

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & KIM MELANSON,
Complainants

v.

DOCKET NO. 98-BEM-2601

ELECTRONIC SECURITY &
CONTROL SYSTEMS, INC.
Respondent

Appearances:

Walter M. Foster, Esquire for the Complainant
Glen A. Duhl, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 20, 1998, Complainant Kim Melanson filed a complaint with this Commission charging Respondent with discrimination on the basis of gender in violation of M.G.L.c.151B. Specifically, Complainant alleged that Respondent failed to pay her a sales commission because of her gender. The Investigating Commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on April 1, 2 & 7, 2003. After carefully considering the entire record

and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. In 1989, Complainant Kim Melanson was hired as an Office Manager by Respondent Electronic Security & Control Systems at its Needham office. Her job duties included taking service calls, timekeeping, sending technicians on service calls, ordering equipment, sending equipment out for repairs and arranging for training on new equipment. As part of her duties, Complainant would call vendors in order to obtain equipment prices and delivery times.

2. Respondent is family-owned and operated business that sells and installs security equipment and systems with offices in Bridgeport, CT, Windsor, CT and Bedford, MA. Prior to 1995, the firm was owned by Ben Jacobellis, Sr. ("Ben Sr.") and his sons James Jacobellis ("Jim") and Ben Jacobellis Jr. ("Ben, Jr.")¹. Ben Sr. retired in 1995, and Ben Jr., John and James Jacobellis took over the operation of the company. Other family members who worked

¹ In order to avoid confusion, family members with the surname Jacobellis are sometimes referred to by their first names.

for Respondent include son Nicholas Jacobellis ("Nick") and daughters Annabelle Manalga and Diane Lucivero.

3. Jim Jacobellis has worked for Respondent since the mid-1970s, initially as an installer of security systems. He is currently Respondent's vice-president and runs the Bedford, MA. office, performing sales, designing systems, overseeing jobs, dealing with personnel issues and directing and managing employees. Jim and Respondent's other principals do not receive sales commissions, because they share in the company's profits.

4. John Jacobellis is Respondent's vice president in charge of sales and works out of the company's Windsor, Connecticut office.

5. Annabelle Manalga has worked for Respondent since 1980. Manalga worked briefly as a salesperson for Respondent in the 1980s, earning a salary plus commissions. She is currently an office manager and corporate secretary in Respondent's Bridgeport office. Manalga testified that she frequently takes telephone or fax orders. She receives a salary, but no commissions. She does have input into some

management decisions regarding pay and hiring. I credit her testimony.

6. Judith Kozak had worked for Respondent since September 1995. She is the office manager in Respondent's Windsor, Connecticut office. Kozak testified that she performed clerical tasks similar to those performed by Complainant, including sales of equipment to existing clients. Kozak used a template containing model numbers, equipment costs and formulas for calculating the total costs, but she never asked for or received commissions, because she considered these tasks part of her duties as an office manager. I credit her testimony.

7. Diana Lucivero worked for Respondent in the early 1980s. After briefly working in an administrative position, she became a sales representative in the Needham, MA office. As a sales representative, Lucivero worked primarily out of the office, meeting with customers. She testified that when an office manager typed up proposals for her, that person did not get a commission. Lucivero would receive commissions for original sales, as well as for residual sales resulting from that sale. Lucivero

worked for Respondent until she became pregnant in the late 1980s. I credit her testimony.

8. In addition to office staff, Respondent employed salespersons and project managers. Both salespersons and project managers receive commissions on sales. Jim and John Jacobellis do not receive commissions for their sales because they are owners of the company and share in its profits. In addition, no commissions were paid on "house accounts" that were landed by the company's principals.

9. Israel Unrad has worked as a project manager for Respondent in its Bridgeport, Connecticut office since 1986. Unrad's duties included frequenting work sites to make sure the jobs sold to customers by Respondent were being delivered in a satisfactory manner and "on budget".

10. According to Unrad, the position of project manager required some technical background as well as familiarity with Respondent's systems. When customers have problems, the project managers address their concerns and fix the problem. I credit this testimony.

11. Unrad testified that prior to Ben Sr.'s retirement, Unrad raised with him the issue of commissions. At the time, only sales persons received commissions and Unrad told Ben, Sr. he thought project managers should receive commissions as well. I credit this testimony. It is undisputed that, at some point before Ben Sr.'s retirement, Respondent instituted a policy whereby project managers were paid sales commissions in addition to their salaries as an incentive to make sales connected to their projects. The sales commissions of project managers were smaller than the sales commissions of sales persons.

12. Complainant initially worked in Respondent's Needham office. The office later moved to Bedford, MA. Jim Jacobellis ran the Needham office and was Complainant's immediate supervisor. Complainant had a good working relationship with Jim and the other employees in the Bedford office, where the atmosphere was relaxed. All of Complainant's work was performed in the office. Nick Jacobellis, who was a sales person, and later a project manager, performed much of his work out of the office. Technicians Steve and Randy installed equipment and were rarely in the office. Office workers did not receive sales commissions

13. In around May 1991, Nick Jacobellis, then the only sales person in the Bedford office, had become "burned out" with the sales position, and he became a Project Manager. As a Project Manager, Nick received both a salary and commissions.

14. Respondent had an account with Raytheon Corporation that was initially landed by Nick and Jim. Subsequent commissions on the account were awarded to Nick because he later sold some equipment to Raytheon related to the account. Respondent also had an account with MIT that was landed by Jim. Nick received commissions on the MIT account.

15. Respondent had an ongoing account with the Massachusetts Trial Court for the sale and installation of a security system. It was not clear whether this account was a house account. Nick Jacobellis worked closely over several years with Dan English at the Massachusetts Trial Court on this project.

16. Complainant sometimes sold equipment over the telephone to existing customers who would call for

equipment prices. Complainant could usually determine the price for equipment because prices were generally fixed and could be found in price books kept in the office.

Complainant would conduct these transactions by faxing or mailing the quoted price to the customers, and if the customer agreed to the price, Complainant would type up a purchase order and book the job. It was undisputed that Complainant sold only equipment to existing customers and never landed a new account. Further, it was undisputed that Complainant never made sales involving labor or determined labor costs and she never made sales to new customers. Complainant did not receive commissions on any equipment sales she made.

17. In 1997 and 1998, Jim Jacobellis was going through a divorce and was frequently out of the office dealing with matters related to the divorce. Jim's frequent absences created more work for Complainant.

18. On June 23, 1998, Dan English from the Massachusetts Trial Court faxed a request for equipment to the Bedford office at 2:00 p.m. requiring a response by 5:00 p.m. the same day. When the fax arrived, neither Jim nor Nick was in the office. According to Complainant, she

then forwarded the fax to John in Hartford, but received no response. Then, using a price book found in the office, Complainant priced out the job and returned the completed fax to Dan English before the deadline. Complainant's work resulted in a major equipment sale to the Massachusetts Trial Court of \$346,000.00. I credit Complainant's testimony regarding this sale, except that I do not credit her testimony that she did not reach John Jacobellis that day.

19. According to John Jacobellis, Complainant merely had to fill in some "standard pricing data" and "fill in some blanks" for the Massachusetts Trial Court account. Further, he recalled that Complainant reached him by telephone that day while he was out on a sales call and he helped her complete the form over the telephone. I credit his testimony that he assisted Complainant in the process.

20. The following day, June 24, Complainant called John Jacobellis and asked him to pay her a commission on the Trial Court sale. He refused to give her a commission, but suggested Respondent might pay her a small bonus of approximately \$150.00. According to Complainant, this proposal was "like a slap in the face." She also wrote a

letter to John Jacobellis stating that Nick would have received a commission for doing the same work. (T3, 4/1) It is undisputed that John Jacobellis told Complainant that in order to receive commissions she would have to give up her position as office manager and become a sales person. Complainant testified that she did not want to go out and "pound the pavement" as a sales person and have to rely solely on commissions. She felt that if Nick could keep his regular job and get commissions for phone sales, that she should be able to get commissions as well.

21. After his discussions with Complainant, John testified that he did not feel Complainant should receive any sort of bonus because he felt it was not fair to the Respondent's other office workers who performed similar tasks without compensation, but the ultimate decision was Ben Jr.'s.

22. Complainant testified that during a conversation with Nick about commissions, he stated to her that, "Girls in the office don't receive commissions." I credit this testimony. Nick Jacobellis recalled a conversation with Complainant and technician Randall Claire in the Bedford office concerning Complainant's entitlement to a commission

on the Massachusetts Trial Court equipment sale in which he stated that Respondent did not award commissions to people in the office, but suggested that Complainant might receive a bonus for the work she performed because of the size of the sale. Complainant composed a letter for Nick's signature in which he supported her request for compensation of \$1,500.00 for the sale. The letter was sent to John Jacobellis.

23. Complainant testified that after being denied the commission, she felt she wasn't going to advance at Respondent, and, after obtaining another job, she resigned from her position at Respondent on August 19, 1998.

24. In August 1998, around the time of her resignation, Complainant received a \$1,500.00 bonus for the work performed on the Massachusetts Trial Court account.

25. According to Jim Jacobellis, Nick would have received a commission on the Massachusetts Trial Court order because he worked on the account. Jim testified that, as project manager, Nick spent three days a week with the client out in the field supporting the project, working

on physical problems, and was on the job site on a day-to-day basis. I credit this testimony.

26. Jim Jacobellis testified that, in contrast, Office Managers remain in the office, handling the telephone, working on proposals and performing some customer support duties. Complainant would never have been permitted to establish a price, as that was the managers' job. I credit this testimony.

III. CONCLUSIONS OF LAW

M.G.L.c.151B, sec. 4(1) makes it unlawful to discriminate in employment on the basis of gender.² Complainant alleges that Respondent discriminated against her on the basis of gender by failing to pay her commissions on telephone sales orders that a similarly situated male employee, Nick Jacobellis, would have received. In order to establish a prima facie case of gender discrimination, Complainant must show that she was a member of a protected class, that she was qualified and reasonably performing her job, that she was subject to

² The Massachusetts Equal Pay Act, M.G.L.c.149,sec.105A-C, was referenced in Respondent's post-hearing brief. That statute is not enforced by the MCAD and thus is not addressed in this decision.

adverse treatment and that she was treated differently from other employees similarly situated who were not members of the protected class. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wheelock College v. MCAD, 371 Mass. 130 (1976). The Complainant must show that the person to whom she compares herself is "roughly equivalent", Perkins v. Brigham & Women's Hospital, 78 F.3d. 747, 751(1st Cir. 1996) or "comparably credentialed." Mack v. Great Atlantic & Pacific Tea Company, Inc., 871 F2d. 179, 182(1989).

I conclude that Complainant has failed to establish a prima facie case of gender discrimination. Complainant, a female, is a member of a protected class who was qualified for and reasonably performing her job. However, I find that Nick Jacobellis was not similarly situated to Complainant and that she was not treated differently from similarly situated employees. On one occasion, Complainant performed work that resulted in a substantial sale of equipment for Respondent. There was ample testimony that the job of project managers required technical knowledge, frequent visits to job sites and specialized knowledge of Respondent's projects and security systems. The job differed significantly from Complainant's position of

office manager, a clerical position requiring her to remain in the office and perform clerical work. Commissions received by Nick Jacobellis resulted from his position as project manager and not because of his gender.

Any sales of equipment Complainant made were to existing clients with pre-set prices. Further, there was uncontroverted evidence that Respondent had an established practice of paying project managers commissions on sales related to their accounts and that clerical workers never received commissions. Judith Kozak, the office manager in Respondent's Bridgeport office, is a more appropriate comparator to Complainant, as her job functions were nearly identical to Complainant's. Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. at 130 ("the most common comparators are performance, qualifications and conduct"). Kozak testified credibly that she frequently assisted in telephone sales, but did not receive commissions.

Complainant worked harder in 1998 because of Jim Jacobellis' absences from the office and made a substantial sale of equipment for Respondent. However, there was no evidence that Complainant's gender played a role in Respondent's decision not to pay her a sales commission for this work. Further, Complainant's work was eventually recognized in the form of a bonus some months after she

performed the work in question. Further, Nick Jacobellis' comment that "girls" in the office did not receive commissions did not constitute evidence of discriminatory animus. It was simply a reference to the fact that all of Respondent's office workers were women. There was no evidence that the women couldn't move into sales positions and in fact, Complainant turned down John Jacobellis' offer to become a sales representative.

For the reasons stated above, I conclude that Respondent did not engage in unlawful discrimination on the basis of gender and order that the complaint in this matter be dismissed.

IV. ORDER

The complaint in this matter is hereby dismissed. This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal with the full commission within 10 days of receipt of this order and a Petition for Review within 30 days of receipt of this order.

SO ORDERED, this 2nd day of October, 2003.

JUDITH E. KAPLAN,
Hearing Officer