. Complainant received two offers of employment after leaving Respondent and collected eight weeks of unemployment compensation. She accepted a position but quit after one week. In April of 2000 she began working at R. Zoppo Corp. at a salary comparable to what she was earning at Respondent with similar benefits.

III. CONCLUSIONS OF LAW

General Laws c.151B s.4(1) prohibits discrimination in the workplace on account of gender. This includes discrimination in the terms and conditions of employment, discrimination in promotion, and termination. In this case, Complainant has alleged that she was treated differently in the terms and conditions of her employment and ultimately terminated because her employer harbored gender based stereotypes about women in the workplace. Essentially Complainant asserts that her termination resulted from Lander's suspicions of her conduct that were fueled by a bad experience with his ex-wife and consequent sexist stereotyping. She asserts that the assumptions Landers made were unfounded, motivated his adverse actions toward her, and constitute unlawful gender stereotyping and discrimination.

Complainant may prove a claim of gender discrimination by direct evidence or in the absence of direct evidence, by utilizing the burden shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). See also *Abramian v.*

President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); *Wheelock College v. MCAD*, 371 Mass. 130 (1976).

To establish a prima facie case of gender discrimination Complainant must establish: (1) that she is a member of a protected class; (2) that she was performing her job at an acceptable level; (3) that she was terminated from her job or otherwise subject to an adverse employment action, and; (4) her employer sought to fill her position by hiring an individual with qualifications similar to hers. *Abramian, supra.*, 432 Mass. at 116; *Wynn & Wynn v. MCAD*, 431 Mass. 655, 665 (2000).

In this case there is a significant dispute about whether Complainant was performing her job in an acceptable fashion. Complainant asserts that her performance evaluation and Wuenneman's continued confidence in her demonstrate that she was performing more than adequately. Landers asserts that the complaints he was receiving about Complainant from his other department heads, and his accountant, led him to believe that the contrary was true. Notwithstanding this dispute, for purposes of establishing a prima facie case, I conclude that Complainant was performing her job adequately. Complainant suffered adverse employment actions in that she was stripped of all of her managerial authority and ultimately left Respondent under conditions that she claims constitute a constructive discharge. Complainant was the sole female manager at Respondent during her tenure and her managerial and accounting duties were ultimately taken over by a male replacement. Thus, I conclude that Complainant has established a prima facie case of gender discrimination.

Once Complainant has established a prima facie case, Respondent must articulate a legitimate non-discriminatory reason for its actions. The articulated reason must be

supported by some credible evidence to show that it was the real reason. *Wheelock College v. MCAD*, 371 Mass. at 138; *Lewis v. Area II Home Care*, 397 Mass. 761 (1986). At the time Complainant was stripped of her managerial authority and check signing authority, she was told by Landers only that he did not want a repeat of past history, where his wife had run off with another employee of the company taking with her significant amounts of the company assets. At the hearing in this matter, Landers asserted that he made the decision to relieve Complainant of her management duties and decided ultimately that she should be terminated because he had lost trust and confidence in her and her ability to do the job. Although Landers specifically denied that he made the decision to fire Complainant because he believed her to be having an affair with Wuenneman, his comments made at the steering committee meeting and subsequently, belie this assertion. Landers did, however, concede credibly that he had lost trust and confidence in Complainant and I presume that this loss of trust was largely motivated by his suspicion that she was engaged in an illicit affair with his brother-in-law. At the same time Landers became suspicious of the relationship between Complainant and his brother-in-law, he was also becoming increasingly frustrated by reports he was receiving about Complainant's lack of accessibility to her subordinates and inadequate financial controls. Thus, there is credible evidence that both reasons contributed to Landers' decision to relieve Complainant of her managerial authority and ultimately to terminate her. I conclude that both are legitimate non-discriminatory reasons.

Once Respondent articulates a legitimate non-discriminatory reason for its actions, the Complainant must prove by a preponderance of the evidence that Respondent "acted with discriminatory intent, motive or state of mind." *Lipchitz v. Raytheon*

Company, 434 Mass. 493 (2001). She may do so by demonstrating that Respondent's articulated reason is a pretext for discrimination. However, even if the trier of fact finds that the articulated reason for the adverse employment action is untrue, the fact-finder is not required to find discrimination in the absence of the requisite intent. *See Abramian, supra.* at 117-118.

Complainant would have me conclude that the decision to relieve her of signatory authority and other managerial duties and ultimately to terminate her employment was motivated by gender bias and that issues of performance were a pretext for this unlawful motive. The evidence of gender bias that she presented was as follows: she was the only female manger at Respondent; she was not invited to be a member of the steering committee; she was paid less than Legare for doing similar duties; Landers believed she dressed in a sexually provocative and inappropriate manner; and finally, that Landers assumed, based on rumor and innuendo, that she was having an affair with his brother-in-law and proceeded to take adverse action against her based on this unfounded assumption.

Respondent proffered evidence that Complainant was not the first female manager at the company and that she was not invited to join the steering committee because she was not a department head. There was also testimony that the sand and gravel business has been traditionally a male dominated industry and it was not uncommon for there to be fewer females in managerial positions. Furthermore, Legare had worked for Landers for over ten years and had proven himself to be a trusted confidante. As regards Complainant's work attire, Landers, as well as female colleagues, expressed the opinion that her manner of dress was often inappropriate and some female co-workers expressed

their discomfort to Landers. To be sure, one can express an opinion about unduly sexual or provocative behavior or dress of a female employee without being sexist or harboring gender bias. I conclude that Complainant's evidence does not support a conclusion that Respondent acted with a discriminatory motive.

Even if I were to conclude that the performance issues raised by Respondent were insignificant or even entirely untrue, and that the only reason Landers took adverse action against Complainant was the belief that she was engaged in an affair with Wuennemann, I do not conclude that Respondent's actions were motivated by gender bias, stereotypical or otherwise. Complainant would have me equate Landers' loss of trust and confidence in Complainant, arising from his suspicions that she and Wuennemann were having an affair, to gender discrimination, a leap I am unwilling to make. I conclude that Landers was equally suspicious of, and angry with, Wuennemann and but for the fact that Wuennemann was his brother-in-law, would have taken similar actions against him. In the end, Wuennemann also felt distrust and disapprobation from Landers, understood there was no future for him at the company, and ended up leaving Respondent within eight months of Complainant. He was later divorced from Landers' sister.

While Landers may have acted precipitously based on his fears, emotions, and unfortunate past experience, I am unable to conclude that any of the reasons articulated by him for marginalizing and terminating Complainant were discriminatory or that they were in violation of G.L. c. 151B.

ORDER

In light of the foregoing findings and conclusions, the Complaint in this matter is hereby dismissed.

So ordered this 23rd day of November, 2004

Eugenia M. Guastaferr
Hearing Officer