

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

Massachusetts Commission
Against Discrimination and
Jennifer Osmani,
Complainant

v.

Docket No. 98-BEM-0655

State Street Bank and Trust Company,
Respondent

Appearances: Tandi Mkwai-Tulloch, Esquire, and Alicia A. McNeil, Esquire, for
Complainant
Patricia A. Granger, Esquire, and Mary E. O'Neal, Esquire, for Respondent

DECISION OF THE HEARING COMMISSIONER

I. INTRODUCTION

This case concerns an individual who claims that she was subjected to discrimination on the basis of her gender (female/pregnancy) by being denied a promotion while on maternity leave. Her complaint alleges unlawful discrimination in violation of M.G.L. Chapter 151B, Section 4, paragraph 1.

II. PROCEDURAL HISTORY

On February 27, 1998, Complainant, Jennifer Osmani, filed a complaint of discrimination against Respondent, State Street Bank and Trust Company. The Investigating Commissioner issued a finding of Probable Cause on June 13, 2000. After conciliation efforts failed, the case was certified for hearing. A public hearing was held

before me on June 6 and July 22, 2002.¹ The parties submitted post-hearing proposed findings of fact and conclusions of law.

I have considered the entire record of the proceedings, including all proposed findings of fact, conclusions of law, and supporting arguments of the parties. To the extent the proposed findings and conclusions are not in accord with the findings herein, they are rejected. Certain proposed findings and conclusions have been omitted as not relevant or as unnecessary to a proper determination of the material issues presented; others have been modified to accord with my findings. To the extent the testimony of various witnesses is not in accord with the findings herein, such testimony is not credited. Having duly considered the record before me, I make the following Findings of Fact and Conclusions of Law and Order.

III. FINDINGS OF FACT

1. Complainant, Jennifer Osmani, is a resident of Lynn, Massachusetts. She is a female of childbearing age. (Tr. I, pp. 20-21)
2. Respondent State Street Bank and Trust is an employer within the meaning of M.G.L. c. 151B. Respondent's branch managers reported to Vice President William Kennedy, head of retail banking. Kennedy reported to Senior Vice President Ralph Sautter. (Tr. II, p. 48)
3. Complainant began her employment as a Teller Trainee at Respondent's 53 State Street office in 1986. From 1986 until 1988, she worked in the Retail Banking

¹ Following the first day of public hearing, Respondent made a verbal Motion to Dismiss the Complaint, alleging that Complainant had failed to establish a prima facie case. After requesting and reviewing the parties written Motions, I denied Respondent's Motion on July 17, 2002, concluding that Complainant had established a prima facie case and that she should be permitted to re-open her case to submit documents received from Respondent after the close of discovery.

Department and was promoted to increasingly higher positions. In August 1989, she attained the position of Banking Service Representative II, Grade 12. (Tr. I, pp. 22-29)

4. In 1992, just prior to Complainant's first pregnancy, Diana Alfama, her supervisor, submitted a recommendation for Complainant's promotion to Banking Service Representative III, Grade 14. Complainant's performance evaluation for the period of June 1992 through June 1993 rated her as "consistently exceeded standard," the highest score on the rating scale. (Tr. I, pp. 31-37)
5. Complainant requested and was granted a four month maternity leave of absence with her first child between November 1992 and March 1993. When she returned, her new supervisor at the Chelsea branch was John McCaffrey. Immediately following Complainant's return, McCaffrey submitted another recommendation to promote her to Grade 14. (Tr. I, pp. 37-38)
6. In 1994, McCaffrey promoted Complainant to a Banking Services Representative III, Grade 14 position, the highest non-exempt level position below an officer position. In her 1994 evaluation, McCaffrey scored Complainant as "consistently exceeded standard." Kennedy, as division manager, signed the evaluation. (Tr. I, p.38)
7. McCaffrey supervised Complainant in her Banking Service Representative III, Grade 14 position from 1995 through 1997. He evaluated her performance during those years as "consistently exceeded standard." Kennedy signed the 1996 and 1997 evaluations, agreeing with McCaffrey's comments. Complainant commented on these evaluations that her goal was to become a banking officer. (Tr. I, pp. 38-41; Exs. 1-D through 1-F)
8. Complainant testified that in January 1997, McCaffrey informed her that he had had a conversation with Kennedy and Sautter discussing her being promoted to an officer

position and that they had asked him to submit a recommendation. She stated that based on this conversation she understood that her promotion would occur within a month or two and she informed family and friends of the impending promotion. (Tr. I, pp. 42-43) I credit her testimony.

9. Typically, only two managers oversee operations of a branch office. In or around January 1997, Respondent transferred a third manager to the Chelsea branch. In anticipation of a possible transfer, Complainant wrote a memorandum to Kennedy on February 27, 1997 requesting one-month's notice should she be the manager chosen to be transferred to another bank. Her memorandum stated in part, 'Relocation to any other State Street site would increase my work hours, due to additional commuting time and longer operating hours. As a result, I would need to find new day care arrangements. This cannot be done in the two weeks notice that is standard for relocation. Therefore, if these reassignments are going to change where I will be reporting, I would appreciate as much advance notice as possible.' (Tr. I, pp. 43-48, Ex. C-2) I find this memorandum does not indicate any reluctance by Complainant to transfer to another location.
10. In March 1997, Complainant became pregnant with her second child.
11. By letter of April 23, 1997, McCaffrey recommended Complainant for promotion to Assistant Treasurer, an officer level position. He stated that, based on Complainant's performance, as indicated by her last seven rating sheets which reflected an above average performance from three different managers, he was recommending she be promoted to Assistant Treasurer, an officer level position. (Tr. II, p. 38; Ex. R-1)

12. In April 1997, Complainant learned that she was to be transferred from the Chelsea branch to 53 State Street. She asked McCaffrey whether she was going to be transferred as an officer and he informed her that her promotion had not yet been approved and that it was necessary she speak with Kennedy. Complainant met with Kennedy the following day to inquire as to the reason she was not transferring to 53 State Street as an officer. She testified that Kennedy informed her that he had received McCaffrey's recommendation and was awaiting her promotion to be voted upon. She stated that Kennedy told her to be patient and to transfer to 53 State Street as a Banking Service Representative III, Grade 14. Complainant testified that after meeting with Kennedy, she believed her promotion was in process. (Tr. I, pp. 44-51) I credit her testimony.
13. On June 2, 1997, Complainant was transferred from the Chelsea branch to 53 State Street. She testified that an officer replaced her in Chelsea and that she replaced an officer and performed an officer's duties at 53 State Street. Nancy Altimonte, Vice President and Human Resources Manager, also testified that Complainant had officer responsibilities upon her transfer to 53 State and had had some officer responsibilities in Chelsea prior to her transfer. (Tr. I, pp. 51-52; Tr. II, pp. 59-60)
14. In the additional comments section of Complainant's June 1997 performance review, Kennedy, as Reviewing Manager, wrote that Complainant had "recently relocated to 53 State Street and assumed an officer position responsibility." (Ex. C-1F)
15. In August 1997, Complainant again met with Kennedy to inquire about her promotion to an officer level position. Complainant was five months pregnant at this time. Complainant testified that Kennedy informed her that her promotion had not yet

occurred because Respondent had expected the retirement of an employee who was presently on leave with an injury and that she would be promoted after this employee had returned and retired. She stated that Kennedy told her she might receive a call concerning her promotion when she was out on maternity leave. Following this meeting, Complainant and Kennedy had coffee in the cafeteria and he asked her whom she believed should replace the employee who was expected to retire. Complainant testified that she suggested Jean Domurat as a replacement and that Kennedy responded no. Complainant stated that she understood Kennedy to be asking who should physically replace the retiring employee, not replace her in title. She testified that she left the meeting believing that her promotion was “in the works.” (Tr. I, pp. 53-58) I credit Complainant’s testimony.

16. Complainant’s quarterly review, dated October 10, 1997, rated her as successfully achieved standard. Her reviewer commented that Complainant “has a goal to become an officer of the Bank which is certainly attainable. I will be working with her to assist her in the achievement of that goal.” (Ex. R-2)
17. Complainant was out on maternity leave from November 14, 1997 until March 2, 1998. (Tr. I, pp. 58, 68)
18. By letter of January 16, 1998, Kennedy recommended that Domurat be promoted from her Banking Service Representative III, Grade 14 position to Assistant Treasurer. By letter of January 22, 1998, Sautter also recommended that Domurat be promoted to Assistant Treasurer. (Exs. C-12, R-24)
19. The responsibilities of an Assistant Treasurer include providing back-up to the branch manager, overseeing the day-to-day operations of the branch while the branch

manager is performing other duties, and performing some auditing functions. (Tr. II, pp. 26-27)

20. Domurat's date of birth is May 1934. She was 63 years old at the time of her promotion to Assistant Treasurer, which occurred in March 1998. (Tr. II, p. 61)
21. During Complainant's leave, the officer who had replaced her at the Chelsea branch called to inform her that Domurat had been promoted to an officer position. Complainant felt upset and betrayed upon learning this information and she immediately made an appointment to meet with Kennedy. (Tr. I, pp. 58-59)
22. At Complainant's meeting with Kennedy to inquire as to why Domurat had been promoted to the officer position and she had not, Kennedy informed her, "I didn't think you wanted to go to Quincy." Complainant protested to Kennedy that she had never told him she did not want to go to the Quincy branch. (Tr. I., pp. 61-62) I credit Complainant's testimony.
23. Following her meeting with Kennedy, Complainant was very upset and telephoned Altimonte to set up a meeting with her. Altimonte testified that prior to meeting with Complainant, she called Kennedy for information and Kennedy had informed her he did not think Complainant wanted to commute to Quincy and that Domurat was more qualified for the position. Altimonte stated that during her subsequent meeting with Complainant, she informed her that she had spoken with Kennedy and re-iterated Kennedy's stated beliefs that Complainant did not want to go to Quincy and that Domurat was the more qualified candidate. According to Complainant, Altimonte informed her that Kennedy's sole stated reason was that he believed she did not want to go to Quincy. (Tr. I, pp. 62-65; Tr. II, pp. 18-24)

24. Altimonte testified that subsequent to meeting with Complainant, she conducted an investigation, meeting with Kennedy to review the files of Complainant and Domurat. She stated that Kennedy was confident that Domurat had greater experience due to 30 years with Respondent as compared to Complainant's thirteen years, that Domurat had been in an officer position previously as both an Assistant Treasurer and Assistant Vice President, and had taken a non-officer position as a floater, working in any branch, subsequent to her officer position being eliminated. Altimonte testified that Kennedy was Domurat's manager at the time of her promotion and that he stated Domurat's floater position included greater responsibilities than Complainant's. Altimonte stated that Kennedy further explained that he had transferred Complainant to 53 State Street in order for her to receive experience in a busier branch and for her to work under a different manager to learn if this manager would also recommend her for promotion. Altimonte testified that Kennedy told her it was Complainant's February 1997 memorandum regarding a potential transfer, as well as conversations he had with her, that led him to believe that she did not want to commute to Quincy. (Tr. II, pp. 24-26, 35-39)
25. Complainant testified that Altimonte called her the day after their meeting, and informed her that Kennedy had stated he did not believe Complainant wanted to go to Quincy and that Domurat was a more qualified candidate. (Tr. I, pp. 65-66)
26. Following the telephone conversation with Altimonte, Complainant filed her MCAD complaint on February 27, 1998. (Tr. I, pp. 66-67; Ex. C-4)
27. Complainant testified that at no point in her career did she object to being transferred to another of Respondent's locations and that in addition to 53 State Street and the

Chelsea branch, she had worked in Respondent's Copley branch office. I credit Complainant's testimony and find that throughout her career, she indicated no reluctance to being transferred. (Tr. I, p. 51)

28. Domurat's performance evaluations from 1995 through 1997 in her position as Banking Service Representative III, Grade 14 rated her as "successfully achieved standard," the next lower rating from "consistently exceeded standard." In 1995, Kennedy signed her evaluation as the Reviewing Manager. No Reviewing Manager signed Domurat's 1996 or 1997 evaluation. Domurat's August 1996 performance evaluation indicated that she had previously served in an officer capacity. In her June 1997 performance review, Kennedy, her manager, had written that officer staffing levels were full but Domurat, along with other qualified individuals, would be considered as opportunities presented themselves. (Tr. II, pp. 27-31; Exs. C-14A-E, R-19, R-20)
29. Altimonte testified that Kennedy addressed the issue of Complainant's receiving "consistently exceeded standard" on her performance reviews versus Domurat's "successfully achieved standard" by explaining that he had higher standards and expectations for Domurat than McCaffrey had for Complainant, and that Complainant worked in a smaller branch while Domurat had more responsibilities in floating from branch to branch as well as managing the Teller Training Program. Altimonte testified that Kennedy stated that McCaffrey had written Complainant's recommendation due to pressure from her and because he did not like conflict. (Tr. II, pp. 34-38)

30. The criteria used by Kennedy for promotion to officer included a recommendation from a manager, availability of a slot, qualifications, experience and performance of a candidate. (Tr. II, pp. 71-75)
31. Altimonte stated that while Kennedy could recommend someone for an officer level position, he was not the final authority and the promotion required the approval of the Board of Directors of Respondent's Corporation. In Domurat's case, Kennedy's recommendation of her for the Quincy officer position was accepted by his superiors and authorized by a Board of Directors vote. (Tr. II, pp. 32-34)
32. Altimonte testified that she reviewed information concerning the ages of women promoted by Respondent into officer level positions and concluded that Respondent did promote women of child bearing age into officer positions. (Tr. II, pp. 42-44)
33. In March 1998, Complainant returned to work at 53 State Street. Subsequent to her return, she was counseled on four occasions for performance issues. Altimonte testified that Kennedy stated that prior to Complainant's maternity leave, she had made an error that was addressed with her upon her return, and that a second issue arose during her leave regarding Complainant's allegedly opening an account for her brother-in-law without running his information through the National Check Protective Services. The two incidents subsequent to Complainant's return related to her leaving early after the cancellation of a meeting and her alleged tardiness for an 8:00 a.m. meeting. (Tr. I, pp. 70-78; Tr. II, pp. 39-40; Exs. R-3, R-4)
34. On November 13, 1998, Complainant resigned from Respondent and commenced employment at Revere Federal Savings Bank. At the time of Complainant's resignation, her salary was approximately \$42,000, the same salary she earned upon

assuming her new position at the Revere federal Savings Bank. Domurat's salary as Assistant Treasurer was \$51,300, an increase of eight percent from her Banking Service Representative, III, Grade 14 salary. (Tr. I, pp. 83-86; Exs. R-5, R-24)

35. Complainant testified that she was devastated when she learned she did not receive the promotion to Assistant Treasurer. She stated that her relationship with her children suffered, that she stopped breast-feeding her daughter earlier than she had intended, within two days of learning she had not been promoted, and that her relationship with her husband deteriorated. She stated that she felt paranoid and suffered from depression and insomnia, up to and including the date of the public hearing. (Tr. I, pp. 59-61, 96-100) I credit her testimony.

IV. CONCLUSIONS OF LAW

G.L. Chapter 151B, Section 4, Paragraph 1 makes it unlawful to discriminate against an employee because of her sex. Because pregnancy and childbirth are sex-linked characteristics, any action by an employer which is based on an employee's pregnancy or need for a maternity leave is therefore unlawful sex discrimination under this paragraph. White v. Michaud Bus Lines, Inc., 19 MDLR 18, 20 (1997); Lane v. Laminated Papers, Inc., 16 MDLR 1001, 1013 (1994). In order to establish a prima facie case of employment discrimination in this matter, Complainant must demonstrate that she is a member of a protected class, applied for and was qualified for promotion, was not promoted and that someone not in Complainant's protected class with similar qualifications was selected for the position. Abramian v. President and Fellows of Harvard College, 432 Mass 107 (2000).

Complainant was a member of a protected class based on her gender and maternity leave status at the time she was not promoted to an officer position. Testimony and documentary evidence established that Complainant was successfully performing the responsibilities of her Banking Service Representative III, Grade 14 position, had consistently received high performance ratings and had been recommended for promotion by a supervisor. Despite Complainant's meeting the qualifications for an officer position, she was not promoted. Respondent instead selected a woman with similar qualifications who was not in Complainant's protected class due to not being on maternity leave and being beyond child-bearing age. I find that Complainant has met her burden and established a prima facie case.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); Abramian, 432 Mass at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass. at 504. Notwithstanding, Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. *Id.*; Abramian, 432 Mass at 117.

Respondent has articulated two nondiscriminatory reasons for Complainant's non-promotion to Assistant Treasurer, asserting Kennedy's belief that Complainant did not want to commute to Quincy and that the candidate he recommended was more qualified. Respondent articulated through Altimonte's testimony its assertion that Kennedy believed the woman selected for promotion was more qualified than Complainant and that Complainant did not want to commute to Quincy.

Respondent has met its burden of production and Complainant must show by a preponderance of the evidence that Respondent acted with discriminatory intent, motive or state of mind. Evidence supports Complainant's contention that she never indicated a reluctance to transfer anywhere, and in particular to Quincy, and that Respondent never asked her if she would be willing to commute to Quincy. Rather, Complainant was transferred several times throughout her career and never objected to the transfers. Respondent's assertion that Complainant's February 1997 memorandum requesting an extended notice period if she were to be transferred from the Chelsea branch, in addition to her conversations with Kennedy, led Kennedy to believe that Complainant did not want to commute to Quincy, is not credible. I found Complainant's testimony on the issue of transfer to be much more credible. Respondent produced no credible evidence to support Kennedy's assertion that he believed Complainant did not want to commute to Quincy. Therefore I find that this reason was false and not the real reason for its action.

Complainant further alleges that she was equally or more qualified than the woman selected for Assistant Treasurer, Domurat. Evidence shows that at the time of the promotion Complainant and Domurat both held the position of Banking Service Representative, III, Grade 14. From 1995 through 1997 Complainant was rated

“consistently exceeded standard” in this position while Domurat received ratings of “successfully achieved standard,” a lower rating. Although Respondent argued that Kennedy believed Domurat to have greater experience due to her thirty years with Respondent, her having been previously employed in an officer position, and her having accepted a non-officer position as a floater when her officer position was eliminated, there was little credible evidence to support that these asserted reasons were reasonable or the actual the basis of Respondent’s employment decision. The evidence instead demonstrated that both Complainant and Domurat had performed in officer positions, with Complainant assuming officer responsibilities not only in the Chelsea branch, but also upon her June 1997 transfer to 53 State Street. Moreover, Complainant’s rating for the previous three year period had been higher than Domurat’s. Furthermore, there was no evidence to suggest that Complainant’s supervisor, McCaffrey, recommended her for promotion to an officer position under pressure from Complainant.

Finally, Complainant testified that in conversations with Kennedy in April and August 1997 when she expressed her desire to become an officer, Kennedy led her to believe that her promotion was imminent. In sum, Respondent’s hearsay testimony by Altomonte on the issue of Domurat being more qualified without any credible evidence to support this contention or the reasonableness of Kennedy’s belief, leads me to conclude that this reason for not promoting Complainant was not the real reason. Rather Complainant has proven that Respondent’s decision not to promote her was motivated by discriminatory animus due to her pregnancy and maternity leave in violation of G. L. c. 151B, Section 4 (1).

V. REMEDY

Pursuant to M.G.L.c.151B s. 5, the commission is authorized to grant remedies to make the Complainant whole. This includes an award of damages to Complainants for lost wages and emotional distress suffered as a direct and probable consequence of their termination by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournemouth Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); see Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997).

On the basis of Complainant's credible testimony concerning her distress upon learning that she had not been promoted to an officer position, I am persuaded that Complainant suffered emotional distress. Complainant testified persuasively that she was devastated upon learning she had not received the promotion, that her relationship with her husband and children suffered, and that she felt paranoid and suffered depression and insomnia. Complainant is entitled to an award of \$50,000.00 for the emotional distress she suffered.

Complainant is also entitled to \$2,520.00, an eight percent increase from her \$42,000 salary (the percentage of salary increase Domurat received upon her promotion to Assistant Treasurer) for the approximately nine month period from the time of Domurat's March 1998 promotion, until November 13, 1998, the date Complainant resigned her position.

VI. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that:

1) Respondent pay to Complainant the amount of \$50,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this order.

2) Respondent pay to Complainant the amount of \$2,520.00 in damages for back pay with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue. Payment shall be made within 60 days of receipt of this decision.

The parties shall notify the Clerk of the Commission as soon as payment has been made. If Respondent fails to comply with the terms of this Order within the time period allotted, please notify the Clerk of the Commission.

This constitutes the final order of the Hearing Commissioner. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

So Ordered this 25th day of April, 2003

Dorca I. Gomez
Hearing Commissioner