

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
KERRY TURPIN,
Complainant

v.

DOCKET NO. 03-BEM-01916

BOSTON ATHLETIC CLUB &
ROGER GRIFFITHS,
Respondents

Appearances: Stephen S. Churchill, Esq. for Complainant
Phillip X. Murray, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 18, 2003 Complainant, Kerry Turpin, filed a complaint with this Commission alleging that she was discriminated against on account of her gender and terminated from her position with Respondent, in retaliation for complaining of gender discrimination.

The Investigating Commissioner issued a finding of Probable Cause and conciliation efforts having failed, the matter was certified for a public hearing on April 6, 2006. The Investigating Commissioner certified the following questions for public hearing:

- 1) Did Respondent's termination of Complainant constitute gender discrimination?
- 2) Did Respondent's termination of Complainant constitute retaliation?
- 3) Did Complainant suffer damages as a result of Respondent's discriminatory action and, if so, in what amount?

A public hearing was held before the undersigned Hearing Officer on October 4 & 5, 2006. The parties submitted post-hearing briefs on January 19, 2006. Having reviewed the entire record of this matter and the parties post-hearing submissions, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Kerry Turpin, is a female, life-time resident of South Boston, who was hired to work at Respondent Boston Athletic Club (BAC) as a receptionist in January of 2001. In 2002, Ms. Turpin was hired to work as a waitress at the Summer Street Grille, the restaurant attached to the BAC, but continued to work at the front desk of the BAC.
2. The Respondent, BAC, is a gym located in South Boston. At all relevant times, BAC's General Manager was Patricia Daly. The manager of the Summer Street Grille and Complainant's supervisor at all relevant times was Roger Griffiths, who testified that he was not an employee of BAC, but of Pappas Properties, Inc. The Grille employs cooks, a wait staff and bartenders. Approximately nine months after being hired as a waitress at the Grille, Complainant began working as a bartender.
3. As a front desk receptionist at the BAC, Complainant reported to front desk managers Sandy Lyons, and Barbara Lyons, who reported to manager Beverly Raws, who in turn reported to Daly, the General Manager. Although Complainant asserts that she had an exemplary work record as a receptionist for the BAC, according to Raws, Barbara Lyons and Daly, she had a persistent

problem with tardiness and absenteeism. Raws testified that when she had to cut back Complainant's shifts as receptionist at the BAC for reasons of chronic absenteeism, Complainant began yelling at her, accused her of discrimination and threatened to sue. Daly testified that Complainant was counseled for these problems and her hours at the BAC were reduced to accommodate her scheduling needs, which resulted in her beginning to work part time at the Grille.

4. Complainant alleges that once she began working at the Grille, Griffiths made several derogatory comments to her that she considered to be hostile to her gender. Complainant claimed that Griffiths yelled at her on one occasion because she had forgotten to turn on the ice machine, referring to her as a "typical woman," insinuating that she was not competent to operate the machine. I do not credit the part of Complainant's testimony that implicates her gender in this incident. Complainant alleges she relayed the incident to Sandy Lyons, who told her to speak to Raws.
5. Griffiths testified that the night before the ice machine incident, he had asked Complainant to turn on the ice machine before she left and she neglected to do so. The next morning he told Complainant that her failure resulted in the restaurant having no ice. I believe that Griffiths was annoyed at Complainant for her dereliction of duties and may have yelled at her, but he denied making any comments or derogatory terms relating to gender and I credit his testimony.
6. On another occasion, Griffiths spoke to Complainant after a Christmas party in 2002, for allegedly refusing to share tips with another employee. She alleges he called her a "cheap bitch." Griffiths denied calling Complainant a cheap bitch.

While I believe that Griffiths spoke to Complainant about sharing the tips, and may have even called her cheap, I do not credit her testimony that he called her a “cheap bitch.” Complainant claims to have been in tears over this incident and was observed upset by Sandy Lyons who again encouraged her to speak to Raws. Thereafter, Raws, Griffiths and Complainant met to discuss Complainant’s concerns. In deposition testimony Raws indicated that Complainant voiced concerns about Griffiths’ tone toward her regarding her work but never mentioned gender bias, harassment or comments regarding women or women in the workplace. Raws testified that Complainant was out of control in the meeting and was yelling at Griffiths and she attempted to get Complainant to speak in a more civil manner. Her recollection was that after the meeting, Complainant considered the issue resolved and she stated that Complainant and Griffiths had an amicable relationship.

7. On a third occasion, when Complainant arrived late to work at the Grille because of a child care issue, she alleges that Griffiths told her she should be home taking care of her children and stated that this was why women shouldn’t be working. Griffiths testified that on the day in question, Complainant called in at 11:30 am stating that she would be 15 minutes late and did not arrive to work until 1:45pm at which point Griffiths told her to go home. Jennifer Adolph, another waitress confirmed that Griffiths yelled at Complainant on this occasion and urged Complainant to report what she viewed as Griffiths’ inappropriate behavior. I believe that Griffiths was upset and frustrated with Complainant for arriving so late to work and angrily told her to go home because the luncheon shift was over.

I do not credit Complainant's testimony that he made gender specific remarks about women in the workplace. Complainant complained to her supervisors at the front desk of the BAC about this incident.

8. Griffiths admitted having to counsel Complainant on a number of occasions, stating that she was "over confident" and that after counseling her, he "didn't stick around for the emotions." While this might be viewed in some respects as a sexist comment, I believe it was more of a characterization of how Complainant reacted to criticism. She frequently cried, yelled, or caused a scene in response to criticism of her performance. Griffiths and O'Connor and Raws testified that Complainant was unable to accept criticism of her performance and reacted badly to criticism. Daly testified that she spoke to Complainant on one occasion where Complainant was very upset about feedback she had received from Griffiths about her performance. She testified that she also heard from Beverly Raws that Complainant was upset on two other occasions because of interactions with Griffiths, but Daly was told the issues related to Complainant's performance and neither Complainant nor anyone else ever mentioned sex or gender discrimination. I credit their testimony.
9. Complainant testified that on another occasion, Griffiths threw some paperwork at her and said words to the effect of, "Here, do some women's work." Griffiths denied that this ever occurred and Jennifer Adolph, who Complainant claimed witnessed this incident, testified that she witnessed Griffiths dropping off the paperwork but heard no demeaning or negative comments. Complainant was unable to explain this inconsistency.

10. In January of 2003, Griffiths received inventory control reports that beverage costs for alcohol and beer were running above normal. As a result of these reports, Griffiths began to suspect staff were giving away free drinks. The Grille had a policy against giving free drinks and the staff knew that it was against the law for a public restaurant/bar to give away free drinks. After Griffiths noted a large discrepancy in the number of beers sold and the number of empty beer bottles, he began a spot check of beer inventory on or about January 31, 2003. A spot check involved counting the number of empty beer bottles before a shift began and again at the end of the shift. Griffiths would then run a register report to determine how many beers the register indicated were sold and compare this tally to the number of empties at the end of the shift, while subtracting the number of empties counted at the beginning of the shift. One of these spot checks revealed a discrepancy after the shift of a long-time male bartender, Patrick Foley. As a result, Foley's employment was terminated, but after requesting that he be allowed to resign, he was allowed to do so.
11. On February 1, 2003, Griffiths conducted a spot check on Complainant's shift as bartender, and there was a significant discrepancy between the number of beers registered as having been sold and empty bottles remaining at the end of her shift. Griffiths testified that there were 62 beer bottles in excess of the number of sales.
12. As a result of these discrepancies, Griffiths re-stated the drink policy in writing, advising staff that giving free drinks was against the policy of the Grille and telling them they could give a complimentary appetizer if they felt the need to give a customer something special. (Ex. 5) According to Griffiths, on Friday,

February 14, 2003, he reiterated the policy to Complainant, and had her restate the policy to him to ensure that she understood it. Complainant testified that she was aware of the company policy against giving away free alcohol. Complainant was the only employee on duty on the evening of February 14, 2003.

13. On February 14, 2003, Griffiths did a spot check of inventory before and after Complainant's bartender shift. According to Griffiths, there were 21 empty beer bottles behind the bar, prior to her shift. When he completed an inventory of empty beer bottles the following morning, there were 128 empty bottles behind the bar. After tallying the sales register, he discovered 46 empty beer bottles were unaccounted for by sales. Complainant stated that it was her policy to put all the empty beer bottles in a beer box behind the bar or throw them away.

14. During the evening of February 14, 2003, one of Complainant's supervisors at the BAC, Barbara Lyons, was in the Grille. Complainant asked her to deliver two glasses of wine that were not ordered to a party that was waiting for their meal. Lyons stated that she was unaware of the policy against giving free liquor because she did not work in the Grille. Lyons testified that the Grille was not very busy that night and she did not think it possible that Complainant could have given away 46 beers, but she was not really paying attention. Although Lyons testified that Complainant told her that Griffiths called Complainant lazy, incompetent and stupid, and once said something about her being at home with her children, Lyons never personally witnessed any such behavior. Lyons stated that she never observed Griffiths behave in any way that was negative toward female employees nor to Complainant specifically.

15. Griffiths testified that based on the results of this spot check he made the decision to terminate Complainant. On February 20, 2003, Complainant was terminated from both the Grille and the BAC. Daly testified that the Grille was owned by the BAC and that the liquor license for the Grille was in her name as the General Manager of the Club. Daly testified that Griffiths came to her to discuss discrepancies in the liquor sales and that she supported his decision to terminate Patrick Foley. Daly testified that she did not have any involvement in Griffiths' decision to terminate Complainant. Daly indicated that she never received any complaints, either direct or indirect, about Griffiths' treatment of women in the club and that the Grille employed a high percentage of females.

16. Raws testified in deposition that she was at the meeting where Griffiths terminated Complainant and had to end the meeting because Complainant was loud and accusatory and yelling at Griffiths that he had been out to get her. Raws testified that, in her view, it was a difficult decision for Griffiths because he genuinely cared for Complainant, but the discrepancy in the inventory left him with no other option. Complainant was also terminated from the BAC, when she was terminated from the Grille.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B § 4(1) prohibits discrimination in employment based on sex/gender and § 4(4) prohibits retaliation for opposing any practices forbidden by the chapter. Complainant alleges that she was subjected to adverse terms and conditions of employment on account of her gender and that

subsequent to complaining of gender discrimination to her managers at the BAC, she was terminated from her employment in retaliation for her complaints of discrimination.

A. Gender Discrimination

Complainant's allegations of gender discrimination are more properly characterized as the assertion of a gender based hostile work environment. Her claims are essentially about sexism, stereotyping of her as a female employee and gender harassment, all of which she claims lead to her termination.

The Commission has analyzed claims of gender harassment using the models established in hostile work environment sexual harassment cases. Dinsmore & Ford v. Home Security, 19 MDLR 4, 6 (1997); Lazure v. Transit Express, 22 MDLR 16 (2000). Relying on the precedent set in College-Town Div. of Interco v. MCAD, 400 Mass. 156 (1987), the Commission has held that when harassment in the workplace based on one's protected class is so severe or pervasive as to alter the terms and conditions of employment, it falls within the scope of the prohibition against discrimination in M.G.L. c. 151B, section 4(1). In order to prevail on such a claim Complainant must establish that she was subjected to a work environment pervaded by harassment or abuse on account of her gender "with the resulting intimidation, humiliation and stigmatization," that creates a barrier to her "full participation... in the workplace." Id. at 162.

Complainant alleges that Griffiths' comments to her and complaints about her performance constituted gender harassment and were demeaning to her as a woman. Complainant alleges that Griffiths made comments to her on two different occasions that she was a "typical woman," and a "cheap little bitch." She alleges that when she was late to work one day he insinuated that she should stay home with her children and stated,

“this is why women should not be working.” After each of these incidents Complainant alleges that she became very upset and made complaints to her supervisors or co-workers at the BAC. However, not a single witness testified that Complainant complained of discrimination or harassment on account of her gender. While I credit the testimony that Griffiths was upset with and yelled at Complainant on more than one occasion, I do not believe that her gender was the motivation for his conduct. Griffiths has articulated legitimate, performance based, reasons for chastising Complainant.

The conduct complained of is evaluated from the standpoint of a reasonable person, taking into account the particular context in which it occurred. While Complainant states that she believed that Griffiths’ conduct arose from discriminatory animus related to her gender, I do not find this assertion credible. Nor am I persuaded that such a belief is reasonably supported by the evidence. Other than Complainant’s testimony on this issue, which I discredited, there is no other evidence to corroborate her allegations or belief that Griffiths’ conduct was motivated by sexism or gender discrimination or that her termination was the result of gender discrimination.

Despite Complainant’s assertions that Griffiths used an angry and demeaning tone with her, this without more, is insufficient to establish gender discrimination. There was ample evidence in the record and Griffiths admitted that he had legitimate work related reasons for being angry at Complainant and critical of her work performance. He was admittedly upset when she failed to turn on the ice machine, leaving the restaurant with no ice and when she showed up hours late for her lunch-time shift, after calling to state she would be a little late. On these occasions Griffiths complained about an aspect of Complainant’s performance that he viewed as deficient and that had a direct impact on

the smooth running of the Grille. Given these facts, Complainant has not persuaded me that Griffiths subjected her to a hostile work environment based on her gender. Despite the fact that the work environment may have been unpleasant, on occasion, due to Griffiths being vocally critical of her poor performance, it is reasonable to assume that this was because she had neglected certain important duties. Other than Adolph's testimony that Griffiths yelled at Complainant and treated her very badly on one occasion, there is no corroboration of any denigrating or sexist comments Griffiths is alleged to have made.

It was also established that Complainant did indeed become very upset when Griffiths criticized her performance or chastised her. There was testimony that she cried, complained openly to certain co-workers and managers of the BAC, and was known to cause scenes. While her complaints ultimately occasioned a meeting with supervisors at the BAC to try to work things out between her and Griffiths, there was no evidence to suggest that sexism or gender discrimination was the subject of the meeting, or that Complainant was ultimately terminated on account of her gender. Consequently, Complainant's claim of gender harassment and termination on account of her gender must be dismissed.

B. Retaliation

General Laws c. 151B § 4(4) prohibits an employer from discharging an employee because he has opposed practices forbidden by the chapter. 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 Sheriff's Department, 22 MDLR 208, 215 (2000), quoting Ruffino v. State Street

Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). In order to prove a claim of retaliation, Complainant must demonstrate that: (1) she participated in protected activity; (2) Respondent knew about her participation in the protected activity prior to taking any adverse action against him; (3) Respondent subjected Complainant to an adverse employment action; and (4) a causal connection exists or can be inferred from Complainant's participation in the protected activity and the Respondent's adverse action(s). Mole v. University of Massachusetts, 441 Mass. 582 (2004).

Complainant alleges that she was terminated from her employment from the Grille and the BAC on the pretext that she was giving away free liquor in violation of the Grille's policy, and that the real reason was in retaliation for her having complained about Griffiths' gender based discriminatory conduct. Complainant need not be successful in her underlying claim of discrimination in order to prevail on a claim of retaliation. She need only prove that the motive for the retaliation was her complainant about discrimination.

In this case Complainant alleges that she complained to several co-workers and supervisors at the BAC about Griffiths' harsh treatment of her, which she alleges was motivated by her gender and created a discriminatory hostile work environment. However, Complainant did not establish and that she engaged in protected activity. The BAC managers testified credibly that she never complained to them or Griffiths about discrimination or gender harassment, but rather, complained only that Griffiths treated her harshly. There is no corroboration from any witnesses that Respondent's managers were aware that Griffiths ever used sexist language or language that denigrated females or complainant on account of her gender. They testified that they never received any

complaints of gender harassment from Complainant, nor did they ever witness Griffiths treating women in a demeaning manner. Their interactions with Complainant surrounding her contretemps with Griffiths were about performance related issues and the fact that Complainant resisted and re-acted badly to criticism. Complainant never actually complained of gender discrimination. I find her complaint about Griffiths' tone when he chastised her, to be insufficient to raise the specter of gender discrimination, and her complaints in this regard were certainly not interpreted as such by her superiors. Therefore, having failed to establish that she engaged in protected activity, Complainant has not proved that her termination was retaliatory and in violation of G.L. c. 151B.

Moreover, in order for me accept the argument that Complainant's termination was in retaliation for any alleged complaints of gender discrimination, I would have to find that Griffiths concocted a scheme to misstate the inventory, which resulted in the termination of both Complainant and a long-time male bartender, Patrick Foley, or that Griffiths decided to frame Complainant for the misconduct of others, in which case, his explicit warnings to her and the termination of Foley would make no sense. These are not reasonable conclusions supported by the evidence. Ultimately, Complainant was treated in the same fashion as her male counterpart who was terminated for suspicion of giving away liquor in violation of the Respondent's rules. I find that Griffiths' actions were supported by a legitimate non-discriminatory reason and were not retaliation in violation of G.L. c. 151B. Therefore, Complainant's claim of retaliation must be dismissed.

IV. ORDER

Complainant's charges of gender discrimination and retaliation in violation of G.L. c. 151B §§ 4 (1) & (4) are hereby dismissed.

So Ordered this 17th day of September, 2007.

Eugenia M. Guastaferr
Hearing Officer