

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and DUNG MAROTTA,
Complainants

v.

Docket No. 09 BEM 00406

NATURAL SALON,
Respondent

For Complainant Dung Marotta: Donna J. Boggs, Esq.
For Respondent: Pro Se

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 24, 2009, Dung Marotta (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) against Respondent Natural Salon in Burlington, MA. Complainant alleges that she was subjected to discrimination on the basis of her age while working as a manicurist at the Salon and that she was constructively discharged.

On August 4, 2009, the Commission issued a Probable Cause Finding as to the age discrimination charges against the Salon. The Commission certified the case for public hearing on May 10, 2011.

A public hearing was held on October 31, 2011. At the hearing, Complainant’s counsel presented a motion to preclude Respondent from presenting any evidence and to seek sanctions for Respondent’s failure to respond to discovery requests. The motion

was taken under advisement and Respondent was allowed to present evidence at the public hearing subject to the proviso that the evidence would be disregarded if the motion were deemed to be justified.¹

The following individuals testified at the public hearing: Complainant, Lien Pham, and Michael Tran. Complainant submitted twenty-seven exhibits.

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, who was born in 1943, lives in Burlington, MA. She worked as a manicurist at Respondent Natural Salon from 1999, when she was age 56, to 2009, when she was age 65.
2. Respondent Natural Salon is a nail care shop located in Burlington, MA. Lien Pham testified that she is the owner of the Salon. She described “Lilly” as the manager. According to Complainant’s W-2 Wage and Tax Statements for 2007 and 2008, Respondent Natural Salon is affiliated with Nail Pro Plus Inc. Complainant’s Exhibits 3, 8 & 9.
3. Complainant testified that Natural Salon was managed by Lien Pham, although

¹ Having considered the motion, I now decline to grant it on the basis that the discovery sought to be elicited is overbroad, burdensome, and of minimal relevance to Complainant’s claims (*see e.g.*, requests for applications and resumes for each and every Salon employee beginning in January 1, 2000 and all “client lists” without specifying whose lists or what dates). Such items are excessively broad and of doubtful utility in leading to relevant evidence. Other document requests bear little or no relation to the proceeding, such as “notices to quit or summary process actions,” loans made by or to Respondent, deposit slips, passbooks, certificates of deposit, leases, motor vehicle registrations, deeds, trust agreements, mortgage applications, real estate tax bills, HUD Settlement Statements, and more. In addition to the problematic breadth of the items, Complainant’s counsel did not move to compel discovery at the expiration of the additional thirty-day period granted by the Hearing Officer at the parties’ prehearing conference but, instead, filed the instant Motion in Limine at the public hearing. The relief sought by the Motion consists of rulings that Complainant was subjected to unwelcome verbal and physical conduct and was terminated based on her age. Such rulings would permit Complainant to prevail on her claims without the necessity of proffering any evidence. I decline to accept such an outcome in the circumstances of this case.

Complainant also asserted that employees “Xuan” and “Lilly” sometimes acted as if they were in charge. According to Complainant, Pham came in several times a week to pick up money. During the period when Complainant worked at the Salon, it was staffed with more than six individuals, most of whom were in their 20s and 30s but at least one was in her 50s.

4. Complainant testified that beginning in 2005, co-workers at the Salon started to call her “old lady,” told customers that she was old, told her that she could not do the work, and told her that she should retire. I credit that there was friction between Complainant and other employees, but I do not credit that the focus of the friction involved Complainant’s age.
5. Complainant sought medical assistance for high blood pressure and depression in 2005. She saw her primary care physician Dr. Judith Feldman, psychiatrist Dr. Annette Kawecki, and a therapist. Complainant was prescribed Wellbutrin, Ativan, and Xanax for depression and anxiety.
6. Complainant testified that co-workers Brenda and Xuan took customers away from her and were “always negative” about her. Complainant claimed that when she passed behind Brenda’s chair, Brenda would move her chair back and hit Complainant in the legs and that Brenda would drop items into Complainant’s food while she was eating. Complainant testified that Xuan would “swing” in front of Complainant when customers asked for her, would touch Complainant’s hands while she was washing them in order to make them dirty, would intrude upon Complainant’s customers while they undressed in order to embarrass them, and would encourage other employees to push their chairs into Complainant’s customers and to give Complainant a “hard time.” I credit that

Complainant and her co-workers had disputes related to the assignment of clients and the small size of the workspace, but I do not credit that these matters related to Complainant's age.

7. Complainant testified that in February of 2006, Brenda tossed acetone into a pedicure basins and it splashed into Complainant's face while she was working on a customer at an adjacent station causing Complainant to get acetone in her eye. Complainant saw an eye doctor and was prescribed eye drops. Complainant's Exhibit 25. I credit that this incident occurred.
8. Complainant maintains that in November of 2008, she overheard Brenda, Xuan and Lilly say, "that old woman should retire and we will take her customers." Complainant claims that she contacted Pham who talked to the other employees but that nothing changed. I do not credit that Complainant's co-workers made the statements attributed to them.
9. Complainant was hospitalized in mid-December of 2008 for one week and remained at home for an additional two weeks. She testified that the cause was "too much stress" but her medical records state that she had an anxiety attack. According to Complainant, she was depressed at the time for reasons pertaining solely to her work situation. I do not credit that the sole cause of Complainant's physical problems was her work situation.
10. Complainant testified that she saw customers at the grocery store who said, "I called [the Salon] a few times and was told you no longer worked there." I credit that some of Complainant's customers called the Salon and were told that Complainant was not working there at the time.
11. Complainant claims that she called the Salon on three or four occasions in January and February of 2009 to say that she planned to return to work. Complainant states that at

some point in February of 2009, she informed Lilly that she was ready to return but was told that all of her possessions at the Salon had been placed in a bag and that she should pick them up. Complainant claims that she then called Pham who confirmed that she should pick up her belongings and not come back to work until she was contacted by the Salon. Complainant asserts that she was never permitted to return to the Salon and that she concluded by late February/ early March of 2009 that she had been fired.

Complainant testified that she was planning to continue working until age 70. I do not credit that Complainant was prohibited from ever returning to the Salon. Complainant's medical record dated February 3, 2008 states that Complainant reported the following to her treating psychiatrist: "When I think about going back to work, I get dizzy."

Complainant's Exhibit 16. I find that Complainant voluntarily took a leave of absence from the Salon and that circumstances made it difficult for her to return but that she was not prohibited from doing so.

12. According to Complainant, she was replaced at the Salon by Lilly's mother who was around 50 years old at the time.
13. According to Lien Pham, she respected Complainant "like a mother." Pham stated that in her culture, people are sometimes called "old" but that it doesn't mean a lack of respect because older workers have more experience and give better service. Pham described the Salon's constricted workspace as the reason why employees sometimes bump into one another. I credit this testimony.
14. According to Pham, she permitted Complainant as much time off as Complainant needed to work another job as an interpreter, to take vacations, and to attend to other matters. According to Pham, the Salon either rescheduled Complainant's clients or "took care" of

them. I credit this testimony.

15. Pham denies that she fired Complainant. She asserts that Complainant had to take off time because of her health-related problems so she put Complainant's "stuff" in a box for safe-keeping and told Complainant that she could come back when she was ready. I credit this testimony.

III. CONCLUSIONS OF LAW

Disparate Treatment Based on Age

In order to prevail on a charge of discrimination in employment based on age (forty or over) under M.G.L. c. 151B, section 4(1B), Complainant must establish a prima facie case by direct evidence or by circumstantial evidence. See Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000). Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace." Wynn & Wynn, 431 Mass. at 667 *citing* Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991). Not every remark constitutes direct evidence of discrimination. Some insignificant statements may be characterized as stray remarks which do not go to the heart of the matter alleged to be discriminatory. See Wynn & Wynn, 431 Mass. 655, 667 (2000) *quoting* Johansen v. NCT Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991) (defining direct evidence as "strong evidence" that "'if believed, results in an inescapable, or at least highly probable inference that a forbidden bias was present in the workplace'").

In a direct evidence case, a mixed-motive analysis is employed. See Wynn & Wynn, 431 Mass. at 666. Under a mixed-motive analysis, Complainant must first offer

direct evidence that an impermissible reason played a motivating part in the employment decision. Id. at 670. If Complainant offers such evidence, the burden of persuasion shifts to Respondents to show that they would have acted in the same manner even without the illegitimate motive. Id.

Insofar as direct evidence is concerned, Complainant asserts that beginning in 2005, co-workers at the Salon started to call her “old lady,” said that she should retire, and told customers that she was too old. I do not credit these assertions, finding more believable the assertion by Salon owner Lien Pham that references to age were made in a non-hostile, culturally-acceptable manner. Support for this finding is contained in Complainant’s medical record which conveys a contemporaneous, albeit hearsay, record of Complainant’s problems at work from 2005 through 2008. Although the medical record documents a litany of complaints about co-workers, it contains no allegations that co-workers called Complainant names conveying age-related animus.

In the absence of direct evidence of forbidden bias, Complainant may attempt to establish a *prima facie* case of employment discrimination on the basis of indirect evidence which shows that Complainant: (1) is a member of a protected class; (2) was performing her position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not of her protected class(es). See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts); Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003) (Complainant must show she was denied a condition or privilege of employment granted to someone at least five years younger or present other evidence that

disparate treatment occurred under circumstances that would raise a reasonable inference of unlawful age discrimination).

The credible evidence indicates that Complainant was a 65-year old employee with satisfactory job skills who was replaced by a manicurist approximately fifteen years her junior. Thus, the elements of a prima facie case of indirect discrimination have been satisfied.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason or reasons for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). If Respondent does so, Complainant, at stage three, must show by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant retains the ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117.

At stage two, Respondent attributes the fact that Complainant stopped working at the Salon to her hospitalization and convalescence in December of 2008 through February of 2009. Pham denies that she fired Complainant, maintaining that she simply stored Complainant's possessions for safekeeping and told Complainant that she could come back when ready to do so. These statements, which appeared credible at the public hearing, are supported by the fact that Complainant was hired at the Salon at age 56 and continued to work there until age 65. Such factors do not indicate hostility towards

senior employees in general or to Complainant in particular. The evidence is therefore sufficient to satisfy stage two.

At stage three, Complainant disputes that poor health was the reason why she stopped working for Respondent by pointing to various circumstances which she characterized as evidence of age-related animus. For instance, she claims that co-workers Brenda and Xuan took her customers away, knocked their chairs into her and into her customers, dropped items into her food, touched her hands while she was washing, intruded upon her customers while they undressed, splashed acetone into her face, and generally gave her a “hard time.” None of these alleged circumstances are convincing as age-related actions as much as they are examples of employees getting on each other’s nerves for reasons unrelated to age such as eating and working in a confined space and competing for clients.

IV. ORDER

For the aforementioned reasons, the complaint is 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 18th day of January, 2012.

Betty E. Waxman, Esq.

Hearing Officer

