

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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MICHELLE VANN AND  
MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION

Complainants

Against

Docket No. 02-BPA-02954

WALCARE, INC., d/b/a  
DIAMANTE SPORTS RESTAURANT, INC.

Respondent

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Appearances: Caitlin A. Sheehan, Esq., for Complainants  
Jeffrey M. Feuer, Esq., for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about September 10, 2002, Michelle Vann (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) alleging that she was subjected to discrimination based on her Native American ancestry

and appearance when the proprietor of the Diamante Sports Restaurant ordered her to leave his bar on September 8, 2002.

The MCAD issued a probable cause finding and certified the case for public hearing on July 25, 2005. A public hearing was held on January 5 and 6, 2006. The Complainant testified on her own behalf as did MCAD investigator Janine Rice. Bar owner Daniel Fasulo Jr. and bartender Karen Ellen Donegan testified on behalf of Respondent. The parties submitted two joint exhibits. Complainant submitted nine additional exhibits and Respondent submitted four additional exhibits. The parties submitted post-hearing briefs on February 6, 2006.

To the extent the parties' proposed findings are not in accord with or irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

## II. FINDINGS OF FACT

1. Complainant, Michelle Vann ("Complainant"), was a resident of Charlestown, Massachusetts at the time of the alleged incident at Diamante's Sports Restaurant, Inc. on September 8, 2002.
2. Complainant identifies herself as a Native American through her maternal grandfather's affiliation with the Mohawk/St Regis tribes. Complainant testified that her father was Jewish and that her mother did not inform teachers or school administrators about the family's Native American identity. According to

- Complainant, her mother “looked native” but did not attend cultural festivals or wear Native American clothing. Nonetheless, Complainant testified that her mother “instituted her ways in [her children]” and taught Complainant to burn sage. Complainant testified that she grew up in upstate New York where she hunted venison with her brothers.
3. Complainant does not possess any particular physical features that identify her as being Native American.
  4. On Sunday, September 8, 2002, Complainant was in Haverhill, Massachusetts attending a weekend-long Native American cultural festival known as a “pow-wow.” Complainant had never attended a pow-wow before. She left the pow-wow sometime in the late afternoon or early evening on Sunday and was dropped off by a friend near the Haverhill commuter rail station in order to get a train home.
  5. Complainant was wearing shorts or blue jeans, a white shirt, and sneakers. She also wore jewelry consisting of a beaded turquoise and white choker, a longer beaded necklace with a feather ornament, and small blue and silver earrings in the shape of owls. Complainant’s hair was braided and in her hair she wore a beaded hair clip and a beaded pony tail holder. Attached to her clothing on her arms and legs were pieces of yellow and red yarn. Complainant wore a cloth shawl decorated with large red and yellow turtles. The yarn may or may not have been visible under the shawl.
  6. Complainant was carrying two bags containing her belongings from the pow-wow. The bags consisted of a brown leather briefcase and a black school backpack.

7. Complainant was dropped off at the commuter train station in the early evening. It had started to drizzle. Complainant just missed a train to Boston and another one would not arrive for about three hours. Complainant waited alone at the train station for about twenty minutes. It started to get chilly so she left the station in order to look for a place where she could get something to eat and drink and use the bathroom. Complainant walked about three or four blocks on Washington Street and came to Diamante's Sports Restaurant. The restaurant was brightly lit and filled with customers.
8. In September of 2002, Diamante's was a bar/ restaurant open to the general public. It was owned by Daniel Fasulo. Fasulo purchased the establishment in November of 1999 and sold it on or about June 30, 2004. The only other employee of the restaurant was Karen Donegan, a bartender and fiancée of Fasulo. Both Fasulo and Donegan were present at the bar on September 8, 2002.
9. A sign over the outside entranceway identified the restaurant by name. The interior had a large horseshoe-shaped bar to the right of the doorway, a pool table in the back area, and two interior steel bank vault doors painted black and gold. The vault doors were behind the bar and on the right wall. There were tables scattered throughout the establishment and bathrooms behind the bar area.
10. In September of 2002, a handwritten sign in the entranceway of Diamante's read, "No Bags of any kind allowed in this Establishment. Thank You." The word, "OLD" had been added in a different handwriting by an unknown person between the words "No" and "Bags." Complainant testified that she saw no such sign in the entranceway of Diamante's on September 8, 2002. I find it more likely than

not that the sign was posted but that Complainant did not notice it as she entered the establishment.

11. Complainant entered Diamante's in the early evening of September 8, 2002. She was carrying a briefcase and backpack which she placed on a high bar table. Complainant went over to the serving area at the bar to order a drink from Donegan before using the restroom. As she attempted to place her order, Fasulo interrupted and told Complainant that he didn't allow bags inside the bar. Complainant responded by saying that her personal belongings were inside her bags and that Fasulo could inspect them. Joint Exhibit 1. Complainant started to open her briefcase and backpack, but Fasulo told her to leave. Complainant testified credibly that she asked to use the bathroom but that Fasulo did not allow her to do so.
12. Fasulo described Complainant as "getting huffy" after he first told her that he didn't allow bags in the bar. Joint Exhibit 3.
13. Complainant did not identify herself to Fasulo or Donegan as being Native American. I credit the testimony of Fasulo and Donegan that neither knew Complainant was Native American.
14. Complainant began talking to a couple sitting at a table. She asked them if they could believe that Fasulo ordered her to leave because she was carrying a briefcase and a backpack. She asked the couple if she could borrow a pen and paper in order to make notes about the incident. The couple gave a pen and paper to her. Complainant asked to see Diamante's license and wrote down the license information. Fasulo continued to order Complainant to leave in a loud and

- threatening manner and again refused to allow Complainant to use the bathroom.
15. Complainant left Diamante's and went to sit on a bench outside. She had to go to the bathroom so badly that she urinated outside by the corner of a building. It was chilly, drizzly, and getting dark. Complainant called 911 in order to ask the police to administer a breathalyzer test to her in order to establish that she wasn't intoxicated. There is no evidence that the police responded to a 911 call from Complainant.
16. While Complainant was sitting on the bench, her friend, Arlene Pimentell, with whom she had attended the pow-wow, unexpectedly came by. Complainant told Pimentell what had happened. Pimentell tried to calm down Complainant and went to a store to get Complainant some food and drink. Complainant and Pimentell waited for, and took, the train together.
17. Fasulo testified that it was his policy not to allow customers to come into his establishment with knapsacks, briefcases, gym bags, shopping bags or other bags except during the annual Christmas Party and other special events such as birthdays. He testified that the "no bags" policy was implemented after September 11, 2001 as a safety and security measure and to help prevent customers from surreptitiously bringing their own liquor into the bar/restaurant and to discourage the stealing of souvenirs.
18. Fasulo usually implemented the "no bags" policy by giving patrons an option of leaving their bags outside [presumably in the entrance foyer]. Joint Exhibit 3.
19. Donegan testified that Fasulo also permitted Diamante's attorney and an attorney whose office was two doors away to bring their briefcases into the establishment.

20. Complainant suffers from ADD/ADHD, post-traumatic stress disorder, and depression. She also has a brain injury from a car accident. Complainant sees a psychiatrist and a therapist for these conditions.
21. In Fasulo's response to the charge of discrimination, he states that, "I have a lot of customers that are Negros [*sic*], Spanish, Dominican, white, Italian, Irish and more." The Commission forwarded this letter to Complainant in accordance with its usual procedures. Complainant wrote to the Commission and subsequently testified at the public hearing that Fasulo's use of the word "Negro" was "upsetting" and "derogatory" and that, "I was left in fear of my life when I recieved [*sic*] such a letter at my private home. Joint Exhibit 2. Complainant also testified that she believed Fasulo was involved in burglaries in her home wherein family pictures, other personal items, and documents relating to her MCAD case were allegedly taken; that Fasulo was involved in her questioning by the Beverly police about a supposed bomb in her bag; and that Fasulo and his attorney had visited and intimidated a potential witness in this case at the Roxbury VA Hospital. None of these allegations are supported by any credible evidence and I do not credit them.
22. An MCAD investigator testified that she made a site visit to Respondent's premises as part of her investigation, but I do not rely on her testimony because it is not clear that she visited the correct establishment.

### III. CONCLUSIONS OF LAW

#### A. Racial Discrimination

M. G. L. c. 272, sec. 98, prohibits discrimination based on race or color in places of public accommodation. See Hatten v. Cliff Seafood Restaurant, 22 MDLR 393 (2000); DeRosa v. Quang Loi Jewelry Company, 20 MDLR 101 (2000). Pursuant to sec. 5 of G. L. c. 151B, MCAD has jurisdiction to accept, investigate, and adjudicate complaints brought pursuant to G. L. c. 272, sec. 98. The elements of proof necessary to establish a claim of discrimination in a place of public accommodation are similar to those in employment discrimination. See Bachner v. Charlton's Lounge and Restaurant, 9 MDLR 1274, 1287 (1987). Complainant must prove that: 1) she is a member of a protected class; 2) she was denied access or restricted in the use or enjoyment of an area or facility; and 3) the area or facility was a place of public accommodation. Id.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a nondiscriminatory reason for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent meets this burden, then Complainant must show by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003). In other words, Complainant must show that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass.

at 504. Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

For the purposes of analyzing Complainant's discrimination claim, I will assume that her professed Native American ancestry is sufficient to establish her status as a member of a protected racial classification. Complainant was denied access to Diamante's Sports Restaurant, a place of public accommodation, by its owner, Daniel Fasulo. The restaurant is a place of public accommodation. Accordingly, I conclude that Complainant has presented a prima facie case of discrimination.

At the second stage of analysis, Respondent articulates a nondiscriminatory reason for his conduct, that being the restaurant's policy not to allow patrons to enter with knapsacks, briefcases, gym bags, shopping bags or other bags except in limited circumstances. Fasulo testified that he implemented the "no bags" policy after September 11, 2001 as a safety and security measure and to help prevent customers from surreptitiously bringing their own liquor into or stealing souvenirs from the bar/restaurant. I conclude that at the time that Complainant attempted to enter the Diamante's, there was a handwritten sign posted in the entranceway that notified patrons of this policy.

The issue in this case is whether Fasulo selectively enforced the "no bags" policy against the Complainant because of her alleged Native American ancestry. I conclude that race was not the real reason for Fasulo's inhospitable conduct, but, rather, because Complainant appeared to be oddly dressed and, in Fasulo's opinion, started "getting huffy" when he first communicated with her.

I arrive at the conclusion that race was not the motivating factor in this case because

Fasulo and Donegan testified credibly that they were not aware of the Complainant's professed Native American ancestry. Their testimony is supported by the fact that Complainant does not have any physical characteristics that appear to be Native American. Complainant submitted into evidence various articles of clothing and ornaments that she wore on September 8, 2002. She contends that these items identified her as Native American. The most conspicuous of the items is a large shawl with a turtle motif. To a lay person, the shawl does not appear to be decorated with a Native American theme. Some of Complainant's jewelry does appear to be Native American in color and design, but the necklaces and hair decorations are moderate in size and could easily have been overlooked by Fasulo and Donegan. In the absence of any other indicia of race, moreover, the wearing of several pieces would not necessarily identify an individual as a member of a particular racial group. The last item which Complainant relied upon to assert her identity as a Native American is yellow and red yarn which was attached to her clothing on her arms and legs. The yarn, in all likelihood, was covered by the shawl which Complainant admits to wearing into Diamante's. Even if the yarn were prominently displayed, however, there is no indication that Fasulo and Donegan recognized it as a Native American symbol.

Complainant makes a compelling case that she was treated unkindly on September 8, 2002, but the evidence does not point to discrimination based on race as the cause. Complainant's rather extreme reaction to Fasulo's use of the outdated term "Negro" in his response to the charge of discrimination, her belief that Fasulo might be involved in burglaries in her home and in her questioning by the Beverly police about a supposed bomb in her bag, her belief that Fasulo and his attorney had visited and

intimidated a potential witness in this case at the Roxbury VA Hospital, all call into question her credibility. None of these allegations are supported by any credible evidence and they raise serious questions about Complainant's judgment and perceptions.

I conclude that Fasulo has articulated and provided credible evidence to support his claim that he did not bar Complainant from Diamante's because of her Native American ancestry. There is some evidence that Respondent's articulated reason for barring Complainant's entry was pretextual in the sense that the "no bags" policy may not have been uniformly enforced. Notwithstanding evidence of pretext, however, I conclude that Complainant was not barred from Diamante's for reasons related to her racial identity, but, rather, because Complainant appeared to be oddly dressed and challenged Fasulo when he informed her of the policy in a hostile manner. I agree with Complainant that Fasulo treated her disrespectfully when he ordered her to leave his establishment after she sought to buy a drink and use the bathroom. Complainant responded by becoming justifiably upset. Nonetheless, Chapter 151B does not govern standards of behavior which are unrelated to discrimination based on protected group status. For this reason, I must dismiss Complainant's complaint of discrimination.

#### IV. ORDER

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10)

days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

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Betty E. Waxman, Hearing Officer

So ordered this 28<sup>th</sup> day of April, 2006.