

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

SHELLIE BLAKE,
Complainant

v.

Docket No. 04 BEM 02907

TEE & M, INC. d/b/a
RALLY CAP PUB and
EDWARD MORGAN,
Respondents

Appearances: George C. Malonis, Esq., for Complainant
John J. Hartigan, Esq., for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 1, 2004, Shellie Blake (“Complainant”), filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that Respondent Edward Morgan subjected her to sexual harassment and retaliated against her for complaining about the harassment by terminating her employment as a bartender with Respondent Rally Cap Pub.

The MCAD issued a probable cause finding and certified the case for public hearing on January 17, 2007.

A public hearing was conducted on September 10 and 11, 2007. The parties introduced fifteen (15) joint exhibits into evidence. An additional exhibit consisting of telephone records was excluded from evidence as was a chalk of the Respondent bar.

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or is 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 Shellie Blake is a single mother. She and her daughter reside with her parents. Complainant worked as a bartender at two bars owned by Respondent Edward Morgan in 2003-2004. Prior to working for Morgan, Complainant was a bartender at the J J Boomers Bar in Lowell and the Train View Bar and Grill. Complainant was fired from the Train View Bar and Grill.
2. Respondent Edward Morgan is the owner of Joker's Lounge and Tee & M., Inc. d/b/a/ Rally Cap Pub. Both are located in Dracut, MA. Morgan purchased Joker's Lounge in 1991 and continues to operate it. He acquired the Rally Cap, a small neighborhood bar, in January of 2004.
3. Respondent Tee & M. Inc. is a corporation organized and existing under the laws of the Commonwealth of Massachusetts with a usual place of business at 95 Pleasant Street, Dracut, MA. Tee & M., operating under the name of Rally Cap Pub, has more than six employees and is an employer within the meaning of Chapter 151B.
4. Morgan, as owner of Joker's Lounge and Rally Cap Pub, works at both establishments. His major duties consist of purchasing liquor, making general repairs, participating in hiring, and reviewing bookkeeping.

5. Karen Courtemanche has been employed by Morgan since 1991. She has been the manager of Joker's Lounge since 1999 and the assistant manager of Rally Cap since Morgan's purchase of the bar in January of 2004. Courtemanche's major duties at both bars consist of handling employee schedules, shift changes, payroll, bookkeeping, and stocking. She shares with Morgan the responsibility for hiring and firing of employees.
6. Complainant worked at Joker's Lounge in August of 2003 for a total of three shifts. She voluntarily left Jokers because of other employment opportunities.
7. Complainant contacted Morgan in 2004 about the possibility of again working for him as a bartender. She began to work at Rally Cap Pub on April 6, 2004. She testified that she worked three day shifts per week on Tuesdays, Wednesdays, and Fridays from 11:00 a.m. to 6:00 p.m.¹ The bar also has a second shift from 6:00 p.m. to 2:00 a.m. which Complainant generally did not work. Complainant estimates that she earned about \$350.00 to \$400.00 per week.
8. Courtemanche prepares the weekly work schedule at Rally Cap which she posts each Monday. The schedule reflects the available information regarding any shift changes as of posting time.
9. Courtemanche testified credibly that in 2003 and 2004, bartenders were asked to provide as much advance notice as possible when requesting time off from a regularly-scheduled shift so that Courtemanche could coordinate coverage and approve shift changes. According to Courtemanche's credible testimony, bartenders in 2003 and 2004 were not allowed to make independent arrangements with other employees to change shifts, even in emergencies, because of their

¹ Joint Exhibit 1 indicates that Complainant's shifts sometimes varied.

different levels of experience and because of Courtemanche's desire to maintain control of scheduling. Complainant acknowledged that it was policy in 2003 and 2004 for bartenders to contact Courtemanche in advance about taking time off so that Courtemanche could arrange for coverage. The "Bartender Guide" in place during 2003-2004 states that bartenders are to, "notify [management] only, not any other employees" about scheduling problems. Joint Exhibit 15, para. 20.²

10. At all times relevant to this case, bartenders were given a "Bartender Guide" when hired and were explicitly told about the shift change policy at that time. The policy was also reviewed the first time an employee requested a shift change. Before Complainant was hired by Morgan to work at Rally Cap, he discussed with her the Bar's policies and procedures regarding attendance.
11. Complainant testified that shortly after she began to work at Rally Cap, Morgan began to make sexual references to her such as, "I hired you for your guns, not your brains" and "when is the last time you f'd your boyfriend because I don't want to taste spick." Complainant also testified that Morgan kissed her neck and squeezed her shoulders and her waist. She claimed that Morgan told her that her shirts were not low enough. According to Complainant, other females who worked at the bar were also subjected to unwanted sexual advances and/or remarks except for Courtemanche and Alicia Ryder, the girlfriend of Morgan's son. I do not credit Complainant's allegations.

² Courtemanche testified that the policy changed in 2005 when she began to allow some bartenders to arrange their own shift coverage. Courtemanche changed the policy because she got tired of arranging for shift coverage and because all the bartenders in the summer of 2005 were experienced.

12. Complainant alleges that on or about May 10, 2004³ she entered the Rally Cap's back room at the start of her shift in order to get dishes. According to Complainant, Morgan grabbed her left breast. Complainant asserts that she slapped him on the left arm several times and said, "don't touch me, don't ever touch my private parts again," and "no more hugs." According to Complainant, she felt humiliated and anxious. She testified that she returned to the front room, but Morgan remained in the back area for an additional eight minutes, completed his regular daily duties, and then left. I do not credit Complainant's testimony.
13. Bar patron Robert Norton testified that he heard, but did not see, Complainant slap Morgan, screech, and cry that, "I'm not a prostitute -- I'm a bartender and you shouldn't have done that." According to Norton, Morgan ran out the back door after Complainant yelled at him. I do not credit this testimony.
14. Norton testified that on another occasion, Complainant was wearing a sweatshirt and Morgan said she shouldn't wear a sweatshirt because he wanted to see her "guns." According to Norton, he saw Morgan "taking shots" out of another bartender's bellybutton. I do not credit this testimony.
15. According to Courtemanche, Norton was refused service of alcoholic beverages at the Rally Cap during August of 2004 due to his level of intoxication. Morgan testified that after he fired Complainant, he heard that Norton was telling people that he [Morgan] was going to be sued by Complainant. According to Morgan, he told Norton on several occasions not to come to the bar if he was going to discuss the potential lawsuit. I credit the testimony of Courtemanche and Morgan about why Norton was refused service.

³ Joint Exhibit 1 indicates that Complainant did not work on May 10, 2004.

16. Complainant testified that she told Norton that she was extremely upset by the breast grabbing incident and that he advised her to quit her job, contact the police and hire an attorney. She also claims that she called her mother following the incident, described what allegedly happened, and was given the same advice by her mother that Norton had offered. Complainant's mother did not testify on Complainant's behalf. I do not credit Complainant's testimony.
17. Complainant testified that she contacted her friend and co-worker, Patti Cullinane, and described the alleged incident to her. Cullinane did not testify at the hearing regarding receipt of this alleged phone call. I do not credit Complainant's testimony that such a conversation took place.
18. Complainant continued to work at the Rally Cap Pub after the alleged breast grabbing incident in May of 2004 until she was fired on or around August 2, 2004. Complainant testified that she continued to work at Rally Cap because she needed the job to support herself and her daughter.
19. While she worked at Rally Cap, Complainant was late for her shift on at least eight occasions and missed a total of seven shifts without any advance notice to Courtemanche. During the same period in which Complainant missed seven shifts, the other employees of Rally Cap combined missed a total of three shifts.
20. During her second week of employment, Complainant failed to appear for two of her three shifts without providing advance notification. Complainant did not complete her third shift that week because of the need to seek medical attention resulting from a domestic matter. Courtemanche was able to acquire last minute coverage for the first two shifts but had to work the third shift herself.

21. Complainant attributed her unexcused absences to taking her daughter to medical appointments, but the records of her daughter's medical appointments do not coincide with Complainant's scheduled work shifts. Joints Exhibits 1, 4 and 5.
22. For each of Complainant's unexcused absences, Courtemanche was the person who coordinated coverage or provided coverage.
23. Complainant testified that in July of 2004, she agreed to fill in for another bartender on a weekend evening shift but called Courtemanche at around 2:30 p.m. to say that she was in heavy traffic. According to Complainant, she had arranged for Jessica Phair to cover her shift. I do not find Complainant's version of this incident to be credible. Instead, I credit Courtemanche's testimony that Complainant asked for extra work on weekend evenings because weekend evening shifts were the most lucrative. The first available weekend evening shift which became available after Complainant's request was Saturday, July 31, 2004. Courtemanche assigned Complainant to the shift, which was to begin at 6:00 p.m. Courtemanche testified that Complainant notified her around 5:00 p.m. that she was stuck in traffic and would not be able to make the shift, but when Courtemanche said she would have the early shift bartender wait until Complainant arrived, Complainant admitted that she had decided to stay at the beach through the night rather than work.
24. Courtemanche testified credibly that it was she who arranged for Jessica Phair to cover July 31, 2004 evening shift. In making the arrangement, Courtemanche learned from Phair that she had previously been contacted by Complainant to cover the shift and had told Complainant she did not want to do so. As a result of

- Complainant's failure to appear for the July 31, 2004 shift and her prior attendance issues, Courtemanche decided that Complainant should be terminated.
25. At her regular Monday afternoon business meeting with Morgan on August 2, 2004 following Complainant's missed shift on Saturday, July 31, 2004, Courtemanche described the incident and stated her view that Complainant should be terminated. Morgan agreed with Courtemanche's suggestion.
26. Morgan left Complainant a cell phone message asking to meet with her at his office at Joker's Lounge. Complainant returned his call and arranged to go to his house immediately after their phone call.
27. Morgan testified that when Complainant arrived at his house, he informed her that he was firing her because she had failed to appear for the weekend evening shift, had failed to provide proper notice, and had lied to Courtemanche. Morgan testified that Complainant responded by saying that if he fired her, she would sue him for sexual harassment. According to Morgan, Complainant called him twice after leaving his house to repeat her threat of a lawsuit. I credit Morgan's testimony. Complainant acknowledges that she told Morgan she was going to sue him for sexual harassment.
28. Complainant testified that Morgan accused her of taking money from a poker machine and that Morgan's accusation made it impossible for her to get another job as a bartender. I do not credit this testimony
29. Complainant identified three individuals who allegedly heard the accusation against her. Complainant only produced one as a witness at the public hearing, Steven Beaudoin. Beaudoin denied hearing such information from Morgan.

30. Complainant testified that her experience working at Rally Cap caused her to develop irritable bowel syndrome, difficulty sleeping, and loss of appetite. She claimed that her employment situation caused her to feel anxious, stupid, and embarrassed. I do not credit her testimony in regard to causation.
31. Following her termination from the Rally Cap Pub, Complainant procured employment in October of 2004 at \$8.50 per hour.

III. CONCLUSIONS OF LAW

A. Sexual Harassment

M.G.L. C. 151B, sec. 4, paragraph 1 prohibits workplace discrimination, including sexual harassment. See Ramsdell v. Western Bus Lines., Inc., 415 Mass. 673, 676-77 (1993). Chapter 151B, sec. 4, paragraph 16A also prohibits sexual harassment in the workplace. See Doucimo v. S & S Corporation, 22 MDLR 82 (2000). Sexual harassment is defined as “sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when (a) submission to or rejection of such advances is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual’s work performance by creating an intimidating, hostile, or sexually offensive work environment. M.G. L. c. 151B, sec. 1, para. 18.

In order to establish a “hostile work environment” sexual harassment claim, Complainant must prove by credible evidence that: (1) she was subjected to sexually demeaning conduct; (2) the conduct was unwelcome; (3) the conduct was objectively and

subjectively offensive; (4) the conduct was sufficiently severe or pervasive as to alter the conditions of employment and create an abusive work environment; (5) the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. See College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987); Parent v. Spectro Coating Corp., 22 MDLR 221 (2000); MCAD Sexual Harassment in the Workplace Guidelines, II. C. (2002).

Sexual harassment must be objectively and subjectively offensive. See Ramsdell v. Western Bus Lines, Inc., 415 Mass. 673, 677-78 (1993). The objective standard means that the evidence of sexual harassment must be considered from the perspective “of a reasonable person in the plaintiff’s position.” Id. at 678. The reasonable woman inquiry requires an examination into all the circumstances, including the frequency of the conduct, its severity, whether it was physically threatening or humiliating, whether it unreasonably interfered with the worker’s performance, and what psychological harm, if any, resulted. See Scionti v. Eurest Dining Services, 23 MDLR 234, 240 (2001) *citing Harris v. Forklift Systems, Inc.*, 510 U.S.17 (1993); Lazure v. Transit Express, Inc., 22 MDLR 16, 18 (2000). The subjective standard of sexual harassment means that an employee must personally experience the behavior to be unwelcome. See MCAD Sexual Harassment in the Workplace Guidelines, II. C. 3 (2002); Ramsdell v. Western Bus Lines, Inc., 415 Mass. at 678-679.

The credible evidence in this case persuades me that Rally Cap owner Edward Morgan did not sexually harass Complainant. I do not believe Complainant’s assertions that shortly after she began to work at Rally Cap a second time in 2004, Morgan began to make sexually explicit comments to her, comment on her clothes, ask about her sex life,

and subject her to unwanted physical touching. Complainant's accusations are undermined by the fact that she had previously worked for Morgan and voluntarily returned to work at the bar, that she did not present testimony at trial that was as credible as Courtemanche's and Morgan's, that she failed to produce as corroborating witnesses other female bartenders even though she testified that they were also subjected to unwanted sexual advances, that she continued to work at the bar following her alleged sexual assault, and that she arranged to go, alone, to Morgan's house on the day she was fired.

The sole witness produced by Complainant – Robert Norton – was also unconvincing. He claims he heard, but admits that he did not see, the incident which allegedly took place on May 10, 2004. His version of what he heard is inconsistent with Complainant's in some significant respects. Whereas Complainant testified that she said to Morgan, "don't touch me, don't ever touch my private parts again," and "no more hugs," Norton testified that Complainant said, "I'm not a prostitute -- I'm a bartender and you shouldn't have done that." Complainant claims that Morgan remained in the back area for an additional eight minutes after he grabbed her breast during which he attended to work duties, but Norton claims that Morgan ran out the back door after Complainant yelled at him. Complainant also asserts that she called fellow bartender Patti Cullinane and her mother following the incident to tell them what had happened, but neither testified on behalf of Complainant.

For the foregoing reasons, Complainant has failed to prove by credible evidence that she was subjected to sexually demeaning conduct.

B. Retaliation

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. Retaliation is a separate claim from discrimination, “motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices.” Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000), *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). Complainant alleges that she screamed and slapped Morgan for grabbing her breast and thus opposed sexual harassment. Complainant contends that her termination was in retaliation for this protected activity.

To prove a prima facie case for retaliation, Complainant must demonstrate that she: (1) engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected her to an adverse employment action; and (4) a causal connection existed between the protected activity and the adverse employment action. *See* Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000).

Under M.G.L. c. 151B, sec. 4(4), an individual engages in protected activity if she “has opposed any practices forbidden under this chapter or ... has filed a complaint, testified or assisted in any proceeding under [G.L.c.151B, sec.5].” While proximity in time is a factor, “... the mere fact that one event followed another is not sufficient to make out a causal link.” MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996), *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996). The fact that Respondent knew of a discrimination claim and thereafter took some adverse action

against the Complainant does not, by itself, establish causation, but it may be a significant factor in establishing a causal relationship.

Once a prima facie case is established, the burden shifts to the Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). If Respondent succeeds in offering such a reason, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext for discrimination. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a discriminatory motive which is the determinative cause of the adverse employment action. See id. Even if the trier of fact finds that the reason for the adverse employment action is untrue, the fact finder is not required to find discrimination in the absence of the requisite intent. See id.; Abramian v. President and Fellows of Harvard College, 432 Mass. at 117-118.

Assuming that slapping and screaming at a supervisor in response to a sexual assault is behavior which, if proven to have taken place, can be construed as protected activity, Complainant has nonetheless failed to present a prima facie case of retaliation because Part III (A), supra, establishes that the alleged protected activity did not, in fact, occur. The adverse action in this case – Complainant’s termination – was motivated by Complainant’s poor attendance rather than her alleged protected activity. During the

time that Complainant worked at Rally Cap, she was late for her shift on at least eight occasions and missed a total of seven shifts without any advance notice. Her attendance record was significantly worse than that of her fellow bartenders. On the first occasion that Complainant sought and received permission to fill in as a bartender during a lucrative evening shift on a Saturday night, she called an hour before the shift was to begin to say that she was stuck in traffic and could not make her shift. Complainant subsequently admitted that she had decided to stay at the beach through the night rather than go to work. These were the factors that led Courtemanche and Morgan to terminate Complainant, not protected activity relating to sexual harassment. Accordingly, Complainant has failed to prove that she was the victim of retaliatory conduct.

IV. ORDER

The case is hereby dismissed. 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.

So ordered this 25th day of March, 2008

Betty E. Waxman, Hearing Officer

