

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION *
AGAINST DISCRIMINATION and *
SHARON BRONZETTI-KING, *

Complainant, *

v. * DOCKET NO. 97-BEM-3002

RICHARD'S FOOD AND DRINK and *
RICHARD P. WINSHMAN, *

Respondents. *

Appearances: Mark D. Horan, Esq., for the Complainant
Thomas V. Orlandi, Jr., Esq., for the Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE HEARING COMMISSIONER

I. PROCEDURAL HISTORY

On July 31, 1997, Complainant, Sharon Bronzetti-King, filed a complaint with this Commission charging Respondents, Richard's Food and Drink and Richard P. Winshman, with unlawful discrimination in employment on the basis of her gender and pregnancy in violation of Massachusetts General Laws (M.G.L.) Chapter 151B, section 4 (1).

The Investigating Commissioner issued a finding of probable cause with respect to the allegations in the complaint. Attempts to conciliate the matter were unsuccessful.

On October 2, 2001, the case was certified for public hearing.

A public hearing was held before me on July 30 and 31, 2002. I have duly considered the entire record before me in making the following findings. Certain proposed findings and conclusions have been omitted as not relevant or as unnecessary to a proper determination of the material issues presented. To the extent that testimony of a witness is not in accord with the findings herein, such testimony is not credited. To the extent the proposed findings of either party comport with my analysis and determination in this matter, they have been adopted.

II. FINDINGS OF FACT

1. Complainant, Sharon Bronzetti-King, is a female who resides in Framingham, Massachusetts.

2. Respondent, Richard's Food and Drink, is a restaurant located in Milford, Massachusetts. Respondent Restaurant is an employer within the meaning of M.G.L. Chapter 151B, section 1(5).

3. Respondent, Richard P. Winshman, ("Winshman") is owner and proprietor of Richard's Food and Drink.

4. Complainant was hired by Winshman in January of 1997 on a part-time basis to work the lunch shift from Monday through Thursday. Her duties included waitressing, as well as bartending after the first week she was hired.

5. Complainant was in the early stages of her first pregnancy when she was hired by Respondents. Winshman testified that he did not know Complainant was pregnant when he hired her, but he realized she was pregnant after she began working.

6. Complainant commenced working at Richard's Food and Drink on Monday, January 27, 1997. She testified that during her first week of employment, she worked as a waitress, but thereafter she was assigned to work at the bar during the lunch shift on Monday, Tuesday and Thursday. She stated that on Wednesdays she was assigned to work the Keno machine.

7. Complainant testified that she worked from late morning until early afternoon, on an as needed basis.

8. Complainant did not miss a day of work at Richard's Food and Drink until Tuesday, March 4, 1997. On that day, Complainant reported to work to set up the bar, but soon after she arrived, she experienced stomach pains. Complainant left work, met with her physician for an ultrasound examination, and was absent for the balance of the work day.

9. Complainant testified that on Monday, March 10, 1997, she did not feel well and called in sick. Complainant was absent for her entire shift on March 10.

10. Complainant testified that March 4 and March 10, 1997 were the only days she was absent during her tenure at Richard's Food and Drink.

11. Respondents disputed Complainant's account of her hours and time absent from work. Winshman testified that Complainant was hired to work from 10:00 a.m. through 4:00 p.m., Monday through Thursday, as a bartender. Winshman stated that he and Complainant had agreed that she would work a 24-hour work week.

12. Winshman testified that Complainant was absent from her job for a total of eight days during the seven weeks she was employed. Winshman cited March 4 and March 10, as well as six Wednesdays that Complainant did not work. To support his

testimony, Winshman offered into evidence a document entitled "Daily Sales by Server." (Exhibit 11) This document purported to demonstrate that Complainant worked the following hours: 19.5 hours during week one, 18.5 hours during week two, 17.5 hours during week three, 18 hours during week four, 16.5 hours during week five, 15.5 hours during week six, and 12 hours during week seven. This document displayed a "no sales" designation for Complainant for every Wednesday except the Wednesday of her first week of employment. Respondents also produced a payroll register (Exhibit 12) and Complainant's 1997 W-2 form (Exhibit 2) to support their contention that Complainant consistently worked fewer than 24 hours per week.

13. Complainant testified that she was in fact at work every Wednesday. Complainant claimed that the "Daily Sales by Server" exhibit displayed a "no sales" designation for her not because she was absent on Wednesdays, but because she operated the Keno machine on Wednesdays. Complainant testified that the Keno machine did not register "sales" that were reflected on the "Daily Sales by Server" records. The "Daily Sales by Server" records reflected only sales of food and beverages.

14. Winshman testified that on any given day, employees did not operate only the Keno machine. He stated that bartenders were expected to tend bar and operate the Keno machine during designated shifts. Winshman's testimony on this point was corroborated by employees who tended bar and operated the Keno machine during the same shift.

15. Winshman testified that the greatest problem with Complainant being absent was that he did not receive adequate notice before she was going to miss work. According to Winshman, he "never received much notice other than maybe an hour,." and this "became a problem, because it was very short time trying to cover the shift with

very limited personnel to do it." Winshman testified that either he or his son, Paul Winshman, usually had to cover Complainant's missed shifts.

16. Several current and former employees of Respondents testified regarding Complainant's absenteeism. Donna Remy, a current employee who worked the same shift as Complainant, testified that she witnessed Paul Winshman filling in for Complainant at lunch. Donna Alarie, a former employee, testified that Complainant called in late "a couple of times." Annie Russell, a former employee, testified, "She was out a lot. I couldn't tell you exactly how much, but at least once a week, probably more." Russell also stated: "Well, Richard always needed two people behind the bar because we would get a very busy lunch rush. So usually Richard or Paul or someone else who could fill in would have to come up. Usually it was Richard or Paul that would come up and help during the lunch rush. Waitresses would not get their drinks on time, you know, if there is only one bartender trying to cover the whole thing."

17. Winshman testified that after Complainant had been employed for three or four weeks, he told her that "the Wednesday situation was becoming a problem." Winshman stated that Complainant responded by saying something to the effect of, "if I'm sick, I'm sick." Complainant denied that such a conversation ever took place and contended that she never received any warnings about absenteeism or any other aspects of her job performance while employed by Respondents.

18. Complainant's employment at Richard's Food and Drink was terminated on Thursday, March 13, 1997. Winshman testified that he terminated Complainant's employment because of her excessive absenteeism.

19. Complainant testified that when he terminated her employment, Winshman

said she had done nothing wrong, but that her pregnancy was making her undependable. Complainant testified that Winshman stated, "it will only get worse," but that Complainant could come back to work for him after her baby was born. She also testified that Winshman said, "You didn't tell me you were pregnant when I hired you, " to which Complainant responded, "I thought it was obvious." Winshman denied ever having such a conversation with Complainant. I credit his testimony.

20. Several witnesses testified on behalf of Respondents regarding their treatment of pregnant employees. Michelle Napper and Kathy Daigle, current employees of Respondents, testified that they became pregnant multiple times while employed at Richard's Food and Drink. Both Napper and Daigle stated that they were treated fairly throughout their pregnancies by Respondents and that they were accommodated when necessary, such as during times when they could not carry heavy trays, cases or kegs. Donna Remy and Ann Russell testified that although they were not pregnant while employed by Respondents, they witnessed many other pregnant employees (including Winshman's own daughter and daughter-in-law) being treated fairly and accommodated throughout their pregnancies.

21. Winshman testified that throughout his 42 years of operating restaurants, he has hired and employed numerous women who were pregnant, including his wife, daughter and daughter-in-law. Winshman stated that he never terminated or otherwise discriminated against any employee because of pregnancy. I credit his testimony.

III. CONCLUSIONS OF LAW

General Laws Chapter 151B, section 4, paragraph 1 prohibits discrimination based upon gender. Gender discrimination has been held to include adverse action based on pregnancy. Croteau v. Salvation Army, 21 MDLR 111 (1999). In order to prove a case of gender discrimination based on pregnancy, Complainant must first establish a prima facie case. She may do so through direct evidence or by using the inferential model of proof articulated in Wheelock College v. MCAD, 371 Mass. 130 (1976). Complainant must demonstrate that she is a member of a protected class who was capably performing the responsibilities of her job and suffered adverse employment action under circumstances giving rise to the inference of unlawful discrimination. Andrade v. Stop and Shop Markets, 23 MDLR 213 (2001); Murphy v. Pub Ventures, 15 MDLR 1098, 1110-11 (1993).

Complainant has established that she is a member of a protected class based on her gender. Complainant was capably performing the responsibilities of her job and she was terminated by Respondents while pregnant. These circumstances give rise to the inference of discrimination in this matter.

Once Complainant has established a prima facie case, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for her termination. Wheelock College, 371 Mass. at 136. Respondents have satisfied this burden. There is substantial evidence in the record that Complainant did not meet Respondent's attendance expectations. Both documentary and testimonial evidence received at the public hearing established that Complainant was absent eight times over a period of seven weeks of

employment. While Winshman and several current employees testified, several of the witnesses who testified to Complainant's poor attendance record were no longer employed at the time of the hearing and therefore had no incentive to fabricate their testimony.

Chronic absenteeism has been acknowledged before this Commission as a legitimate justification for terminating an employee, even when that employee was pregnant. See, e.g., O'Shea v. Great Beginning Hair Salon, 14 MDLR 1281 (1992); DiMichele v. L'Osteria, 11 MDLR 1158 (1989). Winshman and other witnesses testified credibly that Complainant had incurred excessive absences and therefore was not performing her job to her employer's satisfaction. "The Commission is not permitted to second-guess an employer's business decision or establish standards for employee performance." Smith College v. MCAD, 390 Mass. 221 (1978). Complainant's unauthorized absences are supported by credible testimony and documentary evidence in this case.

Once Respondents have articulated legitimate, non-discriminatory reasons for their actions, the burden shifts to Complainant to demonstrate by a preponderance of the evidence that Respondents' actions were motivated by discriminatory intent. Lipchitz v. Raytheon, 434 Mass. 493, 504 (2001).

Complainant attempted to prove that Respondents' reason for terminating her was false. She insisted at the hearing that during the course of her employment with Respondent restaurant, she was absent for only two days, not eight, as alleged by Winshman. However, she did not produce any witnesses to corroborate this assertion. She also failed to produce any documents to corroborate her testimony, nor was she able

to discredit sufficiently Respondents' documentary evidence, namely the "Daily Sales by Server" exhibit, payroll register, and Complainant's own W-2 income tax forms. While Complainant clearly perceives that she was treated unjustly, she simply did not produce evidence that would support a finding that Respondents' articulated reasons for her termination were a pretext for gender discrimination based on her pregnancy. Moreover, the testimony received at the hearing from numerous female employees, both past and present, established convincingly that Respondents went out of their way to accommodate, rather than discriminate against, pregnant employees. Complainant failed to produce any evidence to refute this assertion. Respondents' evidence on this issue further belies the existence of discriminatory motive. Therefore, I conclude that Respondents did not violate G.L. 151B.

IV. ORDER

Based on the foregoing, it is hereby ordered that the Complaint be dismissed. This decision represents the final decision of the Hearing Commissioner. Any party aggrieved by the decision may file a notice of appeal with the Full Commission within ten (10) days of receipt of this decision and a petition for review within thirty (30) days of receipt.

So Ordered this 8th day of January, 2003.

Dorca I. Gomez
Hearing Commissioner

