

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and JAMIE HUGHES,

Complainants

Docket No. 15 NEM 00218

v.

CRANBERRY DENTAL ASSOCIATES,
Respondent

Appearances: Michael Dube, Esq. for Complainant Jamie Hughes
Robert Paul Hegner, President/Owner of Cranberry Dental Associates¹

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 6, 2015, Complainant Jamie Hughes filed charges of discrimination based on gender against Respondent Cranberry Dental Associates. Complainant alleges that she was terminated for seeking a maternity leave. A probable cause finding was issued and the matter was certified for a public hearing on November 15, 2017.

A public hearing was held on June 13 and 14, 2018. The following individuals testified at the hearing: Complainant, Kelley O'Brien, Vera Siciliano, Frank Whetherbee, Benjamin Hughes, Lynn Farrell, and Joan Bertoni.

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.

¹ Robert Paul Hegner is not a bar-licensed attorney, but he conducted direct and cross-examinations of witnesses.

II. FINDINGS OF FACT

1. Complainant was hired by Respondent Cranberry Dental Associates as a dental hygienist in September 2012 and started working for Respondent during the first week of October 2012. At or around the same time, dental hygienist Lynn Farrell was also hired.
2. Respondent Cranberry Dental Associates is a dental practice located in Carver, Massachusetts. The dental practice is owned by Robert Paul Hegner. Vera Siciliano is the general manager of Cranberry Dental Associates and other dental practices owned by Hegner.
3. Complainant testified that when she was being considered for hire, she was asked by Siciliano not to reveal that she was a candidate for hire because a pregnant hygienist "Shauna" was being "let go." Day 1 at 17:25; 1:47; Day 2 at 25:30; 1:15:40. Siciliano denied that Respondent discharged "Shauna" for being pregnant. Day 1 at 3:34:30. I find that there is insufficient credible evidence to support Complainant's allegations about the "Shauna" comment.
4. Complainant worked Tuesdays, Wednesdays, and Friday mornings at Cranberry Dental. She worked elsewhere, at Bourne Dental, on Mondays and Thursdays. Day 1 at 1:34:20.
5. Complainant testified that during her employment with Respondent, she interacted primarily with office manager Kelley O'Brien, dental assistant Katie Scopa, and the following dentists: Drs. Russo, Park, Gaiser, and Whetherbee.
6. In December 2012, Dr. Whetherbee sent an e-mail to practice owner Hegner stating that Complainant was "border line refusing" to use green ink for making chart notes about

his dental patients as he desired and, instead, insisted on using blue or black ink.

Respondent's Exhibit 1. According to Dr. Whetherbee, he got into "a bit of back and forth" with Complainant over the issue. Id.

7. In October 2013, Dr. Whetherbee sent another e-mail to Hegner that described Complainant as "not a team player" who "would not look at me" when he said hello or entered a room. Respondent's Exhibit 2. Dr. Whetherbee suggested replacing Complainant "ASAP" because "she doesn't fit in" even though he deemed her an "average" hygienist in terms of technical skills. Day 1 at 2:55:28; 2:59:20; 3:06; 3:08:30.
8. During 2014, Complainant was criticized by several co-workers for neglecting to sterilize dental instruments, leaving dirty instruments in the sink, failing to re-stock supplies, failing to answer the office phone, and refusing to take out the trash. Respondent's Exhibit 3; Day 1 at 1:25; 1:57; 2:07; 2:25-2:27; 2:32; Day 2 at 7:00, 38:55; 43:25. Complainant asserted that she only failed to sterilize equipment once or twice prior to being instructed to do so. Day 1 at 1:57; 2:08; 2:22-2:24; 2:27; 2:39:30. I do not credit Complainant's testimony that she only failed to sterilize equipment once or twice.
9. Practice manager Vera Siciliano testified that she received calls from Cranberry dental assistant Katie Scopa and dental hygienist Lynn Farrell that were critical of Complainant for failing to assist with general office responsibilities. Day 1 at 3:38:50; 4:11:20; Day 2 at 55:50. Siciliano arranged for a staff meeting in mid-March 2014 to address the criticism about Complainant's failure to help out in the office. Day 1 at 1:25:27; 2:34:30; 4:19:20; 4:32:40. Complainant denied the accusations and expressed

the sentiment that she was being picked on. Day 1 at 3:44:10. After the meeting, Scopa texted Siciliano to complain that Complainant continued to leave dirty instruments in the office sink. Respondent's Exhibit 3; Day 1 at 4:03:30. I credit that there was dissatisfaction about Complainant's lack of helpfulness in the office.

10. Hygienist Lynn Farrell testified that despite her frustration about Complainant not sterilizing instruments, she respected Complainant's technical skills as a hygienist and recommended Complainant for employment at another dental office. Complainant's Exhibit 4K; Day 2 at 54:00.
11. On March 26 or 27, 2014, Complainant and Hegner met at Pizzeria Uno to discuss employment issues. Respondent's Exhibit 5; Day 1 at 2:36:20. According to Complainant, the subject of probation never came up and her employment situation "went well" from March through the summer of 2014. Day 1 at 1:27:05; 2:37:10. According to Vera Siciliano, however, Complainant was placed on probation during or immediately after the restaurant meeting. Day 1 at 3:46:20; 4:18:20. Respondent submitted an excerpt from a computer ("palm") calendar belonging to practice owner Hegner which indicates that on March 26, 2014, he made the decision to place Complainant on probation. Respondent's Exhibit 4. Complainant, herself, texted a co-worker in September 2014 about being placed on probation. Complainant's Exhibit 4H. I credit that Complainant was placed on probation at one or more points during her employment and that Complainant was not credible in denying her probationary status.
12. On March 31, 2014, Respondent placed an ad on Craig's List for a dental hygienist. According to Siciliano, the reason was to find a replacement for Complainant but no hygienist was hired at that time either because no suitable candidate could be found or

because Complainant's performance improved for a period following the imposition of probation. Respondent's Exhibit 7; Day 1 at 4:23:30; 4:38.

13. In or around June of 2014, dental assistant Joan Bertoni asked Complainant to help file office charts and Complainant refused. Day 2 at 1:02. Complainant testified that there was insufficient room behind the desk for two people to put away files at the same time. I do not credit this excuse.
14. During the summer of 2014, Hegner hired Dr. Gaiser, who was willing to work full days on Fridays. At or around the same time, Hegner instituted Saturday work hours. Day 1 at 4:31:45. Hegner sought to have Complainant work on Friday afternoons along with Dr. Gaiser and some hours on Saturdays, but Complainant refused. Day 1 at 4:32; Day 2 at 5:00.
15. Siciliano testified that she and Hegner decided that it was time to replace Complainant during the second week in August 2014 and attempted to use names from the March 2014 Craig's List advertisement for this purpose but the list was stale. Siciliano said that she and Hegner decided to re-post an ad for a dental hygienist on Craig's List after Labor Day. Day 1 at 3:59. I credit this testimony.
16. On or around August 27, 2014, Complainant announced that she was pregnant, was due the beginning of March 2015, and wished to take an extended maternity leave through mid-June 2015. Respondent's Exhibit 4 A; Day 1 at 3:54:50. According to Complainant, Siciliano asked if the pregnancy were planned and said, "We'll see what Paul [Hegner] thinks about this." Day 1 at 1:35:20; 2:15. According to Siciliano, Complainant asked for an extended maternity leave and was told that the request would be brought to Hegner's attention. Siciliano acknowledged that she asked Complainant

if the pregnancy were planned but maintains that she did so because Complainant didn't seem very excited about being pregnant. Day 1 at 3:56:20.

17. On September 2, 2014, Siciliano posted an ad on Craig's List for a dental hygienist.

Respondent's Exhibit 7.

18. On September 16, 2014, Hegner and Siciliano met with Complainant and terminated

her employment. Respondent's Exhibit 6. According to Complainant, Hegner

referenced her pregnancy several times and threatened her reputation as a dental

hygienist if she did not leave voluntarily. Day 1 at 1:39:10; 2:17. Siciliano denied that

Hegner threatened Complainant. Day 1 at 4:08. According to the termination letter,

Complainant "suggested" at the meeting that being pregnant protected her from

termination. Respondent's Exhibit 6.

19. Following the meeting, Hegner drafted a letter memorializing Complainant's

termination. Respondent's Exhibit 6. The letter states that the termination was not

related to Complainant's pregnancy but, rather, was due to her inability to work with

other staff members and her refusal to work the hours requested. Id. The letter

references the fact that Complainant was placed on probation on March 26, 2014. Id.

20. Complainant testified that she felt awful after being terminated. She stated that she

experienced anxiety which caused her stomach issues, cramps, and hives. Day 1 at

1:42. According to Complainant, the loss of her job contributed to her husband failing

his engineering exams and contributed to a breach in the relationship between her

husband and her father. Day 1 at 1:43. Although she looked for other hygienist

positions, she did not receive many call-backs. Her other employer, Bourne Dental,

tried to give her extra work amounting to an extra day of employment. Day 1 at 1:44;

2:14:50. Complainant testified that the stress of losing her Cranberry Dental job adversely affected her relationship with her husband during a time that was “supposed to be a great time.” Day 1 at 1:45.

21. Complainant’s husband Benjamin Hughes testified that after being terminated, his wife became very agitated and experienced extreme anxiety. He stated that their relationship deteriorated. Day 1 at 3:19:40. After Mr. Hughes graduated from college with a degree in engineering, he took the “Fundamentals of Engineering” exam without adequate preparation in order to begin working sooner than planned, and he failed the exam. Complainant’s father criticized Complainant’s husband for not being able to ease Complainant’s tension and anxiety. Mr. Hughes was forced to borrow money from his grandmother to pay rent.

22. According to Complainant’s W-2 from Cranberry Dental Associates, she received \$24,743.00 in annual income from Cranberry Dental in 2013 and \$21,422.45 in 2014. Day 1 at 1:48. Her hourly rate was \$35.00 per hour. She collected unemployment compensation beginning in December 2014 and stopped receiving unemployment compensation on or around March of 2015 when she gave birth and stopped actively looking for another job. Day 1 at 1:49.00.

III. CONCLUSIONS OF LAW

M.G.L. Chapter 151B, sec. 4 (1) makes it an unlawful practice to discriminate against an employee because of her sex. Since pregnancy and childbirth are sex-linked characteristics, actions by an employer which “unduly burden” an employee because of pregnancy or childbirth may amount to sex discrimination under M.G.L.c.151B. See MCAD Guidelines on the Massachusetts Maternity Leave Act (2000) *citing* School

Committee of Braintree v. MCAD, 377 Mass. 424, 430 (1979); Gowen-Esdaile v. Franklin Publishing Co., 6 MDLR 1258 (1984) (termination of complainant during troubled pregnancy because of fears of additional absences deemed unlawful sex discrimination). Further, M.G.L. c. 151B sec. 4 (11A) makes it unlawful for an employer to refuse to restore a female employee to employment following a maternity leave under M.G.L. c. 149, sec. 105D.

In the absence of direct evidence, a prima facie case of sex discrimination requires a showing that Complainant: 1) is a member of a protected class, 2) was performing her job at an acceptable level, 3) was terminated, and 4) the circumstances of the removal raise a reasonable inference of discrimination. See Sullivan v. Liberty Mutual Ins. Co., 444 Mass. 34, 41 (2005) (retention of lower-rated, similarly-situated male attorneys rather than a female attorney during a reduction in force is sufficient to satisfy fourth prong of prima facie case); Weber v. Community Teamwork Inc., 434 Mass. 761 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000).

The evidence in this case supports a prima facie case. Throughout most of her employment with Respondent, Complainant was perceived to be a competent, if difficult, employee. Significantly, Respondent sought to increase her hours prior to learning that she was pregnant. Complainant was acknowledged to have “average” dental hygienist skills by Dr. Whetherbee notwithstanding his negativity about the way she interacted with him and others. Fellow hygienist Lynn Farrell testified that despite frustration over Complainant failing to sterilize instruments, she respected Complainant’s skills as a hygienist and recommended her to another dental office for employment. Based on these factors, I conclude that Complainant performed her job at an acceptable level. Complainant’s

announcement of her pregnancy and her subsequent termination approximately three weeks later, constitute the final elements of a prima facie case.

Once Complainant establishes a prima facie case, the burden-shifting paradigm of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) requires that Respondents, at stage two, articulate a rationale and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. See Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000). Respondent points to Complainant's failure to function as a team player, her failure to sterilize instruments, her refusal to perform generic office functions, her prior probation, and her refusal to work additional hours as the reasons for her termination. There is sufficient evidence in the record to support these assertions for purposes of satisfying Respondent's stage two burden.

At stage three, the burden shifts back to Complainant to persuade the fact finder by a preponderance of evidence that the articulated justifications for her termination are not the real reasons for the adverse action but, rather, a pretext for gender discrimination. See Sullivan v. Liberty Mutual Insurance Company, 444 Mass. 34, 55 (2005) quoting Lewis v. Boston, 321 F.3d 207, 214 (1st Cir. 2003); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 117 (2000). For the following reasons, I conclude that Complainant has not succeeded in establishing pretext.

In evaluating this matter, I must weigh the competing narrative offered by the parties. According to Complainant, she was fired because she announced that she was pregnant. According to Respondent, the decision to replace Complainant had already been made prior to the announcement of Complainant's pregnancy, and Respondent had already formulated

the intention to repost its ad for a hygienist after Labor Day. Respondent asserts that Complainant announced her pregnancy some six months before her due date to forestall Respondent's intention to fire her for reasons unrelated to her pregnancy. Of the two narratives, I conclude that Respondent's version is more persuasive.

I arrive at the above conclusion because there is evidence in the record that Complainant was not perceived to be a team player and that she refused to work on Friday afternoons. Complainant disputes these assertions but her credibility is undermined by her untruthful assertion at the public hearing that she was never placed on probation. Respondent's position, on the other hand, is buttressed by evidence of Complainant's probationary status, ongoing dissatisfaction with Complainant's performance, and the steps taken to attempt to replace her in late-March and mid-August 2014. I infer that after Complainant refused to work on Friday afternoons during the summer of 2014 following the hiring of Dr. Gaiser, the decision was made to terminate Complainant for reasons unrelated to gender. I further conclude that Complainant announced her pregnancy some six months prior to her due date in an effort to buttress her job security and forestall being fired.

The foregoing establishes that the pregnancy was not a substantial motivating factor in Complainant's termination. See University of Texas Southwestern Medical Center v. Nassar, 579 U.S. ____ (2013) (recognizing "motivating factor" causation standard in regard to Title VII's status-based provisions). See also Carella v. Blue Cross Blue Shield of Mass., 35 MDLR 1 (2012) (credible testimony showed that decision to terminate Complainant for poor performance was made prior to management being made aware of her pregnancy).

V. ORDER

Based on the foregoing findings of fact and conclusions of law, the case is Ordered Dismissed. Any party aggrieved by this decision may appeal to the Full Commission. To do so, a party must file a Notice of Appeal 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 28th day of August 2018.

A handwritten signature in cursive script, appearing to read "Betty E. Waxman", written over a horizontal line.

Betty E. Waxman, Esq.,
Hearing Officer