

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

YOLANDE LOUIS & MCAD,  
Complainants

v.

DOCKET NO. 05-BEM-01080

KIESSLING TRANSIT, INC. &  
ROBERT CLERMONT,  
Respondents

Appearances: J. Whitfield Larrabee, Esq. for Complainant  
Stephen M. Foley, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 20, 2005, Complainant filed a complaint with this Commission charging her former employer, Respondent, Kiessling Transit, Inc., and her supervisor, Robert Clermont, with quid pro quo and hostile work environment sexual harassment resulting in her unlawful termination. The Investigating Commissioner found probable cause to credit the allegations of the Complaint and efforts at conciliation failed. The case was certified for hearing in May of 2008 and a hearing was held before the undersigned hearing officer on January 7 and 8, 2009. The parties submitted post-hearing briefs in April and May of 2009. Having reviewed their briefs and the entire record of the proceedings, I make the following findings of fact and conclusions of law.

## II. FINDINGS OF FACT

1. Complainant, Yolande Louis, is a female of Haitian national origin whose primary language is Haitian Creole.<sup>1</sup> Complainant began her employment with Respondent in November of 2004 as a shuttle van driver. Prior to working for Respondent Complainant held various cleaning and housekeeping jobs.
2. Respondent, Kiessler Transit, is an employer within the meaning of M.G.L. c. 151B. The route which complainant drove for Respondent was called the Link, a shuttle service provided under contract between Respondent and the MBTA to provide transportation service in the Mission Hill area of Boston.
3. John Sullivan is the General Manager of Respondent, Kiessler Transit, located in Norfolk, Massachusetts. Sullivan testified that Kiessler Transit had contractual obligations with the MBTA to operate and provide transport vehicles for the Link. Sullivan described the Link as a neighborhood shuttle service managed by the Mission Hill Neighborhood Association and funded by the MBTA and the New England Baptist Hospital. The shuttle service had three mandated stops which included the New England Baptist Hospital, the Landmark Assisted Living Facility off Parker Avenue in Mission Hill, and the Stop and Shop grocery store on Calumet Street.
4. Pursuant to its contractual obligations with the MBTA, the vehicles Respondent used to transport passengers were required to be ADA compliant and were required to be regularly inspected before each shift. Passengers who used the Link's shuttle service were frequently patients in wheelchairs and included non-

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<sup>1</sup> A certified Haitian Creole interpreter was present at the Hearing and the entire proceeding was translated from English to Haitian Creole.

ambulatory residents of the Landmark facility. Respondent's van number 309 which was assigned to the Link was specifically designed to transport individuals with disabilities and had straps to secure wheelchairs. There was extensive testimony about the four point tie down system used to secure wheelchairs in the van and about photographs of the interior of the van floor. (Exs. C-2, C-3, C-5)

5. In her duties as a van driver for the Link, Complainant was supervised by Robert Clermont who was a route supervisor and who also spoke Haitian Creole. She received training in driving the transport van from Clermont and another route supervisor. Complainant testified that she was trained how to strap passengers in wheelchairs into the van, but that her service did not transport individuals in wheelchairs. She stated that Clermont advised her not to pick up passengers in wheelchairs because of a previous accident with a passenger in a wheelchair, whose chair crashed through to the driver. I do not credit the testimony that Complainant was told not to transport passengers in wheelchairs or that she was not required to do so, as it contradicts the testimony of Clermont, van driver Jean Mentor, and Respondent's General Manager.
6. Complainant alleged that during her training in November of 2004, Clermont asked her if she had a husband and told her that she needed a boyfriend to take care of her. She also testified that he asked Complainant if she liked him and wanted to be with him. While I believe that Complainant and Clermont had some discussion of Complainant's personal life, I find that she initiated this conversation and that he said nothing sexually offensive to Complainant. In the context of the discussions about her family and the fact that she had four children,

Clermont may have stated words to the effect that Complainant needed someone to help her take care of the children, but I do not believe that this was a sexual overture to Complainant or a request for sexual favors.

7. Clermont testified that on Complainant's first day of work he was buying Chinese food near her apartment and she invited him to her house to eat the food.

According to Clermont, Complainant introduced him to her two daughters and discussed her family situation with him. She told Clermont about her about ex-husband and the many problems she had had with him, including how he cheated her out of a house in Haiti that she had purchased before she was married. After that first occasion, Complainant invited Clermont to her house a number of times, and she sometimes brought food to him at work. She also bought Clermont some socks and a sweater at Christmas to thank him for helping her. They had many conversations about her family problems in Haiti. Clermont stated that a couple of times he brought Complainant's pay check to her apartment at her request. I do not credit Complainant's testimony that when Clermont handed the check to her that he would hold her hand. Clermont stated that March 4, 2005 was the last time he visited Complainant at her home. I credit Clermont's version of his friendship with Complainant.

8. On or about April 11, 2005, Respondent's General Manager Sullivan directed Clermont to tell Complainant that her employment with Respondent was terminated at the end of her shift because she had she refused to pick up some passengers in wheelchairs at the Landmark Assisted Living Facility. Sullivan testified that he made the decision to terminate Complainant after he received a

complaint from Kay Gallagher who oversees the Mission Hill Link Board. The complaint initiated with April Thomas, the activities director at the Landmark Assisted Living Facility. Sullivan identified the letter of complaint from Thomas and stated that he relied upon the information contained therein in making the decision to terminate Complainant. (R-3) Thomas complained that the van Complainant was driving on April 11, 2005 drove through the Landmark Facility and refused to stop to pick up some residents in wheelchairs. After the wheelchair residents waited another 45 minutes for the van to return, Thomas forced the van to stop, and sought to board the wheelchair passengers. According to the complaint, Complainant refused to board the passengers, stating that she had a schedule to keep and wheelchair passengers took too long to board.

9. Sullivan testified that Complainant's refusal to transport handicapped passengers was a violation of the law and could have jeopardized Respondent's contract with the Link or resulted in liability to Respondent. He stated that he had no reports or knowledge of malfunctioning equipment and absent any such information, there was no justifiable reason for the refusal to transport a person with physical disabilities. For these reasons, he directed Clermont, who spoke Haitian Creole, to inform Complainant that she was terminated at the end of her shift. Clermont testified that he complied with this directive by calling Complainant at home at approximately 9:30 p.m. on April 11, 2005. According to Clermont, Complainant asked to meet with Sullivan, and Clermont offered to take her to Respondent's offices, but she never called him. I credit the testimony of both Sullivan and Clermont, that Clermont did not have the authority to fire Complainant, and he

did not participate in the decision to terminate Complainant's employment, but that he was merely the messenger.

10. Complainant alleged that she did not understand why she was terminated but she decided to go and take some pictures of the van, because Clermont had indicated there was a problem with her not picking up a handicapped person. Complainant claims that the photos she took following her termination show that the bottom strap needed to secure a wheelchair is missing. She also claims that Clermont told her not to pick up wheelchair patients with that van because it was not properly equipped. Clermont testified that he covered Complainant's route on April 12, 2005, the day after she was terminated and the tie down straps for wheelchairs were in the van. He stated that the straps are removable and are stored in a compartment in the wall of the van next to the seats. I credit his testimony. Complainant acknowledged that the section of her time sheet for the period at issue where she was required to note any missing equipment in the van was left blank.

11. According to Complainant, on the day following her termination, Clermont came to her home and tried to kiss and hug her, and when she refused, Clermont stated words to the effect of, "You don't need a job? If you needed a job you wouldn't act like that," and then left her home. I do not believe that this incident occurred. Clermont testified that he phoned Complainant to inform her of the termination but never went to her home and I credit his testimony.

12. Complainant testified that in the days after her termination she attempted to contact John Sullivan by phone and was unable to do so. On Friday, April 15,

2005 Complainant, and her daughter, who speaks English, went to Respondent's offices and asked to speak with John Sullivan. Sullivan spoke to them and explained that Complainant's employment was terminated because of her failure on April 11, 2005, to transport passengers in wheelchairs who were awaiting a ride from the Link shuttle, and that this was a violation of the ADA and Respondent's contract with the MBTA. Complainant asked for and received a written termination notice by Respondent. (Ex. R-1) Complainant did not raise any issues of sexual harassment or improper conduct by Clermont to Sullivan at this meeting.

13. Clermont testified that after Complainant visited Respondent's offices, one of her daughters called him to state that Complainant was told at the office that Clermont had fired her and she stated that he would pay for that. He stated that a week or so later Complainant told him that one of her daughters was studying the law and that he would pay for firing her. Clermont testified that Complainant blamed him for the termination and told people that he fired her. Clermont also stated that a month or so earlier Complainant had been removed from the Link route by supervisor Kevin Dixon and assigned to another route for three weeks because she had refused to pick up a passenger on the Link route. Clermont stated that he had no "harmony" with Complainant after that because she thought he had removed her from the Link in order to give the assignment to a friend of his, and that Complainant told everyone he had removed her from the route. Clermont testified that this is what he is paying for. I credit his testimony.

14. After receiving notice of Complainant's charge of sexual harassment against the company and Clermont, Respondent suspended Clermont for seven months. He stated that he was suspended because Complainant told John Sullivan that Clermont went to her house and robbed her and kissed her. Sullivan stated that it is Respondent's policy to suspend an employee upon receipt of an MCAD complaint until they can complete an investigation or determine if allegations are substantiated. Sullivan testified that Clermont was reinstated because many months ensued without a disposition in the matter. In the ten years he worked for Respondent, Clermont he had no other complaints of any kind filed against him.

### III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B § 4(16A) prohibits sexual harassment in employment.<sup>2</sup> The Complainant in this case has alleged actions by her supervisor that constitute quid pro quo and hostile work environment sexual harassment. As defined below, quid pro quo sexual harassment occurs when a term or condition of employment, or remaining employed, is conditioned upon the granting of sexual favors. A hostile work environment occurs when unwelcome or offensive conduct is so pervasive that it creates a barrier to Complainant's full and untrammelled participation in the workplace, alters the terms and conditions of her employment or unreasonably interferes with her

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<sup>2</sup> Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or sexually offensive work environment." *Collegetown Division of Interco v. Massachusetts Commission Against Discrimination*, 400 Mass. 156, 165 (1987). See also *Massachusetts Commission Against Discrimination Sexual Harassment in the Workplace Guidelines*, pp.4-6 (2002)

work performance. See *Ramsdell v. Western Mass. Bus Lines, Inc.*, 415 Mass. 673, 677 (1993).

The determination of whether conduct constitutes sexual harassment depends upon the severity and frequency of the conduct, and whether it is unwelcome and offensive to the reasonable person. The conduct must be sufficiently severe and pervasive to interfere with a reasonable person's work performance. *Muzzy v. Cahillane Motors, Inc.* 434 Mass. 409 (2001). The alleged conduct must be both objectively and subjectively offensive from the perspective of a reasonable person. *Ramsdell, supra.* at 677. The objective standard means that evidence of gender harassment is to be considered from the "view of the reasonable person in plaintiff's position." *Muzzy, supra.* at 411-412.

Complainant alleges that she was sexually assaulted by her supervisor, Robert Clermont, when he attempted to kiss her after she was terminated from the job and when she declined his advances stated, "oh you don't want a job." Complainant also alleged that Clermont previously told her she needed a boyfriend and asked her if she liked him and wanted to be with him. I did not find any of Complainant's allegations regarding such advances to be credible. I found Complainant generally to be an evasive witness and I did not find her testimony to be credible or forthcoming. I believed Clermont's testimony that he and Complainant merely had a friendship that was initiated by Complainant, that she invited him to her home on a number of occasions, cooked for him and bought him presents. I also believed Clermont's testimony that Complainant had a motive for initiating charges of sexual harassment against him, and that she did so to punish him because she believed he had made the decision to terminate her employment

and previously to remove her from the Link route. Thus, I conclude that Complainant has not established a prima facie case of sexual harassment.

Moreover, even if Complainant's allegations regarding Clermont were credible, the evidence was clear that Clermont did not have the authority to fire Complainant, did not initiate her termination and did not make the decision to terminate her. Thus, I place no credence in Complainant's allegation that Kiessling terminated her employment for her refusal to submit to Clermont's sexual advances or that Clermont conditioned her continued employment on submitting to his sexual advances. As her supervisor, and a person who spoke her language, Clermont was merely charged with delivering the message. Sullivan, who made the decision to terminate Complainant, had a legitimate, non-discriminatory reason for doing so, a reason thoroughly unrelated to Complainant's post-termination allegations of sexual harassment.

Even if one were to conclude that Sullivan's decision to terminate Complainant without having first sought or received an explanation from her, was precipitous, harsh or otherwise unfair, there is not one scintilla of evidence that the decision was motivated by retaliation for her having refused alleged sexual advances. In order to prevail, Complainant must ultimately prove that Respondents acted with discriminatory intent, motive or state of mind. *Lipchitz v. Raytheon*, 434 Mass. 493, 504 (2001). This she has not done. Even where a "managerial decision may be unsound or even absurd,"... which was not the case here ... "if the reason given for the decision is the real reason," and is supported by credible evidence, absent a showing of pretext, the Complainant cannot prevail. *Smith College v. MCAD*, 376 Mass. 221, 229 (1978).

Finally I place no stock in Complainant's argument that her refusal to transport disabled passengers under alleged unsafe conditions was protected activity under G.L. c. 151B, s. 4(4), because she was opposing discrimination against the disabled. Hence I do not believe that her termination was in retaliation for engaging in activity protected by G.L. c. 151B.

Given all of the above, I conclude that Complainant has failed to prove that she was the victim of sexual harassment or that she was terminated for rejecting her supervisor's sexual advances. The evidence does not support a conclusion that Respondents violated G.L. c. 151B.

#### IV. ORDER

It is hereby Ordered that the above referenced complaint be 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 pursuant to 804 CMR 1.23 by filing a Notice of Appeal of this decision with the Clerk of the Commission within ten days after receipt of this Order and a Petition for Review within thirty days of receipt of this Order.

So Ordered this 10<sup>th</sup> day of December, 2009.

Eugenia M. Guastaferr  
Hearing Officer

