

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
MARY FLAHERTY,
Complainant

v.

DOCKET NO. 98-BEM-2686

PERINI/KIEWIT/CASHMAN,
A JOINT VENTURE,
Respondent

Appearances: Rosemary Caulfield, Esq. for Complainant
Richard D. Wayne, Esq. & Brian E. Lewis, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On August 27, 1998, Complainant, Mary Flaherty, filed a charge of discrimination against the Respondent Perini/Kiewit/Cashman (hereinafter PKC) alleging that she was discriminated against on the basis of sex in violation of G.L. c. 151B s. 4. Specifically, Complainant alleged that a supervisor, Peter Buckjune, subjected her to harassment which included constant yelling and screaming at her, treated her more harshly than male employees, and terminated her employment without cause, replacing her with a male employee. Respondent denied all allegations of discrimination and stated that Complainant was terminated for failure to perform her job in a satisfactory manner and for sleeping in her truck twice during her shift while on the road.

The Investigating Commissioner found probable cause to credit the allegations of the complaint and after conciliation efforts failed the case was certified to public hearing on November 21, 2000. A public hearing was held before the undersigned hearing officer on July 23 and 24, 2002. The parties filed post-hearing briefs in October 2002. Having considered the record before me and the post-hearing submissions of the parties, I make the following findings of fact and rulings of law.

II. FINDINGS OF FACT

1. Respondent is the general construction contractor for Contract C11A1, a section of the construction of the new Central Artery (I-93) tunnels, new interstate highway interchanges, and ramps in downtown Boston, commonly known as the “Big Dig.” (T-266)
2. Contractors working the Big Dig, including PKC, operate under a collective bargaining agreement known as a Project Labor Agreement, which requires the contractors to employ a workforce from local trade unions, and to comply with the provisions of the local collective bargaining agreements for the various construction trades. (T-18, 19).
3. The Project Labor Agreement for the Big Dig contains a grievance and arbitration, non-discrimination, and safety clause. (R-1, T-36-40).
4. Contract C11A1 covers the construction of the Central Artery tunnel underneath Atlantic Avenue from Kneeland to Congress Street in downtown Boston.
5. Among the projects required by this contract were slurry wall construction, utility relocation, excavation and construction of 2,000 linear feet of tunnel, and the

rehabilitation and support of the MBTA Red Line subway tunnel at the Summer Street location where it passes over the newly constructed expressway tunnels. (T-269).

6. PKC was also the general construction contractor responsible for the construction of the MBTA Red Line “superstation” at South Station, which was adjacent to the project. (T-266). The cost of this contract for construction of the “superstation” was in excess of \$100 million. (T-269).
7. In 1998, Greg Shaw was PKC’s general superintendent for Contract C11A1. (T-267). Shaw was responsible for all aspects of construction for the entire project. Peter Buckjune was PKC’s night superintendent for Contract C11A1. As night superintendent, Buckjune, who had over thirty years experience in construction, was responsible for approximately 200 workers from various trades. (T-297). Derek Hanson and Frank Nee were PKC’s Assistant Superintendents on the night shift.
8. Complainant, Mary Flaherty, a member of Laborers Local 223, first began working for PKC on Contract C11A1 in September 1997 on the night shift. Complainant was referred to the Project through Local 223’s hiring hall. (T-178). PKC employed an average of 570 to 580 employees on these two projects and operated a day and a night shift.
9. Upon being hired, Complainant was assigned to a utility relocation crew. In the late fall of 1997, a vacancy arose for the position of driver of the Maintenance of Traffic (MOT) truck for the night shift. Peter Buckjune, Derek Hanson and Frank Nee made the decision to transfer Complainant to the MOT truck driver position because she did not have the requisite skills as a laborer to make her valuable for the utility

relocation work. Her duties were mainly in the area of clean-up and sweeping the streets and not skilled labor. Thus, her transfer would have the least effect on her crew. (T-301-304).

10. As the night shift MOT driver, Complainant's main responsibility was to place traffic barrels and cones around the work zones being used by PKC work crews before the beginning of the night shift. Because there were certain traffic areas in which PKC could only work at night, it was important for work zones to be set up quickly, after rush hour, so that the night shift could begin work immediately upon reporting to work. PKC expected that setting up work zones would take approximately one hour. At times Buckjune would assign another laborer to assist Complainant with setting up work zones. (T-307-308).
11. One hour before the night shift began, Complainant would report to PKC's "laydown" area at C Street in South Boston. At the "laydown" area, PKC stored equipment and materials that could not be kept at the worksite in downtown Boston. At the C Street yard, Complainant would pick up the MOT truck from the day shift driver, Frank Federico. The male "yardman" in the C Street yard, assisted Complainant in loading the MOT truck with barrels, cones and flashers. (T-306).
12. On certain days, the MOT truck driver would be responsible for placing a VMS or an arrow board at a certain area of the construction site to direct traffic or provide information on detours or changes in traffic patterns. If Complainant had to hitch a VMS board to the back of the MOT truck, the "yardman" would assist her. (T-158).

13. After setting up the work zones, Complainant was the required to patrol the work site to ensure that the work zones remained intact and to replace barrels, if necessary. At the end of the shift Complainant removed the barrels and cones from the work zones.
14. After Complainant began driving the MOT truck, Derek Hanson, the assistant PKC superintendent at night and Buckjune observed that the work zones were sometimes not being set up in a timely manner and that Complainant was not completing her work within expected time frames.
15. Complainant's job required that both superintendents and foremen be in touch with her at all times, so they could contact her if a work zone needed to be moved, if more traffic control devices were needed or if damaged devices needed to be replaced or repaired. (T-309). For this purpose Complainant was issued a two-way radio and the MOT truck had a radio installed. Despite this, Buckjune and Hanson claimed that on many occasions they and others could not locate Complainant anywhere on the jobsite, and could not contact her on the radio. They claimed that she frequently would not respond to repeated radio calls. Complainant alleged that the two-way radios were unreliable and frequently malfunctioned and were useless.
16. Complainant alleged that simultaneous with her beginning the MOT truck driving job, Peter Buckjune began harassing her and yelling at her in a manner that she considered degrading and sexist. She stated that he constantly yelled at her in front of others and humiliated her. She gave an example of him screaming at her for talking to a policeman at South Station one evening while she was exchanging damaged barrels and flashers. She claimed that he drove up and yelled over a loudspeaker, "what the hell are you doing shooting the shit with the policeman." She

claimed that both employees and pedestrians overheard this and that she was embarrassed. (T-200-201).

17. Complainant also testified there were times when Buckjune was exasperated with her and would say things like, “never should have women in construction, damn women.” She stated that Buckjune would yell at her in front of other employees and embarrass her and called her stupid. She stated that he would not treat men as harshly because they would “scream back at him and yell.” (T-205-208).
18. There was testimony from a co-worker Thomas Ward that Buckjune was very rude and gruff to Complainant and on one occasion called her a “dumb bitch.” (T-108-138,150). Ward stated that he thought Complainant had too much responsibility and that Buckjune was “always riding her” and that “he didn’t ride anybody else like that.” (T-109). Ward stated that the while all laborers swear and use profanity, they are careful not to direct it at a female co-worker. (T-150, 152).
19. Complainant made numerous complaints to Buckjune about the MOT truck being in disrepair and how this was a hazard and a safety violation. She claimed that her repeated entreaties to have the truck repaired went unheeded. (T-194-196). Respondent asserted that the day shift driver who was male, used the same truck and that all repairs were made by PKC mechanics based on their availability and the priority of the repair, regardless of the sex of the truck driver.
20. Respondent asserted that the night supervisors had difficulty locating Complainant during her shift and were frequently unable to raise her on the radio. In order to monitor her whereabouts during her shift Buckjune, Hanson and Nee assigned her to the PKC tool room on Atlantic Avenue. To enter the building in which the tool

room was located, employees had to enter an access code on a keypad lock. All employees were given the access code. The tool room was locked with a padlock and had an alarm system. Only Buckjune and Hanson had the keys for the padlock and the codes for the tool room alarm system. (T-316-317).

21. After Complainant set up the work zones at the beginning of the shift, she would meet either Buckjune or Hansen at the tool room. Buckjune or Hansen would then open the room and de-activate the alarm, and Complainant would wait inside.
22. Complainant's tool room duties were primarily to deliver tools to workers on the site or check out tools for workers. If Complainant had to deliver a tool to a worker or received a radio call to perform a duty with the MOT truck, she would padlock the room and proceed to the worksite. She would have to notify Buckjune or Hanson to let her back in the room when she returned after the delivery. If a tool was left outside the tool room when she was out working on the MOT truck, Complainant stated that Buckjune told her not to worry about it. (T-222)
23. In late April 1998, during her shift, Buckjune discovered Complainant asleep at the wheel of the MOT truck on Kneeland Street in a travel lane. At approximately 3:00 a.m., Buckjune was patrolling the work site in a pickup truck. At a red light on Kneeland Street, he pulled behind the MOT truck while the lights went through two red-green cycles. Buckjune then got out of his truck and walked up to the MOT truck driver's side window. He observed Complainant sleeping in the truck with her foot on the brake and the truck in gear. Buckjune woke Complainant and told her to get on with her duties. Later that shift, Buckjune reported the incident to the site safety office and the next day he reported the incident to Greg Shaw. (T-311-313).

24. Two weeks after Buckjune encountered Complainant sleeping at the wheel of the MOT truck, Derek Hanson found her asleep at the wheel of the MOT truck at almost the same location. This incident occurred on May 14, 1998, when Hanson could not raise Complainant on the radio, so he began patrolling the worksite in a pickup truck searching for her. While driving south on the Surface Artery, Hanson spotted the MOT truck sitting at a red light in the left-hand turn lane at the corner of the Surface Artery and Kneeland Street. Hanson pulled his truck behind the MOT truck and tried to contact Complainant on the radio, but she did not respond. The light turned green and the MOT truck did not move and Hanson sat through three red-green cycles but the truck still did not move. He again tried to raise Complainant on the radio but got no response. Hanson then got out of his truck, approached the MOT truck and observed Complainant asleep in the driver's seat. He knocked on the window, and woke Complainant who then rolled down the window. Hanson informed her that this was not an appropriate place to be sleeping. At the end of the shift, Hanson reported Complainant sleeping in the truck to Buckjune. He also reported the incident to Greg Shaw. (T-252-255). Complainant claimed that she was not sleeping on either occasion. At the time of the second incident, Complainant claimed that she had just had dental surgery and was medicated, but not sleeping. I do not credit Complainant's version of these two incidents and I do not believe that Buckjune and Hanson fabricated identical stories about Complainant sleeping in the truck.
25. Complainant alleges that Buckjune fabricated the first incident to retaliate against her for her having made complaints to the project safety officer about Buckjune's refusal to heed her warnings that the MOT truck was unsafe and needed repairs.

26. The following day, Shaw made the decision to terminate Complainant because of her sleeping on duty while driving the MOT truck and instructed the payroll office to prepare her termination check. (T-283). At the beginning of the night shift, Shaw spoke to Buckjune about his decision to terminate Complainant and gave him the termination check. Buckjune in turn gave the termination check to Hanson and instructed him to terminate Complainant. (T-314). Hanson intercepted Complainant at the beginning of her shift in the C Street yard, and notified Complainant that she was terminated.
27. At the time of the termination, Shaw informed Harold “Muggsy” Whitaker, the union steward for Laborers’ Local 223 on the project, about his decision. Whitaker testified that during his tenure as the union steward, no one got fired at the Artery. He stated that terminations if contested were usually negotiated with management and converted to a lay-off. The employee was then able to collect unemployment and return to the union hall with a clean slate for a referral to a new job. He stated he did not know why the decision was made to terminate Complainant rather than lay her off. (T-24-25-91-98). Shaw and Hanson testified that male employees had been terminated from the site for offenses that included sleeping on the job. (T-263).
28. After discussing Complainant’s situation with Whitaker, Shaw decided to rescind the termination and to re-instate Complainant for work in a different position on the day shift. (T-285). Complainant then went to work on the day shift for PKC in a position where Buckjune was not her supervisor. Her rate of pay and benefits on the day shift were the same as on the night shift. (T-229).

29. Complainant worked only two days on the day shift, and then left the job claiming that she was too humiliated to continue working for PKC. (T-228-229) I do not credit this assertion. Complainant's charge of discrimination also neglected to mention that after her termination, she was re-instated to a different job on the day shift with a new supervisor and then quit the job two days later. Thereafter, she did not go to the union hall to register for work, despite the fact that there were plentiful opportunities for work in construction at the time. (T-228).

III. CONCLUSIONS OF LAW

General Laws c. 151B, s. 4 (1) makes it an unlawful practice to discriminate in the terms, conditions or privileges of employment based upon sex. Sex discrimination includes harassment in the workplace that is gender based but not necessarily sexual in nature. Baldelli v. Town of Southborough, 17 MDLR 1541 (1995); Magill v. Mass. State Police, 24 MDLR 355(2002). Complainant has alleged that her direct supervisor, Peter Buckjune, harassed her on the job because she was a woman and ultimately caused her employment to be terminated on account of her sex.

Complainant bears the initial burden of setting forth a prima facie case. To establish a prima facie claim of harassment based on her gender Complainant must demonstrate that (1) she is a member of a protected class; (2) that she was the target of speech or conduct based on her membership in that class; (3) the speech or conduct was sufficiently severe or pervasive to alter her conditions of employment; and (4) the harassment was carried out by someone with a supervisory relationship to Complainant or the employer otherwise knew or should have known of the harassment and failed to take

remedial action. Fluet v. Harvard University, 23 MDLR 145, 161 (2001); Lazure v. Transit Express, Inc. 22 MDLR 16, 18 (2000); MCAD Sexual Harassment in the Workplace Guidelines, fn. 23 p.30 (October 2002) [24 MDLR Statutes and Regulations].

Complainant claims that her manager frequently yelled at her and chastised her in a manner that was sexist and degrading, that he stated women do not belong in construction jobs and on at least one occasion called her a “stupid bitch.” In response to her frequent complaints about needed repairs to her truck or other equipment failures, he is alleged to have told her that none of the men complained of these problems. Buckjune did not deny yelling at Complainant, in fact he quite candidly admitted that he did so. However, he claimed that he did so on account of her incompetence, poor performance and the fact that she was always complaining about the conditions of the job.

I find that Complainant has met the elements of a prima facie case of gender harassment. She was a female on the job in a male dominated industry and working the night shift essentially alone, supervised by all male managers. I found credible her assertions that her immediate supervisor frequently yelled at her, chastised her, and demeaned her in a humiliating fashion, often in front of other employees or the public. I also believe that he made comments to the effect that women did not belong in construction and on at least one occasion called Complainant a “stupid bitch” in the presence of a co-worker. When Complainant made legitimate complaints about equipment failures or needed repairs to the MOT truck, Buckjune’s response was that the male employees did not complain insinuating that her complaints were silly or unjustified. There was no evidence that Buckjune treated male employees in a similarly abusive fashion. I find that his conduct toward complainant was gender-based and that it was

sufficiently severe and pervasive to adversely impact Complainant's morale and her ability to do her job. I believe she was humiliated and embarrassed by his conduct.

The Respondent offered no legitimate non-discriminatory reasons for Buckjune's conduct, other than to state that he was a very busy manager directing a very large project, who had little time or inclination to focus on Complainant's issues. Buckjune, himself, admitted that he screamed and yelled at Complainant. The implication is that Buckjune's behavior was justified by dissatisfaction with Complainant's performance and the managers' inability to locate her at times during the night shift. I cannot conclude that Complainant's alleged deficient performance justified Buckjune's demeaning and sexist behavior and comments to her.

Complainant also asserts that her termination from the night shift MOT truck driver job was motivated by her gender and was unlawful. In order to establish a prima facie case of discrimination for her termination, Complainant must demonstrate that she was a member of a protected class, was performing her job at an acceptable level and was terminated while similarly situated males remained on the job. Blare v. Huskey, 419 Mass. 437 (1995). There is a serious dispute of fact about whether Complainant was adequately performing the duties of her job. Respondent asserts that she was not setting up the work zones in a timely fashion and that she was often AWOL and unable to be found, which is the reason she was assigned to the tool room. There are also credible allegations that Complainant was discovered sleeping on the job by two different supervisors in situations that could have been dangerous to her safety and that of others. I found Respondent's assertions that Complainant was not performing adequately to be

credible and thus conclude that she has failed to establish a prima facie case of discriminatory termination.

However, even if Complainant had persuaded me that she was performing the duties of her job in a satisfactory manner, Respondent has articulated a legitimate non-discriminatory reason for her termination. Respondent claims that Complainant's sleeping on job on two occasions while operating her vehicle was a legitimate safety violation meriting termination. I believe that Respondent's managers legitimately reached this conclusion and I reject Complainant's assertion that these infractions were somehow fabricated against her on account of her gender.

With Respondent having articulated a legitimate non-discriminatory reason, the burden shifts back to Complainant to prove that the reasons given were a pretext for unlawful sex discrimination. She may do so by showing that Respondent acted with discriminatory intent, motive or state of mind when it made the decision to terminate her employment. Lipchitz v. Raytheon Co., 434 Mass. 493 (2001). Complainant argued, as evidence of pretext, that similarly situated male employees were not terminated for similarly serious infractions. She gave the example of a previous male driver of the MOT truck who was transferred to another job when it was discovered he'd lost his driver's license for operating under the influence. The union steward testified that generally employees on the project are not terminated, they are laid off or transferred. However, Complainant was, upon discussion with the union steward, likewise transferred to another job on the day shift, with no significant loss of pay or benefits. Complainant failed to note in her complaint that she was re-instated to another job on the day shift, where Buckjune would no longer be her supervisor. She left this job voluntarily after only two

days. Thus, I conclude that her termination was for legitimate, non-discriminatory reasons and was not a pretext for unlawful discrimination.

Complainant would have me find that she was constructively discharged when she left the new job within two days, ostensibly because she could not tolerate the embarrassment and humiliation of having been terminated. I am not persuaded that her leaving the job constituted a constructive discharge. The standard for constructive discharge is a strict one. Complainant must prove that the working conditions were so intolerable that she was without recourse and that no reasonable person would have remained on the job. Andrews v. National Hair Care Center, 24 MDLR 115 (2002); Norman v. Andover Country Club, 15 MDLR 1395, 1419 (1993); Estate of Douglas McKinley v. Boston Harbor Hotel, 14 MDLR 1226 (1992). Complainant has not proven that the situation she found herself in would have inescapably led to her leaving the job. Thus, I conclude that she was not constructively discharged.

IV. REMEDY

General Laws c. 151B s. 5 authorizes the Commission to award remedies to make the Complainant whole. This includes a grant of damages for emotional distress. College-Town div. of Interco., Inc. v. MCAD, 400 Mass. 156 (1987). Since I have concluded that Complainant was not terminated for discriminatory reasons and that she was not constructively discharged when she left her new assignment, she is not entitled to lost wages or benefits.

Complainant is, however, entitled to damages for emotional distress resulting from the sexist and degrading manner in which Buckjune treated her on the job, which I

have concluded was harassment on account of her gender. Complainant testified that she was frequently demeaned, humiliated and embarrassed by Buckjune in a manner that made her feel inadequate and inferior because she was a woman working in construction. This conduct often occurred in the presence of male co-workers or the public. I conclude that Complainant experienced emotional upset as a result of this treatment and that she is entitled to be compensated for this injury. I conclude that she is entitled to an award of \$15,000 in damages for emotional distress she suffered as a direct result of Buckjune's treatment of her.

V. ORDER

On the basis of the 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 shall pay to the Complainant within 60 days of the receipt of this decision the sum of \$15,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the Complaint was filed until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue.

2) The parties shall promptly notify the Clerk of the Commission when payment is made.

3) The Respondent shall conduct a training for all its managerial and supervisory employees regarding issues of gender discrimination and harassment on the job. Said training session shall be conducted annually for the next five years. A training agenda shall be submitted to the MCAD's director of training for review and approval. The

agenda shall include the name and credentials of the trainer, the subjects to be covered in the training, the length of the training and the number of employees anticipated to attend each session. A Commission representative shall be allowed to attend any such training session. Written documentation that such training sessions have been conducted shall be submitted to the Commission on an annual basis along with a list of those managers and supervisors in attendance.

Any party aggrieved by this Order may file an appeal to the Full Commission pursuant to 804 C.M.R. 1. 23 by filing a notice of appeal with the Clerk of the Commission within 10 days of receipt of this decision and a Petition for Review within 30 days of receipt .

So Ordered this 27th day of August, 2003.

Eugenia M. Guastaferr
Hearing Officer