

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

COMMISSION AGAINST DISCRIMINATION)
AND STEVEN GALLANTER,)
Complainants)
)
AGAINST)
)
BOSTON BALLROOM CORP.)
D/B/A THE ROXY)
Respondent)

DOCKET NO.
98-BEM-1202

APPEARANCES

Counsel for Complainant
Attorney Kelly M. Bonnevie

Counsel for Respondent
Attorney Stuart H. Sojcher
Attorney Brian A. Gillis

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On January 9, 1997, Complainant, Steven Gallanter (“Complainant”), filed a complaint with the Massachusetts Commission Against Discrimination (“Commission”) (Docket No. 97-BEM-0072) charging Respondent, Boston Ballroom Corp. (“Respondent”), a corporation doing business as The Roxy, with discrimination against him based on sex/gender. On May 8, 1997, Complainant reached an agreement with Respondent, which provided that Complainant would be rehired and that for a period of 52 weeks he could be terminated only for cause. Complainant withdrew his MCAD charge pursuant to that agreement.

The Complainant was terminated again on October 18, 1997. Complainant filed a complaint with this Commission on April 16, 1998 charging the Respondent with unlawful retaliation in violation of M.G.L. c. 151B, sec. 4 (4a). A probable cause finding was issued on May 28, 1999. On May 2, 2001, the case was certified for public hearing to determine: (1) Whether Respondent terminated Complainant's employment, in retaliation for Complainant's having filed and resolved an earlier complaint before this Commission, in violation of M.G.L.c.151B; and (2) Whether Complainant suffered damages as a result of the alleged acts of Respondent and, if so, the amount and/or value of such injuries or damages. A public hearing was held before me on May 22, 2002. The parties have submitted Proposed Findings of Fact and Conclusions of Law. In reaching my decision, I have considered the entire record including the post-hearing briefs of the parties. To the extent that the proposed findings and conclusions are in accord with the findings herein, they are accepted; to the extent that they are not, they are rejected. Certain proposed findings have been omitted as not relevant or necessary to a proper determination of the material issues presented.

Based upon all the credible evidence and reasonable inferences drawn therefrom, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. The Complainant, Steven Gallanter, ("Complainant") is a male, who began working as a Bartender for the Respondent in the spring of 1993. I find that Complainant was an employee within the meaning of M.G.L. c. 151B, sec.1(6).

2. The Respondent, Boston Ballroom Corporation d/b/a The Roxy (“Respondent”) is a Massachusetts corporation with its principal place of business located on Tremont Street in Boston. (Exhibit 9, Section III (b)). It is uncontested that the Respondent employed more than six (6) employees and therefore, I find that Respondent is an employer within the meaning of M.G.L. c. 151B, section 1(5).
3. The Respondent operates primarily as a nightclub and dance facility open to the public, in addition to holding concerts, boxing events, and large-scale private parties. At the times relevant to the Complaint, the nightclub was open to the public three to four days per week. (Exhibit #3)
4. The Complainant was hired by the Respondent to work as a bartender in 1993. Complainant’s immediate supervisors were managers Michael Breen (“Breen”) and Michael Gijewski (“Gijewski”), both of whom reported to Louis A. Delpidio (“Delpidio”), the President of Respondent. (Exhibit #3)
5. From 1993 to 1996 there were typically 13 –14 bartenders employed by the club, serving an area that included a large dance floor and stage. Complainant testified that, during the first few years of his employment, he received compliments from his managers for his ability to work in a fast-paced, nightclub environment.
6. In 1996, “service bars” were added to the club and a total of over 16 bartenders were employed. George Kalevas, who worked as a bartender¹ during the same period of time as the Complainant, testified that when

¹ Kalevas, a male, was eventually promoted to the position of manager.

bartending at one of the service bars, club policy² is to give priority to the orders submitted by a waitress. Kalevas explained the club's reasoning that a waitress with ten orders should be serviced before a customer with one order. Kalevas testified that, despite this policy, Complainant consistently served the customers first. Kalevas testified that he got along with the Complainant though they only worked together at the same bar on occasion. When Kalevas did tend bar on the same evenings as Complainant, he observed that the waitresses appeared to frequent his service bar more often and they complained to him about Complainant "flipping out" on them when customers were waiting. I credit Kalevas' testimony.

7. On or about October 11, 1996, the Complainant was terminated. Complainant believed this termination was gender biased. He testified that one of his managers told him that the owner, Delpidio, wanted "more broads" bartending.
8. On January 9, 1997, the Complainant filed a complaint with this Commission (Exhibit #1) alleging that the Respondent discriminated against him on the basis of his gender.³
9. Complainant testified that, when Delpidio first received the complaint, he expressed disbelief that Complainant had filed an MCAD charge and said, "Why the fuck are you doing this?"

² Since neither party produced a written policy to this effect, I have inferred that this is a general practice and procedure in this club.

³ The allegations in the initial complaint are disputed.

10. Complainant testified that he had further conversations with Delpidio about the complaint. Subsequently, Delpidio told the Complainant that he wanted to settle the matter.
11. On May 9, 1997, Complainant and Delpidio (on behalf of the Respondent) entered into an agreement (Exhibit. #6), which was drafted by the Complainant.
12. The agreement provided, in part, that the Respondent would reinstate Complainant and that Complainant would tend bar every Saturday evening for 52 weeks and could be dismissed only “for cause.” Complainant testified that he entered into the agreement with the understanding that he was required to follow the policies of the Respondent, including reporting to work on time, dressing and acting appropriately at the workplace, and being polite and courteous to other employees, in addition to providing documentation from MCAD that he had withdrawn his complaint. I find that Complainant understood, when he executed the agreement, that violating the policies and procedures of the Respondent would constitute cause for his dismissal.
13. Following his reinstatement, Complainant encountered problems with some of the waitstaff when he refused to float drinks and argued when asked to pour free drinks for customers in order to replace those that had been spilled by waitstaff.
14. Complainant testified that he took issue with adhering to the replacement drink policy because it required him to pay for the drinks he replaced for

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the waitstaff. In their testimony, both the general manager Michael Breen and head waitress Annette Fougere explained the Respondent's procedures for billing replacement drinks which directly contradicted Complainant's version. I credit Breen and Fougere's testimony that replacement drinks were to be billed and tracked as separate transactions so that neither the waitstaff nor the bartender would be responsible for the cost of such drinks.

15. Complainant denied problems with co-workers, testifying that he was known for being "intensely nerdy" while also claiming to be "jovial with co-workers." I find Complainant's testimony to be inconsistent in this regard. I also observed Complainant to be arrogant and smug during his testimony when recounting his discussions about floating drinks and the resulting problems with the waitstaff.
16. Michael Breen has worked in the nightclub industry for twenty-one years and has been employed at The Roxy for the past seven years. His duties include overseeing club operations, hiring, terminations, closing, and review of register receipts. He testified that he received complaints from the waitstaff that the Complainant yelled at them and upset them. He also testified that the head waitress had approached him on several occasions to report that Complainant was giving the waitresses a hard time. I credit Breen's testimony.
17. Breen gave the Complainant several verbal warnings, during 1997⁴, about his job performance, specifically with respect to his harsh treatment of the

⁴ The witness referred generally to the year in question, but did not specify times and dates.

waitstaff. Breen requested that the Complainant “take it easy” and suggested that if he had any problems that he should come to him to discuss the matter. Complainant denied receiving verbal warnings from Breen. I credit Breen’s testimony and find that Breen did address these matters with Complainant.

18. Managers Michael Gijewski and Michael Breen both testified that, from time to time during 1997, they each held group meetings to remind staff about cash register accuracy and procedures dealing with cash discrepancies. Gijewski also spoke directly with Complainant, on a few separate occasions, about discrepancies in his cash register.
19. In late September or early October 1997, the Complainant received a verbal warning from Gijewski for yelling at a waitress. Gijewski asked Complainant if he understood that continued inappropriate treatment towards waitresses would result in his losing his job. Complainant told Gijewski that he understood.
20. On the evening of October 18, 1997, Fougere was working as head waitress. Fougere testified that although she could not see Complainant directly, she could hear him “bellowing” at a waitress. This waitress, “Julie,” had apparently spilled some drinks and Complainant was shouting that the replacement drinks would come out of his pocket.
21. Fougere spoke with Julie, who was crying as a result of Complainant’s loud tone and manner. Fougere reported the incident to Gijewski.

22. Gijewski terminated the Complainant following Fougere's verbal report. Gijewski told the Complainant that he had warned him not to yell at a waitress again, and as a result of Complainant's shouting at Julie, Complainant was terminated.
23. Later that evening, Gijewski contacted Breen and informed him that he had terminated the Complainant for arguing with a waitress who had left the workplace crying as a result of Complainant's conduct.
24. Gijewski testified that he terminated Complainant for arguing with and upsetting a waitress, after being warned several times that his conduct was unacceptable and in direct violation of the policies of the Respondent. He testified that he did not have any other reason for terminating Complainant. Though he recalled Complainant had filed some type of claim against Respondent, he wasn't certain about the details. Gijewski further testified that at the time he terminated the Complainant, he was not aware of any written contract of employment or any written agreement between Complainant and Respondent. I credit Gijewski's testimony.
25. The termination on October 18, 1997, took place approximately 23 weeks after the Complainant and the Respondent executed the reinstatement agreement.
26. Following his termination, Complainant wrote a letter to Delpidio questioning his termination, in light of the agreement that he would only be terminated for cause. Complainant handed this letter to him while

working at one of Delpidio's other clubs. Delpidio stated that he would look into the matter.

27. The Complainant did not receive any written response to his letter. However, he subsequently spoke with Breen who conveyed to him that yelling at a waitress was in violation of the policies and procedures of the Respondent, that his conduct was inappropriate for a bartender, and was sufficient grounds for termination.
28. Complainant testified that when he was accused of yelling at a waitress and was fired for that reason, he was "shocked, saddened and had to hold back tears." I find Complainant's testimony to be exaggerated, insincere and not credible.
29. Following Complainant's termination, Delpidio and the other owners, hired Complainant to bartend for them at their other clubs.
30. In 1997 and 1998, Complainant worked as a bartender, D.J., office manager, and purchasing agent at the Jukebox and Club Joy⁵, both owned by Delpidio (Exhibit #2), and also worked at other nightclubs not owned by the Respondent.
31. Complainant wrote a letter to Breen, dated March 12, 2001, stating: "At this point, I have no beef with anyone at The Roxy. My issue is with Gijewski, and he is long gone."
32. At the time of this hearing, Complainant worked for Tillinger's Concierge Service, at the Prudential Center, approximately 2 – 3 nights per week and

⁵ Alternately referred to as "Club Joy" and "Joy Boston" in testimony.

worked as a bartender for the Boston Red Sox, as well as at Club
“Europa.”

33. Complainant testified that working at The Roxy gave him “professional prestige.” He stated that people in the hospitality industry questioned why he was no longer employed at The Roxy and that he was embarrassed that he did not have an explanation. I do not find Complainant’s testimony credible in this regard, since he had been working at The Roxy only on Saturday nights and was employed by numerous other clubs and establishments both during his employment and following his termination.

III. CONCLUSIONS OF LAW

M.G.L. ch.151B, sec. 4(4) prohibits employers from discharging, expelling or otherwise discriminating against a person who has opposed any practice prohibited by Chapter 151B or has filed a complaint alleging a violation of Chapter 151B. In order to establish a prima facie case of retaliation, a Complainant must show that, (1) he was engaged in a protected activity; (2) the employer was aware of the protected activity; (3) he subsequently was subjected to an adverse employment action; and (4) evidence existed sufficient to establish a retaliatory motive or the adverse employment action followed the protected activity within such time proximity as a retaliatory motive can be inferred. Richards v. Bull HN Information Systems, Inc., 16 MDLR 108,1639 (1994). Retaliation is “motivated, at least in part, by a distinct intent to punish or rid the workplace of someone who complains about an unlawful practice.” Thomas v. King Arthur’s Motel and Lounge, Inc., 24 MDLR 66 (2002), Fountas v. Medford Public Schools, 22 MDLR 264 (2000), citing Ruffino v. State Street Bank and

Trust Company, 908 F. Supp. 1019, 1040 (D.Mass.1995). To succeed on a claim of retaliation, “the plaintiff must prove that he reasonably and in good faith believed that the employer was engaged in wrongful discrimination, that he acted reasonably in response to his belief and that the employer’s desire to retaliate against him was a determinative factor in its decision to terminate his employment.” Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) quoting Tate v. Department of Mental Health, 419 Mass. 356, 364 (1995).

The Respondent argues that Complainant fails to establish a prima facie case because there is no causal connection between the Complainant’s termination and his MCAD complaint. Since a link between the protected EEO activity and the adverse employment actions(s) at issue is not always explicit, the Commission can infer “a causal connection where the timing of the events makes an inference reasonable.” Thomas v. King Arthur’s Motel and Lounge, 24 MDLR 66 (2002), citing Kealy v. City of Lowell, Department of Public Schools, 21 MDLR 19 (1998), Cimino v. BLH Electronics, Inc. 5 MDLR 1263, 1287 (1983) (finding retaliation where the discharge occurred within 15 months after protected EEO activity took place). I find that Complainant engaged in a protected activity by filing a complaint with the Commission. There was an adverse employment action against him 23 weeks after he entered into an agreement dismissing his January 1997 discrimination complaint. Based on these factors, a retaliatory motive could be inferred and the Commission then follows the burden–shifting framework set forth in Wheelock College v. MCAD, 371 Mass. 130,136 (1976).

Where there is an adverse employment action, as there is here (Complainant’s termination from employment), the Respondent assumes the burden of articulating some

legitimate, nondiscriminatory reason for the action in question. The Respondent has set forth several legitimate reasons for terminating the employment of the Complainant. During his continued employment, Respondent warned Complainant that his behavior towards his fellow co-workers was unacceptable and violated Respondent's policies. (Findings of Fact 17,18). Subsequently, the Complainant was terminated. (Finding of Fact 22). Respondent has set forth that its reason for terminating the Complainant was his failure to adhere to its policies and procedures by continually mistreating his fellow employees even after several warnings. I find that Respondent has articulated a clear and credible non-discriminatory reason for terminating Complainant.

Once an employer sets forth non-discriminatory reasons for its actions, the analysis moves to the third stage, shifting the burden back to Complainant to demonstrate that the reasons articulated by Respondent were not the real reasons or were a mere pretext for discrimination. In an indirect evidence case, if the fact finder is persuaded that one or more of the employer's reasons is false, it may, but need not, infer that the employer is covering up a discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Co., 434 Mass. 493 (Mass. 2001). Other than the fact that he was terminated twenty-three weeks after dismissing his MCAD complaint, Complainant has not presented any persuasive evidence that would suggest discriminatory animus on behalf of the Respondent, or that the real reason for his termination was discriminatory or retaliatory. I find the fact that Respondent has continued to employ Complainant at its other clubs and bars (Findings of Fact #29, #30) supports its position that Complainant was terminated because of his inappropriate interactions with one or more particular waitresses at one specific club, The Roxy. Respondent established that the managers at

The Roxy, Breen and Gijewski, were dissatisfied with Complainant's inappropriate outbursts towards the waitstaff and his repeated violations of club policy. There was credible evidence presented that the Complainant was warned numerous times that his behavior was unacceptable and that he would be subject to termination if it continued. He was presented with several opportunities, including the offer by Breen to come to him with any problems, to avoid adverse action. Based on this evidence, I conclude that the termination stemmed entirely from Complainant's improper behavior and failure to adhere to employee policy, and was not motivated by any discriminatory animus of his supervisors.

In the absence of evidence to the contrary, I find Respondent has set forth legitimate, non-discriminatory reasons for Complainant's termination. Accordingly, I conclude that Complainant has failed to establish that Respondent's articulated reasons are a pretext for unlawful retaliation. Based on all the evidence, I conclude that Respondent did not engage in unlawful retaliation in violation of M.G.L. c.151B, sec.4 (4).

The Complainant's case must be dismissed.

IV. ORDER

For the reasons stated above, this matter 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 after the receipt of this Order.

SO ORDERED this 16th day of July 2003.

HELENE HORN FIGMAN

HEARING OFFICER