COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and KIRSTEN PAVONI,

Complainants

Docket No. 11 SEM 01208

v.

WHEELY FUNN, INC.[1] and
KEVIN W. BAKER,

Respondents

Appearances: Timothy J. Ryan, Esq. for Complainant
David M. O'Connor, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 13, 2011, Complainant Kirsten Pavoni filed a charge of employment discrimination against Respondents Wheely Funn, Inc./Interskate 91 and Kevin W. Baker. Complainant alleges that she was subjected to *quid pro quo* sexual harassment and to retaliation when she was fired after rejecting Baker's overtures to engage in a personal relationship.

A probable cause finding was issued and the case certified to public hearing on July 24, 2015.

---

[1] Wheely Funn, Inc. is a corporate entity also known as Interskate 91. Transcript I at 12. Because the parties use the latter designation in their post-hearing briefs, this decision will likewise do so.

A public hearing was held on April 28 and 29, 2016. The following witnesses testified at the hearing: Complainant Pavoni, Coral Collette, Kevin Baker, and Robert Gould. The parties presented nineteen (19) joint exhibits.

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.

II. FINDINGS OF FACT

1. Complainant met Respondent Baker (hereafter Baker) while she was working as a bartender at a Red Robin Restaurant in mid-2010. Transcript II at 5. The Red Robin Restaurant is located next door to Baker's business. In the summer/fall of 2010, Baker ate frequently at Red Robin.
2. Respondent Kevin Baker is the owner and founder of Wheely Funn, Inc./Interskate 91 (hereafter Interskate 91). The business occupies a 25,000 square foot building in Wilbraham, MA. The business consists of a roller skating rink, a video arcade, a concessions area, and a laser-tag area.
3. During the summer/fall of 2010 while Complainant worked at Red Robin Restaurant, she texted Baker a couple of nights a week inviting him to join her and her friends at bars. Transcript II at 45-46.
4. In early November of 2010, Baker loaned Complainant $1,000.00 and paid a utility bill for her. Transcript I at 25, 99; II at 39-40, 46; Joint Exhibit 12. Complainant only repaid $300.00 of the money loaned to her. Transcript II at 47.
5. While working at Red Robin Restaurant, Complainant overheard Baker say that he was looking to hire an individual for a managerial position at Interskate 91. Transcript II at

6-7. Complainant told Baker that she was interested in applying for the position. Transcript II at 7. He told her to submit an application to Robert Gould, the General Manager of Interskate 91. Transcript I at 29. Gould is responsible for the hiring, firing and training of staff and the maintenance of the facility. Transcript II at 88. Baker told Gould that he should expect an inquiry from Pavoni about the position. Transcript II at 6-7.

6. During a job interview with Gould, Complainant said that she might have to leave work, at times, to pick up her children during "off-sessions" and bring them back to work for a short periods. Transcript I at 112. According to Complainant, Gould said that was okay. Transcript I at 32. Transcript II at 32. Gould testified that Complainant said that she would only do so if an "emergency" came up. Transcript II at 50-51, 98-99. I credit Gould's version over Complainant's.

7. Prior to starting Complainant starting her job at Interskate 91, Baker told her that he was interested in dating her. Transcript II at 19-21. Complainant's response was non-committal. Transcript II at 20-21.

8. Complainant invited Baker for dessert at her family's Thanksgiving celebration on November 25, 2010. Transcript I at 50.

9. Two days later, on Saturday, November 27, 2010, Complainant began working at Interskate 91. Transcript I at 36.

10. Complainant was hired as an operations manager at a salary of $35,000 a year for a fifty-hour week. Transcript I at 180; II at 112. She reported to General Manager Gould. Complainant worked various hours every day except Thursdays. Her position involved supervising the concessions stand, ordering food, running the public and

private skate sessions, and booking birthday parties. Transcript I at 42; Joint Exhibit 13.

11. Complainant and Baker went to dinner together approximately four times in late November/early December of 2010. Charge of Discrimination, Para. 15; Transcript I at 94; II at 48. On two occasions, her children accompanied them. Id. Complainant testified that it was not until she received Baker's December 17, 2010 e-mail that she was "very, very clear" that he wanted to date her. Transcript I at 36, 54. I do not credit this assertion.

12. On the evening of November 30, 2010, Complainant and Baker had an on-line chat during which Complainant mentioned masturbation and "vitamin O" -- her term for an orgasm. Transcript II at 48. Complainant disputes that the conversation took place. Transcript I at 38. I credit Baker's testimony that the conversation took place. Transcript I at 38.

13. On December 1, 2010, Baker e-mailed Complainant thanking her for a fun on-line chat the prior evening. He wrote that she was an "exciting woman" because she had communicated with him online about intimate matters such as wearing a thong and body shaving. Transcript II at 37-38. He said that he "looked forward to spending time with [her] ..." Joint Exhibit 1. Baker's e-mail mentioned Complainant taking "vitamins" – a reference to Complainant's term for sexual activity. Complainant denies that she discussed sexual matters, shaving, or wearing a thong, but I credit Baker's testimony in this regard. Transcript I at 38, 108.

14. On Sunday, December 12, 2010. Baker sent Complainant an e-mail containing a picture of red roses. Joint Exhibit 2.

15. On December 17, 2010, Baker sent Complainant an e-mail entitled "Confused" in which he states, "As I told you I really like you and Want [sic] to spend time with you. ... I have been getting mixed messages from you about how you feel about me. I don't want to chase somebody I have no chance to catch. I am your friend but want to be more. ... I have not really wanted to date anyone but you. I get it if I'm just not who you want or need to date. Just let me know. ... Tell me, call me, text me, show up here. Whatever the answer it will NOT affect your job in anyway [sic] or our friendship." Joint Exhibit 3.
16. On December 22, 2010, Complainant e-mailed Baker that, ".... I am sorry if you feel I've given you mixed messages, I've just been single so long, and although I do like you and want to spend time with you too, I guess I just want to take it pretty slow.... I'm definitely not ready to jump into a serious relationship." Joint Exhibit 4.
17. Complainant testified that Baker gave her a "shot" glass at work as a present. Transcript I at 118. Baker testified credibly that it was his yearly practice to bring to all his managers shot glasses he purchased while attending conventions. Transcript II at 55.
18. In late December of 2010, Complainant told Baker, unequivocally, that she was not interested in pursuing a romantic relationship with him. Transcript I at 96. Baker ceased contacting her for personal reasons and ceased giving her gifts. Transcript I at 120-121. Baker testified credibly that he "moved on" after learning that Complainant's lack of interest in him as a romantic partner, that he started dating, and that he met his current wife in January of 2011. Transcript II at 71.

19. Complainant testified that Baker went from being very friendly and complimentary to being very hostile and mean. Transcript I at 59, 96. I do not credit this testimony.
20. During the time that Complainant worked at Interskate 91, she began to bring her children to work more and more frequently. Transcript II at 99-100. When she started to bring them to public skating sessions, Baker objected. Transcript II at 51.
21. On January 18, 2011, Gould counseled Complainant that she should not eat in front of staff, should not carry a cell phone around while working, should not bring her children to work as frequently as she did, and should not leave them unattended at work. Gould gave Complainant suggestions about how to improve her performance. Joint Exhibit 16. On February 7, 2011, Gould again counseled Complainant for eating in front of staff and for being late. On other occasions, Gould and Baker spoke to Complainant about dressing professionally, about not eating in front of staffers, about not discussing personal matters with teen staff, about ensuring that staff cleaned the concessions after a public skate, and about not spending excessive time in her office. Transcript II at 58, 102-107. Baker criticized Complainant for failing to carry a staff radio on her person in order to be in contact with other employees. Transcript II at 58-59. I credit the testimony of Gould and Baker about their counseling efforts over Complainant's denials that she was criticized for work-related shortcomings.
22. Baker testified that on Monday mornings when he arrived at work during Complainant's employment at Interskate 91, he observed that the floors weren't swept and sinks had food in them which indicated that the concessions were not properly cleaned after Sunday skating sessions. Transcript II at 63. According to Baker, skating

sessions are followed by a one-hour clean-up period in order to ensure that the rink is clean for parties on the following day. Transcript II at 84. I credit this testimony.

23. Baker testified that on two occasions when Complainant was in charge of skating sessions, she was in her office on her computer visiting social media websites rather than attending to safety and security issues involving the public. Transcript II at 64; Joint Exhibit 15.

24. On one occasion in late 2010/early 2011, Baker was entertaining a skating crowd by playing music and operating a fog machine. Transcript II at 56. According to Baker, Complainant told him to turn off the fog machine because a customer had asthma. Baker testified that he became annoyed because the customer was an individual who "complains all the time" and Complainant, by taking his side, was "kind of throwing me under the bus." Id. According to Complainant, a couple of customers complained to her that they had asthma and that the fog machine was bothering them. Transcript I at 68-69. Complainant testified that when she asked Baker about the possibility of shutting off the fog machine, he became angry and said in a raised voice that it was his rink and he was going to do whatever he wanted. Transcript I at 69. I credit Baker's version over Complainant's.

25. Complainant was counseled about her tardiness on multiple occasions. Joint Exhibits 16 & 17. On March 7, 2011, due to her frequent tardiness, Complainant was switched from salaried status to an hourly worker status. Transcript I at 109; II at 113, 118. Complainant was paid $13.50 an hour which, if she worked fifty hours, equated to her former $35,000.00 salary for a fifty-hour week. As an hourly employee, Complainant was required to clock in and out, allowing Respondent to keep track of her time.

Transcript II at 112. Complainant testified that her status was changed after it had become "really hostile" to work at Interskate and that she agreed to the arrangement because it was a relief to work fewer hours, but I do not credit this testimony. Transcript I at 65-67.

26. Between March 7, 2011 and the last day she worked on March 30, 2011, Complainant was scheduled to work eighteen shifts. Joint Exhibit 9. On ten of the eighteen shifts (3/9, 3/11, 3/12, 3/13, 3/15, 3/18, 3/19, 3/20, 3/26 and 3/27), Complainant arrived up to four hours late. Joint Exhibit 9. On seven occasions (3/8, 3/15, 3/16, 3/22, 3/23, 3/29, and 3/30), Complainant took breaks lasting from one to three-plus hours. Joint Exhibit 9. Although Complainant compensated for some of the breaks by coming to work early, her early arrivals did not compensate for all of the breaks. Joint Exhibit 9

27. Complainant was terminated by General Manager Gould with Baker's approval on April 7, 2011. Transcript II at 125, 158-159. Prior to her termination, Complainant failed to appear for her 1:30 p.m. to 10:30 p.m. shift on Wednesday, April 6, 2011. Transcript 63-64; Joint Exhibit 9. According to Complainant, she arrived home from a Las Vegas trip on the night of April 5, 2011, called Gould on April 6th to say that she was too sick to come to work, and arranged for Mike Pappelardo, a long-term employee who had previously run public skating sessions, to be her replacement for the April 6th adult evening skate session. Transcript I at 78-79, 187; II at 154. According to Gould, he did not receive a call from Complainant on April 6, 2011. Gould testified that he did find out until April 7, 2011 about the circumstances of the previous day and upon learning of the circumstances, he arranged to meet with Complainant on April 7th to fire her. Transcript II at 120-121, 126, 152.

28. According to Interskate's Employee Handbook at p. 28, employees are to call at least four hours prior to their shift to report an absence due to sickness, but if the employee is not able to give four hours' notice, the employee is responsible for finding a replacement. Joint Exhibit 8. Complainant did not give prior notice that she would be absent for her April 6, 2011 shift.

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. Complainant alleges that she was subjected to the first type of type of sexual harassment, i.e., *quid pro quo* harassment.

A prima facie case of *quid pro quo* harassment may be established whether or not the employee submits to unwelcome sexual conduct by an alleged harasser. See *Massachusetts Commission Against discrimination Sexual Harassment in the Workplace Guidelines* (2002) II.B. Where an employee alleges that she rejected unwelcome sexual

conduct, a prima facie case may be established based on evidence that the tangible terms or conditions of her employment subsequently changed in an adverse manner, giving rise to the possibility that the change was causally-connected to the rejection of the sexual advances. See *MCAD Sexual Harassment Guidelines* at II.B.; Socarides v. Camp Edwards Troop Welfare Council, Inc., 21 MDLR 173 (1999); Hinojosa v. Durkee, 19 MDLR 14, 16 (1997).

In this case, Complainant was fired within months of rejecting Baker's request for a personal relationship. Throughout the fall/early winter of 2010, Baker expressed his interest in dating Complainant. A request for a date has been deemed to constitute an unwelcome advance. See *MCAD Sexual Harassment Guidelines* II.B at p. 3; Bradbury v. The Elbow Room, 18 MDLR 107, 108 (1996) (*quid pro quo* claim can be based on supervisor's request that employee "go out" with him).

Complainant definitively rejected Baker's advances in late December of 2010, after first telling him that she wanted "to take it pretty slow." A little over three months later she was fired. The temporal proximity between the rejection of Baker's advances and Complainant's termination is sufficient to create an inference of causation, thereby establishing a prima facie case. See Bradbury v. The Elbow Room, 18 MDLR at 108.

Once an employee establishes a prima facie case, the employer must articulate a legitimate, non-discriminatory reason for the adverse employment action, supported by credible evidence. See Shanley v. Pub 106, Inc., 22 MDLR 333, 336 (2000). Baker and his staff offer credible testimony that Complainant: 1) began to bring her children to work with increasing frequency over the course of her employment and had them attend public skating sessions that she was supposed to be supervising; 2) exhibited unprofessional

conduct by eating in front of staff, failing to dress professionally, and discussing personal matters with teen staff; 3) habitually arrived late for work; 4) failed to oversee staff in the cleaning of concessions after public skating sessions, 5) spent too much time in her office using her computer for personal matters rather than supervising public areas, and 6) failed to carry a staff radio around with her in order to maintain contact with other members of the staff. The charge of habitual lateness is supported by evidence that Complainant was taken off a salaried form of compensation and put on an hourly pay plan on March 7, 2011. After becoming an hourly worker, Complainant continued to be tardy and to take extended breaks. Complainant sometimes compensated for such breaks by arriving early but did not do so most of the time.

Aside from Complainant's chronic problems with lateness, breaks, and inattentiveness to job duties, she failed to show up for work following a vacation and arranged, without authorization, for another employee to appear in her place. According to Respondent, it was this incident which precipitated her termination because it violated the policy set forth in Interskate's Employee Handbook that employees must endeavor to call at least four hours prior to their shift to report an absence due to sickness. This matter does not appear to be egregious on its own, but in conjunction with Complainant's other deficiencies, it was the final straw. Taken together, the accumulation of issues during the four months that Complainant worked at Interskate 91 constitutes legitimate, non-discriminatory reasons for her termination. Accordingly, Respondent satisfies its stage two burden.

Since Respondent has satisfied its burden at stage two, Complainant, at stage three, must prove that the reasons given for her termination were not the true reasons but,

rather, a pretext for discrimination. See Lipchitz v. Raytheon Co., 434 Mass. 493, 504-505 (2001); Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 116-117 (2000). Complainant attempts to do so by arguing that the real reason for her termination was her rejection of Baker's personal interest in her.

Complainant's attempt to satisfy her stage three burden by blaming her employment difficulties on a foundering personal relationship is unpersuasive. Rather than behave like a scorned suitor, Baker, after learning that his feelings for Complainant were not reciprocated, assured her that her rejection of a personal relationship would not affect her job, turned his attention to dating other women, and promptly met his current wife. Based on these factors and on Baker's convincing denials of hostility, I reject Complainant's assertion that Baker went from being very friendly and complimentary to being hostile and mean once she rejected his romantic overtures. See Louis v Kiessling Transit, Inc., 31 MDLR 166 (2009) (where employee alleges that she was terminated from her job for declining to submit to her supervisor's sexual advances, hearing officer found no credible evidence to support the assertion). I credit, instead, that Complainant's failure to meet job expectations soured her employment relationship with Respondent. Accordingly, Complainant fails to prove at stage three that the reasons proffered for her termination were not the true reasons but, rather, a pretext for discrimination based on the rejection of sexual advances.

B. Retaliation

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B. 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).

In the absence of direct evidence of a retaliatory motive, the MCAD follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). The first part of the framework requires that Complainant establish a prima facie case of retaliation by demonstrating that: (1) she 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 exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 442 Mass. 82 (2004); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. See 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).

Protected activity may consist of internal complaints as well as formal charges of discrimination but regardless of the type of complaint, the charges must constitute a reasonable belief that unlawful discrimination has occurred. See Guazzaloca v. C. F. Motorfreight, 25 MDLR 200 (2003) *citing* Trent v. Valley Electric Assn. Inc., 41 F.3d 524, 526 (9th Cir. 1994); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208 (2000). The evidence in this case reveals no protected activity.

Rather than protected activity, there are several e-mails between Complainant and Baker in which Complainant acknowledges giving Baker "mixed messages," says she wants to "take it [their relationship] pretty slow," and subsequently tells Baker, unequivocally, that she is not interested in pursuing a romantic relationship with him. See Louis v Kiessling Transit, Inc., 31 MDLR 166 (2009) (claim of protected activity based on van driver's refusal to transport disabled passengers under allegedly unsafe conditions rejected by hearing officer). The evidence establishes that Baker responded to Complainant's communications by ceasing to contact her for personal reasons. There is no evidence of adverse action attributed to the termination of the parties' incipient romance. What Complainant deems to be adverse action appears to be Respondent's insistence that Complainant conform to the legitimate requirements of her job.

Based on the foregoing, I conclude that Complainant fails to establish a prima facie case of retaliation. Even if she had, Respondent has established legitimate reasons for counseling Complainant about performance deficiencies, for converting her from a salaried to an hourly employee, and for ultimately terminating her employment. See Part 3.A., supra. Thus, Respondent satisfies its stage two burden consisting of rebutting a prima facie retaliation claim. See Mole v. University of Massachusetts, 442 Mass. 582, 591 (2004); 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) (once a prima facie case is established, burden shifts to Respondent at the second stage of proof to articulate a legitimate, nondiscriminatory reason for its action supported by credible evidence). There is no showing at stage three that the justifications presented by Respondent are untrue.

IV. <u>ORDER</u>

The complaint 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 26th day of September, 2016.

Betty E. Waxman, Esq.,
Hearing Officer