

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & MARIA ORTIZ,
Complainants

v.

DOCKET NO. 03-BEM-01090
03-BEM-02961

HEALTHCARE SERVICES
GROUP, INC.,
Respondent

Appearances:

Johannes Z. Zlahn, Esquire, for Maria Ortiz
Timothy J. McCartney, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 29, 2003 and October 31, 2003, Complainant Maria Ortiz filed complaints with this Commission charging Respondent Healthcare Services Group, Inc., with discrimination and retaliation in employment on the basis of national origin in violation of M.G.L.c.151B§4. The Investigating Commissioner found probable cause to conclude that discrimination occurred. Attempts to conciliate the matters failed and, following a conciliation conference the following questions were certified for public hearing: 1. Whether Complainant was subjected to insults and adverse terms and conditions of employment on account of her national origin (Puerto Rican); 2. Whether Complainant's hours were reduced on account of her national origin; 3. Whether Complainant was retaliated against when she rejected a temporary transfer to another facility and was terminated after rejecting the transfer; 4. Whether Complainant suffered

any compensable damages from lost wages and/or emotional distress on account of the alleged discriminatory treatment and termination.

A public hearing was held before me on July 17, 18 and 26, 2007. Alice Bubello, a certified Spanish interpreter, translated the proceedings for Complainant, whose English comprehension is limited. After careful consideration of the record before me and the post-hearing submissions of the Respondent¹, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Maria Ortiz is a woman of Puerto Rican origin, currently residing in Charlestown, Massachusetts.

2. Respondent Healthcare Services, Inc. is a Connecticut-based company that subcontracts housekeeping and laundry services to numerous long-term care facilities. Since 1994, Respondent has contracted to provide housekeeping and laundry services to the Corey Hill (“Corey Hill”) Nursing Home, a small, 45-bed long-term care facility in Brighton, Massachusetts.

3. Joseph McCartney has been employed by Respondent since 1978 and is currently the manager of Respondent’s Northeast Region including New England and New York. McCartney’s office is located at the company’s headquarters in Connecticut.

4. Complainant was employed by Respondent from June 2002 to April 22, 2003, as a laundry worker at Corey Hill, where her duties were to launder clothing and linens utilized by staff and residents. Throughout her employment, Complainant was the sole hourly employee on Respondent’s Corey Hill staff who was of Puerto Rican origin. The

¹ Ortiz did not file a post-hearing brief

other laundry employees were Domingas De Pina, who is Cape Verdean and Maria Costa, who was Brazilian.

5. When first hired, Complainant worked five days per week, from 6:00 a.m. to 2:00 p.m. She worked one weekend day, every other weekend. From July to December, 2002, Complainant's supervisor was Account Supervisor Jose Badillo, who resigned his position in order to return to his native Puerto Rico. According to Complainant, Badillo never expressed dissatisfaction with her work performance.

6. On February 16, 2003, Antonio ("Tony") Matias, who is Cape Verdean, replaced Badillo as Respondent's Account Manager at Corey Hill. In this position, Matias was in charge of both housekeeping and laundry at that facility. Matias was Complainant's direct supervisor.

7. Canute ("Kenny") DeSouza, who is of Indian national origin, is Respondent's District Manager. In this position, he is responsible for Respondent's employees at 19 facilities, including Corey Hill. DeSouza has been Matias' supervisor since Matias' transfer to Corey Hill. As part of his duties, DeSouza visited Corey Hill on a weekly basis. DeSouza reported to Respondent's Regional Manager.

8. Respondent's Regional Manager, Pablo Smidt, is of Argentine origin and is fluent in both Spanish and English.

9. Shaun McCallum was employed by Corey Hill Nursing Home as its Director of Nursing from November 11, 2002 until October 18, 2003.

10. Complainant testified that Matias repeatedly commented to her that Puerto Ricans were "lazy" and frequently threatened to fire her. Complainant testified that although she felt bad about Matias' remarks, she walked away and did not respond to

such remarks. On cross-examination Complainant stated that when Matias made such comments, she responded, "If you want to fire me, fire me." I do not credit her testimony that Matias made offensive comments to her about her national origin. Matias denied ever making disparaging remarks to Complainant about Puerto Ricans and I credit his testimony.

11. Complainant testified that on one occasion, she approached DeSouza about Matias' comments, but he refused to discuss the issue with her. I do not credit her testimony. In her affidavit dated June 23, 2003 which was submitted to this Commission in connection with her charge, Complainant stated that she told no one in management about Matias' comments. DeSouza testified that Complainant once approached him to complain about Matias pressuring her to finish her work; however DeSouza testified that Complainant did not raise the issue of discriminatory comments. I credit DeSouza's testimony.

12. Shaun McCallum testified that, one Sunday afternoon Complainant complained to him that Matias had unfairly reduced her hours and that she intended to take the matter to the "Labor Board." McCallum told Complainant that if she had difficulty with Matias, to speak to Respondent's managers about seeking another assignment. According to McCallum, Complainant said nothing about any discriminatory conduct by Matias against her. I credit his testimony.

13. Antonio Matias testified that Complainant performed her job poorly, worked slowly and did not finish the laundry in a timely manner. He stated that Corey Hill employees complained to him about not having enough clean linens and clothing. He stated that he discussed this matter on a daily basis with Complainant.

14. DeSouza testified that on one occasion, Complainant approached him and said that Matias was driving her too hard to finish the laundry. DeSouza replied that Matias had to pressure her because the laundry had to be done in a timely manner. DeSouza in turn had to press his Account Managers because Respondent's clients expect the laundry to be done in a timely manner. DeSouza told Complainant that if she kept the washers and dryers running constantly, she would be able to complete the laundry by the end of her shift. DeSouza testified that Complainant never mentioned Matias making disparaging remarks about her national origin. I credit his testimony

15. Matias testified that in April 2003 he was paged to Corey Hill on two Sundays when Complainant was scheduled to work, because the facility did not have enough clean linen. On these occasions, Matias completed the laundry himself. After the second incident on Sunday April 13, 2003, he informed Kenny DeSouza about the matter. Complainant acknowledged that she called Corey Hill one Friday in April and told "someone who spoke Spanish" that she did not feel well and would not be in on Sunday. She believed that person would, in turn, inform Matias that she would not be in on that Sunday. She knew that Matias was called in to work one Sunday when she called out of work.

16. DeSouza testified that Matias informed him that he had to come to the Corey Hill facility to do laundry on the weekend because Complainant had not finished it. DeSouza then advised Matias to cut Complainant's hours until her work performance improved.

17. On Complainant's next day of work, Tuesday, April 15, 2003, Matias told Complainant that he was reducing her schedule by eight hours until she could prove she

could do the job. Matias documented these events contemporaneously in a “Verbal Counseling Record” dated April 15, 2003. (Exh. R-6)

18. Complainant testified that on April 17, 2003, she asked Matias for permission to leave work ten minutes early. She claimed that Matias told her that if she swept the sidewalk, he would decide whether to allow her to leave early. According to Complainant she swept the sidewalk, but Matias refused to allow her to leave early; instead he permitted Domingas De Pina to leave early that day. Complainant testified that, near the end of her shift that day, while she was in the laundry room putting away the clothes for the following day, Matias grabbed the clothes away from her, because she was complaining that he would not permit her to leave early. I do not credit her testimony that Matias grabbed the clothes from her. Her testimony regarding this incident was vague, inconsistent and was contradicted by the credible testimony of Matias. In describing this incident in her affidavit dated June 23, 2003, Complainant made no mention of asking to leave early or that Domingas De Pina was allowed to leave early.

19. Matias testified that that on April 17, while sweeping the courtyard, Complainant approached him and began to argue about the reduction in her hours. Matias responded that he did not wish to argue, and advised her to direct any questions to DeSouza. He denied telling Complainant to sweep the leaves, as that was not part of her job. He also denied grabbing clothes from her and denied giving De Pina permission to go home early. I credit his testimony.

20. Matias stated that during this conversation in the court yard, Complainant told him to watch out and stated, “You don’t know who you’re playing with.” I credit this testimony.

21. Complainant testified that on April 22, 2003, around noon, Matias entered the laundry room and, as she walked by Matias, he pushed her without provocation, causing her to fall to the ground. This interaction caused a number of Corey Hill employees to gather to see what had happened. Complainant immediately called the police from her cell phone. She also called a friend to drive her to the hospital. The police never came and Complainant proceeded to the emergency room at St. Elizabeth's Hospital, where she was examined and released with instructions to take Motrin as needed. I do not credit Complainant's testimony that Matias pushed her.

22. Matias testified that on April 22, 2003, he went to the laundry to pick up time cards. He testified that Complainant fell to the ground as he passed by her and began screaming, "You pushed me. You pushed me." He responded, "Maria I did not even touch you." Complainant immediately called 911. Matias denied pushing Complainant. I credit Matias' testimony. I find that Complainant deliberately created a scene and made a false accusation of assault against Matias.

23. Matias testified that the Corey Hill Administrator, Carol Dignon, came to ascertain what happened, took Matias into her office, told him to remain there and stated that she and Shawn McCallum, director of nursing, would handle the matter. Matias later gave Shawn McCollum a statement and then left the facility. The following day he gave a statement to DeSouza.

24. Shaun McCallum testified that on April 22 at about noon, he was at the first floor nurses station, when he observed Complainant looking out the window, sobbing. About an hour later, McCallum was paged to the second floor where Corey Hill

Administrator Carol Dignon told him that Complainant alleged that Matias had hit her and that she wanted to go to the hospital.

25. McCallum testified that he immediately separated Complainant and Matias and began to take statements from each as to what occurred between them.

26. According to McCallum, Complainant told him that Matias had struck her, causing her to fall to the floor. She showed him two small bruises just below her collar bone as proof of the assault. McCallum observed that the bruises had turned brown, which he believed indicated that they were old. He mentioned this to Complainant; who then claimed for the first time that Matias had pushed something into her on the previous week. Complainant also told McCallum that she had recently seen her doctor for stress. After giving her statement to McCallum, Complainant left for St. Elizabeth's Hospital. McCallum then interviewed Matias, who denied pushing Complainant. McCallum testified that Complainant never raised the issue of discrimination. I credit McCallum's testimony.

27. On the morning of April 23, 2003 DeSouza came to Corey Hill in order to investigate Complainant's allegations. McCallum gave him the statements he had taken the day before and, in addition, DeSouza took statements from Matias and Complainant, and sought out possible witnesses to the incident. According to DeSouza, Complainant never mentioned her national origin as an issue of contention between her and Matias. At this time Complainant provided DeSouza with a doctor's note stating that she could not return to work until April 28. DeSouza told Complainant that upon her return to work he would speak to Pablo Smidt about her situation. I credit this testimony.

28. Complainant testified that on April 23, 2003, Matias terminated her employment, but then called her back and offered her reduced hours instead of termination. I do not credit her testimony that Matias terminated her employment on April 23, 2003.

29. McCallum testified that initially he, Corey Hill owner Gilbert Thisse, and DeSouza all agreed that, pending the investigation, Respondent would offer Complainant a temporary transfer to another location, but that she would be allowed to return to work at Corey Hill, following a grace period.

30. McCallum testified that within in the space of a week following the alleged assault, Complainant twice came to the Corey Hill facility before she was cleared by her physician to return to work. On the first occasion, McCallum asked Complainant to leave the building. On the second occasion, upon observing Complainant in the facility's driveway, McCallum informed her that if she showed up again, he would call the police and have her arrested for trespassing. I credit his testimony.

31. After warning Complainant to refrain from coming to the workplace a second time, McCallum discussed the matter with Gilbert Thisse. They concluded that Complainant should no longer work at Corey Hill and so informed DeSouza. I credit his testimony.

32. Because he was fluent in Spanish, Smidt was designated to have a discussion with Complainant regarding her transfer to another position. To that end, Smidt and DeSouza set up a meeting with Complainant at a Brazilian café on May 1, 2003. According to DeSouza and Smidt, at the meeting Complainant was offered a transfer to

an identical position at the German Home in W. Roxbury and was provided with directions to that facility and the name of the manager.

33. Smidt, McCartney and DeSouza all testified that Respondent routinely separated employees when conflicts arose between them and it was a common practice to transfer employees in such situations. Ultimately Respondent offered to transfer Complainant instead of Matias because Corey Hill did not want her back.

34. Complainant testified that at the May 1 meeting, Smidt told her that if she dropped her MCAD complaint, Respondent would transfer her to The German Home, a long-term care facility located in West Roxbury. Complainant told them that she had no transportation to that location and did not know how to get there. I do not credit Complainant's testimony to the extent that she claimed DeSouza and Smidt asked her to drop her complaint. It conflicts with the credible testimony of DeSouza and Smidt that they did not learn of Complainant's MCAD complaint until May 5, 2003. When Complainant was questioned at the public hearing as to how Respondent may have learned of her MCAD complaint, she stated that maybe they learned of the complaint because she had called Respondent from the Commission's office. I do not believe this is a plausible explanation.

35. Complainant also testified that she attempted to find the German Home. However, her testimony in this regard contradicted her earlier testimony that she rejected the offer of a job transfer during the meeting. Instead, she claimed that she told Smidt and DeSouza that she would try to locate the German Home but would not accept the transfer if she couldn't get there. The next morning she called Smidt to say that she could not locate the German Home, that it was too far away and that she wanted to return to

Corey Hill. Smidt tried to give her directions again, but she insisted it was too far, she couldn't locate it and she refused to go.

36. DeSouza learned that Complainant never showed up at the German Home and he never heard from Complainant again. He learned of Complainant's MCAD complaint for the first time on May 5 when McCartney faxed him a copy of her complaint from Respondent's front office

37. Smidt denied telling Complainant she could return to Corey Hill if she withdrew her discrimination charge and denied telling her that she could not go to the German Home until she withdrew her charge. Complainant never mentioned the issue of discrimination at the May 1st meeting and Smidt had no knowledge of her complaint at the time of the meeting. Smidt and DeSouza testified that they first learned of Complainant's MCAD complaint the on Monday, May 5 when Joe McCartney faxed them a letter regarding Complainant's MCAD claim. I credit their testimony.

38. DeSouza stated that after considering all of the information they gathered in their investigation, they came to the conclusion that Matias had not pushed Complainant. The focus of the investigation was not discrimination because Complainant did not make any allegations of discrimination at the time. I credit his testimony.

39. Complainant filed a worker's compensation claim regarding her alleged injuries on April 22. That claim was denied. (Exh. R-1) Complainant also filed a police report regarding the April 22nd incident the following day. The police report did not result in any further police activity.

40. McCartney testified that he first received notice of Complainant's MCAD complaint by mail on May 5, 2003. He faxed copies of the notice to DeSouza and Smidt,

and advised them to no longer contact Complainant directly. He put the position statement together, and he asked DeSouza to obtain written statements. I credit his testimony.

III. CONCLUSIONS OF LAW

M.G.L.c.151B§4¶6 prohibits discrimination on the basis of national origin in employment. Complainant alleges that Respondent discriminated against her based on national origin by subjecting her to insults about Puerto Ricans and reducing her hours of employment and assaulting her. In order to establish a prima facie case of national origin discrimination, Complainant must show that she was a member of a protected class, that she was qualified and reasonably performing her job and that she was subjected to adverse treatment different from similarly situated employees not in her 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). Complainant has established the first prong of her prima facie case by virtue of her Puerto Rican national origin. However, she has failed to establish that she was adequately performing her job or that she was subjected to either a hostile work environment or subjected to disparate treatment on the basis of her national origin. Complainant testified that her supervisor, Anthony Matias made disparaging remarks about Puerto Ricans, reduced her hours and on two occasions, assaulted her. However, I found her testimony to be contradictory, inconsistent, vague and not credible. On the other hand I found the testimony of Matias and Respondent's other witnesses that Complainant failed to properly perform her job to be credible. On at least two Sundays,

Complainant did not complete enough laundry for Corey Hill residents and staff. As a result, Matias was twice called to the facility on his day off in order to do laundry. After consulting with his supervisor about the matter, Matias cut Complainant's hours. Thereafter Complainant complained bitterly to Matias and others about the reduction in her hours and, according to Matias, she told him to "watch out." Shortly thereafter, she accused Matias of pushing her to the ground. I did not find credible Complainant's testimony that Matias pushed her on two occasions and believe she fabricated both the incidents wherein Matias supposedly grabbed clothes from her and the alleged assault in the laundry room. Corey Hill's director of nursing, McCallum testified credibly that upon examining Complainant's bruises he determined that they were not fresh and he believed that they were not caused by her fall in the laundry. Further there was no credible evidence to support Complainant's allegations that she was subject to adverse terms and conditions of employment on account of her national origin. I credited Matias' testimony that he made no remarks disparaging Complainant's national origin. I did not credit Complainant's account regarding such comments. Therefore, I conclude that Complainant has failed to establish a prima facie case of discrimination on the basis of national origin with respect to the terms and conditions of her employment.

B. RETALIATION

Complainant alleges that she was subjected to retaliation after rejecting an offer by Respondent for a temporary transfer to another work location and was terminated after rejecting the transfer. In order to establish a prima facie case of retaliation, Complainant must show that she engaged in a protected activity, that Respondent was aware of the protected activity and that Respondent subjected her to an adverse action and that a

causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41(2003).

Complainant engaged in protected activity by filing her MCAD complaint on April 29, 2003. However, she has failed to prove that Respondent was aware of the protected activity prior to May 5, 2003 and the offer of the transfer took place prior to that date. There was no credible evidence that Complainant complained of discrimination to any one at Respondent or at Corey Hill prior to filing her complaint. Further, Complainant has failed to establish that her employment was terminated. The credible evidence shows that Complainant rejected the transfer and thereafter abandoned her employment with Respondent.

Finally, Complainant's testimony was inconsistent and just plain not credible. I conclude that she fabricated the tale of Matias assaulting her and making discriminatory comments about her after he reduced her hours for poor work performance. I conclude that Complainant made up this story, believing she would benefit from a financial windfall if successful in her claim.

Having found that Complainant was not the victim of a hostile work environment based on national origin, was not assaulted or retaliated against, and that she left her employment voluntarily, given all of the above, I conclude that Respondent is not liable for unlawful discrimination. I hereby order that the Complaint be dismissed.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed.

This constitutes the final order of the Hearing Officer. 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 28th day of January, 2008.

JUDITH E. KAPLAN,
Hearing Officer