

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & PAUL THERENCIEL,
Complainants

v.

DOCKET NO. 97-BEM-4008

FAIRLAWN NURSING HOME, INC.,
Respondent

Appearances:

Paul Therenciel, Pro Se

William F. Jesson, Jr., Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 6, 1997, Paul Therenciel filed a complaint with this Commission charging Respondent Fairlawn Nursing home with discrimination on the basis of race, color and national origin in violation of M.G.L.c.151B§4(1). The Investigating Commissioner issued a probable cause finding. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on January 3, 2005. After careful consideration of the record before me 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. Paul Therenciel is a native of Haiti who came to the United States 20 years ago and is a naturalized U.S. citizen. He resides in Canton, MA. (Tape 1)

2. Respondent Fairlawn Nursing Home is a nursing home located in Lexington, Massachusetts. Respondent has been owned and managed by the Walsh family since 1949. Mary Berrigan, the granddaughter of the Respondent's founder, has been Respondent's general manager since 1994. (Tape 3)

3. In 1997, Respondent had approximately 120 employees, 30-40% of whom were Haitian. At the time of the public hearing, Respondent employed 102 persons, 45-60% of whom are Haitian. (Tape 3)

4. On or about December 27, 1996, Complainant was hired as a dietary aide, working in Respondent's second floor kitchen. His job duties included placing food on trays and transporting the trays to Respondent's residents. Complainant's direct supervisor until February 1997 was Food Service Supervisor Suzanne Souza. When Souza left

Respondent, Richard Walsh became the Food Service Supervisor in March 1997. (Tape 1)

5. Complainant testified that approximately one month after his employment began, a cook named Paul Jenney who worked with him in the second floor kitchen asked him his name and Complainant responded "Paul". Jenney said that they both could not be called "Paul" and that he would call Complainant "baboon." Complainant testified that Jenney repeatedly called him a baboon throughout his employment at Respondent, and Complainant took this expression as a derogatory reference to his race and color. I credit this testimony. (Tape 1)

6. Complainant testified that Jenney was not a supervisor and that he never reported Jenney's conduct to any manager or supervisor at Respondent. I credit this testimony.

7. Complainant testified that on one occasion in May 1997 he got into a loud dispute with a Haitian co-worker who arrived late to work. The co-worker resigned from her position that day. Complainant stated that the dispute took place in the kitchen and not in a patient area.

Complainant testified that managers told him that the patients were upset because he and his co-worker spoke Creole and he was told not to speak Creole in front of patients. Complainant testified that other non-Haitian employees whose native language was not English were permitted to speak to one another in their native language. I credit Complainant's testimony that he was told not to speak Creole in front of patients. I do not credit his denial that he was within earshot of patients. (Tape 1, Tape 2)

8. As a result of this incident, on May 14, 1997, Richard Walsh and Kathleen McKenna issued Complainant a written warning for "Showing disrespect to a co-worker." The warning stated: "If any problems of this kind happen again the food service supervisor should be notified right away. The next time a problem like this arises you will be terminated." The warning said nothing about speaking in Creole or disturbing patients. Complainant refused to sign the warning. (Respondent's Exhibit No. 4)

9. The Director Berrigan testified that she had no personal knowledge of the incident, but that at the time of Complainant's employment, Respondent's policy was to

require workers to speak English only in patient areas because the patients became confused and upset when hearing a foreign language. Employees were permitted to speak their native language in non-patient areas. Berrigan testified that the English-only policy has since been discontinued. I credit this testimony.

10. Complainant testified that on one occasion, a manager, possibly Respondent's Director of Nursing, asked him whether he had been downstairs because someone was missing some money. Complainant testified that he asked the Director of Nursing why a Chinese employee who worked downstairs was not asked if he had taken the money. (Tape 1) I credit this testimony.

11. Complainant testified that on one occasion the supervisor of housekeeping asked him to come outside and clean up a diaper containing feces. Complainant at first refused to perform this task and told the supervisor that it was a job for someone in housekeeping. He testified that the supervisor then spit in his face. He testified that Berrigan came along and told him to perform the task and Complainant complied. Complainant later complained to

his supervisor about this and she said she would speak to the supervisor about it. I credit this testimony.

(Tape 1)

12. Complainant testified that when hired he was told he would be required to work every other weekend. However, he testified that at one point he was scheduled to work two weekends in a row. Complainant refused to come in on the second weekend despite being scheduled to work. I credit this testimony. (Tape 1) On July 24, 1997, he sent or delivered a memorandum to Respondent's administrative office that stated:

I've already orally requested that I not be scheduled to work every weekend. Please do not schedule me to work every weekend because it is impossible for me to cover every weekend. I accepted this position back in 1996 with a promise that I will work every other weekend not every weekend. If theirs(sic) any question see me. Thank you.

(Exh. R-5)

13. Complainant called in sick on Saturday, July 19, Sunday, July 20 and July 21, 1997 and again on Sunday July 27. (Exh. R-8)

14. On July 30, 1997, Respondent's Administrator, Kathleen McKenna, issued a written warning to Complainant

for "calling out" on the two previous weekends. The warning stated, in part:

...it is essential that we have sufficient coverage...alternating weekends off are scheduled as long as coverage is sufficient...Excessive calling outs will not be allowed. In addition, it is required that callouts are made ahead of the start time of your shift.

(Exhibit R-6).

15. Complainant testified that in August 1997, he injured his leg and upon leaving work he went directly to the hospital where he was told to stay out of work for four days. He testified that he directed his girlfriend to take a letter from the hospital to Respondent indicating that he could not return to work for four days. I do not credit this testimony.

16. Complainant testified that when he returned to work after two days out, he found that his name was no longer on the schedule and assumed that his employment had been terminated. (Tape 1) He did not speak with anyone at Respondent; he simply left the premises, got in his car and went home. Complainant did not return to work.

17. Complainant did not produce the note or other evidence of the injury at the public hearing. Berrigan

denied that Respondent ever received a medical note from Complainant regarding the purported injury. I credit her testimony.

18. Berrigan was responsible for preparing employees' work schedules during the summer of 1997. She testified that Respondent's policy was to terminate employees who failed to call or appear for work for two consecutive days. She testified that Complainant did not come to work or call in on Monday August 4 and Tuesday August 5. She wrote the words "OUT" and "no call no show" on the work schedule for those days and crossed out Complainant's scheduled hours for the remainder of the week. (Exhibit R-8) I credit her testimony.

19. Berrigan testified that she did not send Complainant a termination letter or otherwise communicate further with Complainant. However, she considered him terminated because of his failure to appear at work without calling in. I credit her testimony, which is supported by Respondent's time records and work schedule for the relevant dates.

III. CONCLUSIONS OF LAW

A. Harassment

Complainant claims that Respondent violated M.G.L.c.151B, §4, by discriminating against him in terms conditions, or privileges of employment on account of his race because he was subjected to racial epithets in the workplace. This is a racial harassment claim. Complainant must establish that he was a member of a protected class; that he was the target of speech or conduct based on his membership in that class; that the speech or conduct based on his membership in that class; that the speech or conduct was sufficiently severe or pervasive to alter his conditions of employment and create an abusive working environment; and that the harassment was carried out by an employee with a supervisory relationship to Complainant or Respondent knew or should have known of the harassment and failed to take prompt remedial action. Beldo v. Univ. of Mass. Boston, 20 MDLR 105, 111 (1998), citing Richards v. Bull H.N. Information Systems, Inc., 16 MDLR 1639, 1669 (1994); College-Town, Division of Interco v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162 (1987); Complainant has not met his burden of proof on each element of his claim. Complainant is a member of a protected class

based on his race and color. I credited Complainant's testimony regarding the offensive words uttered by his co-worker. Therefore, I find that Complainant was the target of speech based on his membership in a protected class.

However, since Jenney was not a supervisory employee, Complainant must establish that his supervisors knew or should have known about Jenney's conduct. College-town, supra. The Complainant testified that he never complained to his superiors about Jenney's conduct and offered no other evidence to suggest that the Respondent was aware of it. Further, Berrigan testified that Respondent was not aware of any such conduct. Therefore, I conclude that Complainant has failed to establish a prima facie case of racial harassment for which his employer is liable.

B. Disparate Treatment

M.G.L.c.151B, sec. 4(1) makes it unlawful to discriminate in employment on the basis of race, color and national origin. Complainant alleges that he was subjected to different terms and conditions of employment and ultimately terminated on the basis of his race, color and national origin. Complainant alleges that he was ordered to perform tasks not within his job description, such as

cleaning and disposing of feces. He further alleges that he was disciplined for speaking Creole in a non-patient area, and was scheduled to work two weekends in a row, and was terminated after injuring his leg and being required to remain out of work.

To establish a case of unlawful discrimination, Complainant must show that he was a member of a protected class, that he was performing his job adequately, that he was subjected to adverse employment actions, and he was terminated or disciplined while similarly situated persons not of his protected class remained on the job or he was terminated or disciplined under circumstances that gave rise to a reasonable inference of unlawful discrimination based on his race or color. Abramian v. President & Fellows of Harvard College, 432 Mass 107, 116 (2000).

I conclude that Complainant has failed to establish a prima facie case of discrimination with respect to his allegations of disparate treatment and his termination. There was no evidence that the Respondent was motivated by discriminatory animus in ordering Complainant to perform unpleasant housekeeping tasks. There was no evidence that Respondent treated other employees differently with regard to performing this type of work.

Respondent's policy was to require employees to work on consecutive weekends only if necessary for staffing purposes. Complainant objected in writing to working on consecutive weekends, subsequently called in sick for the following two weekends and was thereafter issued a written warning. There was no evidence that Complainant was treated differently from non-Haitian workers in this regard.

Complainant also alleged that he was instructed not to speak Creole in a non-patient area. The Respondent stated that at the time of Complainant's employment, its policy was to require employees to speak only English in patient areas so as not to confuse the elderly patients, but they were permitted to speak in their native language outside of patient areas. Respondent has since discontinued the policy. While I believe that Complainant was instructed not to speak Creole, this was a legitimate request by Respondent because he was in an area where patients could hear him. Notwithstanding, Complainant was not disciplined or otherwise treated adversely for speaking Creole on this occasion. Thus, I conclude that Complainant has failed to establish a prima facie case of discrimination with respect to the issue of disparate treatment.

With respect to his termination, I conclude that Complainant has failed to establish a prima facie case of discrimination. I did not credit Complainant's testimony regarding the facts surrounding his termination. I did not believe that Complainant provided Respondent with a doctor's note excusing him from work. There was evidence that Complainant had continuing attendance problems for which he was disciplined and ultimately terminated pursuant to Respondent's policy for failing to either call in or report to work for two consecutive days. Thus, I conclude that Respondent did not engage in activity unlawful under M.G.L.c.151B.

IV. ORDER

For the reasons stated above, this matter is hereby dismissed. This constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to 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 March, 2005.

JUDITH E. KAPLAN,
Hearing Officer