

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
ANA PELLEGRINI,

Complainants

v.

DOCKET NOS. 11-NEM-02757
11-NEM-02955

PIZZA QUEEN,

Respondent

Appearances: Christopher S. Brown, Esq., for Complainant
Saher Joseph Macarius, Esq. and Martina Y. Matta, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 20, 2011, Complainant, Ana Pellegrini, filed a complaint against Respondent, Pizza Queen, a pizza shop in Bellingham, MA, alleging that Respondent's manager George Mekhaeil, discriminated against her based on her gender/pregnancy and national origin, when he reduced her schedule as a pizza delivery driver, after he learned she was pregnant. The Investigating Commissioner found probable cause to credit the gender/pregnancy claim only. On November 7, 2011, Complainant filed a second claim of retaliation against Respondent, alleging that her employment was terminated by George Mekhaeil, because she had filed a claim of discrimination against Respondent. The Investigating Commissioner found probable cause to credit the allegations of retaliation and the matters were consolidated. Efforts at conciliation

were unsuccessful and the matters were certified for Hearing. A Hearing was held before the undersigned Hearing Officer on September 15, 2015. At the Hearing, Complainant, whose first language is Brazilian/Portuguese, testified with the aid of an interpreter. The parties submitted post-hearing briefs subsequent to the Hearing. Having reviewed the record and the post-hearing submissions I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Ana Pellegrini, is a 37 year old female of Brazilian national origin, whose native language is Brazilian Portuguese, and who speaks limited English. She came to the United States in 2008 and is married with a three year old child.
2. Respondent, Pizza Queen, is a small family-owned and operated pizza restaurant which specializes in food delivery service. It is located at 56 Pulaski Boulevard in Bellingham MA. The owner of the business is Gozeph Mekhaeil. His brother George Mekhaeil is the manager of Pizza Queen. Gozeph's wife, Josephine Mekhaeil, is employed at the restaurant.
3. Complainant was hired by Pizza Queen in March of 2011, primarily as a driver delivering orders to customers. Complainant testified that when she was hired she worked an average of 35-45 hours per week delivering orders. She was paid a combination of hourly wages and received tips from customers. She testified that she earned an average weekly wage of \$500 to \$600 per week. No payroll records for Complainant were introduced into evidence.
4. Complainant was trained by co-worker Brittany Tessier and advised of Respondent's employment policies including its vacation policy. Respondent Gozeph Mekhaeil testified that a few weeks after she was hired, Complainant asked for vacation time. Complainant was told this was normally not permitted after such a short period of employment, but Respondent allowed her

to take vacation, despite its policy that two weeks' notice was required for vacation, since it was not a busy time for the restaurant. Complainant testified that she took a week off and traveled to Orlando Florida with her husband for vacation. Mekhaeil expressed surprise that Complainant was seeking a vacation since she had just begun working for Respondent and advised her that in the future she would have to request vacation time at least 15 days in advance, so that Respondent could find coverage. George Mekhaeil testified that Complainant was the second delivery driver at that time and was assigned approximately 15-20 hours per week and not 35 to 45 hours. I found George Mekhaeil to be a very credible witness and I credit his testimony.

5. In September 2011, Complainant learned that she was pregnant. She conveyed this news to a co-worker and George Mekhaeil. Complainant testified that the Mekhaeils initially seemed happy about her pregnancy, offered congratulations, and served ice cream to the employees to celebrate. However, she claims that not long thereafter, George Mekhaeil reduced her hours and told her it was not good for her to work while pregnant and that she should stay home and rest. Complainant testified that she worked 35-40 hours doing deliveries at that time and after revealing she was pregnant, her hours were reduced to approximately 8-12 hours per week. She testified that she complained to Gozeph Mekhaeil about the reduction in her hours telling him she needed the money because she was expecting a child, but was told to accept her assigned hours or leave. Complainant did not testify about the amount of reduction in her income as a result of her hours being cut.

6. Respondent asserts that Complainant took some time off for doctors' appointments and because of migraine headaches, but that it had no problem granting her this time off. Gozeph Mekhaeil disputed Complainant's assertion that her hours were reduced in September and testified they were reduced in October, after she asked for, and took a second vacation with

little notice to Respondent. Respondent was compelled to give her hours to the second delivery driver. Respondent maintained no payroll or scheduling records and there was no documentary evidence regarding Complainant's hours or her requests for time off.

7. On October 20, 2011, Complainant filed a charge of discrimination at MCAD alleging that she was told her hours were cut back because of her pregnancy and stating the violation date as October 15, 2011. Her complaint states that prior to filing at MCAD, she told Gozeph Mekhaeil the reduction in her hours was discriminatory and further states that she believes Respondent reduced her hours to force her to resign.

8. Respondent denied that Complainant's hours were reduced in September of 2011. Both George and Gozeph Mekhaeil asserted that Complainant requested time off for a second time to go on vacation to Florida with her husband in October of 2011, but did not give sufficient notice in accordance with Respondent's policy. There is no evidence in the record to establish the dates of this trip.¹ October is a much busier time for Respondent because it is football season and the Mekhaeils reluctantly allowed Complainant to take time off, but informed her that another delivery driver would be given her hours on a permanent basis if she took vacation. They testified that Complainant's hours were reduced in October because she requested time off and took a second vacation without adequate notice. Upon her return, Complainant was no longer the first delivery driver on call, but became the second driver, and was assigned more tasks working in the kitchen such as cleaning pizza pans, assembling pizza boxes, and doing a variety of other chores. Complainant did not receive tips when she performed these other chores in the restaurant. George Mekhaeil testified that Complainant was not happy performing these

¹ Complainant could not recall the dates she traveled to Florida and submitted evidence of a plane ticket from 2010 and not 2011. Respondent had no scheduling or payroll records. Complainant testified that she was not scheduled to work on that Saturday, Sunday and Monday and only asked for one additional day off, a Tuesday, for her trip to Miami. George Mekhaeil testified that she requested three days off.

jobs and other employees complained that she exhibited a bad attitude and was “slacking off.” He testified that he gave her a verbal warning. I credit Geoge Mekhaeil’s testimony. Gozeph Mekhaeil testified that when Complainant returned from vacation, she complained about her hours being given to another delivery driver. He stated she had an “attitude,” didn’t talk to anyone, refused to perform tasks she didn’t want to do, and engaged in rude behavior causing Respondent to lose a long-time customer. I credit this testimony. George Mekhaeil admitted that as the number two delivery driver, Complainant’s hours were reduced from some 30-32 hours to 7-15 hours, because Respondent needed a reliable driver.

9. Brittany Tessier, a co-worker and de facto supervisor, who had worked at Respondent for some six years, testified that it was a policy of Respondent to switch delivery drivers if one driver took time off without giving sufficient notice. The substitute driver would be given the additional hours on a permanent basis. I credit hers and the Mekhaeils’ testimony regarding the reason why Complainant’s hours were reduced. I also credit the testimony that this occurred in October 2011 and not September, as further evidenced by the violation date of October 15, 2011, cited by Complainant in her charge of discrimination.

10. Complainant testified that after she filed her MCAD complainant, she maintained her reduced schedule but Respondent would not allow her to use the computer to dispatch deliveries and instead decided which deliveries she would go on. Complainant asserted that instead of being given multiple deliveries to shorter destinations, which the other drivers were assigned, she was sent on longer single delivery trips. As a result she made fewer tips and less money. While I believe that this likely occurred, it was the consequence of being the number two delivery driver. Gozeph Mekhaeil testified that the computer determines deliveries and the drivers rotate,

with the first driver who is up taking the first order. George Mekhaeil testified that the computer assigns orders by driver number 1, 2 or 3.

11. Respondent accepted payment in cash or by credit card and Complainant normally returned the credit card receipts along with cash payments to Respondent. On or about November 5, 2011, a few weeks after Complainant filed her charge of discrimination, she and Josephine Mekhaeil became engaged in dispute about receipts from deliveries Complainant made that day. There is contradictory evidence about why the argument began and who called the police, but Bellingham police officer Richard Nummela was dispatched to Pizza Queen. Patrolman Nummela filed an Incident Report regarding the call and testified at the hearing. (Jt. Ex. 1) Nummela testified that he responded to a dispute at Pizza Queen at approximately 8:30 on the evening of November 5, 2011. His report does not reflect who contacted the police. Upon arrival he spoke with George Mekhaeil who reported that Complainant was refusing to turn over receipts and money to Respondent after returning to the shop from some deliveries. He spoke with Complainant who gave him the receipts and money which he turned over to Respondent. It was determined that all receipts and money were accounted for and Complainant was paid her tips and a week's pay. Officer Nummela wrote in his report that, "Mekhaeil could not decide if they would terminate Pelligrini due to the fact that she had claimed discrimination and has allegedly filed a law suit." The report states that Nummela advised Mekhaeil to consult an attorney. Nummela testified that he could not recall the conversation about terminating Complainant's employment, but stated it must have been discussed because he wrote this in his Incident Report.

12. Complainant testified that she called the police on her cell phone because a dispute arose after Josephine Mekhaeil refused to allow her to cash out and demanded to see all the receipts for payment and the order receipts for cash purchases. Complainant claimed that she did not have the latter, as the order receipts remained with the customer upon delivery. She stated it was the practice that only credit card receipts be turned over with the cash payments and she had not previously returned purchase order receipts when payment was made in cash. She testified that she called the police, although her reason for doing so was not clear. Complainant verified that when the police officer arrived, she turned over her cash and credit card receipts to him and that he conveyed them to Respondent. Complainant then received a check from Respondent and her tips in cash. Complainant claims that she was fired when George Mekhaeil called her that same night to tell her she did not need to come back to work at Respondent. Tessier testified that she was friends with Complainant and spoke to her after she left Respondent and that Complainant told her that George Mekhaeil told her not to return to work, but Tessier did not know if this was true.

13. Josephine and George Mekhaeil were present at the pizza shop on the night of the incident. They stated that Josephine Mekhaeil told Complainant to cash out and asked her for her receipts. Josephine testified that Complainant refused to provide the receipts, argued with her, refused to give her the money from the deliveries, and walked out of the store. George Mekhaeil testified that he then called the police who spoke with Complainant and the receipts and money were turned over to Respondent. Complainant was then given a check for her hours and her tips. George Mekhaeil denied calling Complainant to tell her not to return to work and stated that she simply did not return after that night, but I do not credit this testimony.

14. Respondents testified that when they received Complainant's discrimination complaint they did not understand what it meant and hired an attorney to deal with it. They did not discuss it with her, and claim that they took no adverse action against her as a result of her complaint.

15. Complainant did not look for work after her separation from Respondent and she has not worked since. Her child was born in May of 2012. She claimed she did not look for work initially because she stayed home to rest from the ordeal she went through with Respondent. She stated that after a time, she felt no one would hire her because she was pregnant, and that she had some problems with her pregnancy. Once her baby was born she stayed home and did child care. Complainant had worked at other three or four other pizza shops prior to working at Respondent, including Papa Ginos and Dominos, had experience in the industry, but made no effort whatsoever to find work at these places.

16. In response to an inquiry about how her termination affected her emotional well-being, Complainant testified that she was upset, wanted to keep working to have money to buy things for the baby, and wanted to keep active, but instead, stayed home crying.

III. CONCLUSIONS OF LAW

A. Pregnancy/Gender Discrimination

General Laws c. 151B s. 4(1) prohibits discrimination based on sex/gender which includes pregnancy. Since pregnancy and childbirth are sex-linked characteristics, any action which burdens a Complainant because of these factors constitutes sex discrimination.

Carmichael v. Wynn & Wynn, 17 MDLR 1641 (1995); Massachusetts Electric Co v. MCAD, 375 Mass 160, 167 (1978). Policies, practices, or actions that place an additional burden on pregnant employees or treat them in a disparate fashion are prohibited, as are decisions based on

stereotypes and assumptions related to gender/pregnancy. Complainant has established a prima facie case, in that she was a pregnant employee who was adequately performing her duties and claims she was subjected to adverse action after notifying her employer that she was pregnant. She claims that her hours as a delivery driver were significantly reduced after she notified Respondent that she was pregnant and that her employer advised her she should stay at home and rest.

Once Complainant has established a prima facie case, the burden of production falls to Respondent to articulate a legitimate non-discriminatory reason for its action. Blare v. Husky, 419 Mass. 437, 441-442 (1995). Respondent does not deny that Complainant's hours were reduced but states that this occurred in October of 2011, and was not because of her pregnancy, but because she sought to take time off for vacation for a second time within several months of commencing her employment, without providing adequate notice. Respondent asserts that this was its busiest time of year because of the football season. Complainant was informed if she took the time off her hours would be given to another driver.

There is virtually no reliable documentary evidence available to resolve the dispute surrounding when Complainant's hours were actually reduced. There are no employment records establishing her hours or income and Complainant offered no record of the dates of her travel in October of 2011. Given the disputed testimony and the lack of employment records, the only documented information related to the timing of events is Complainant's initial complaint to the MCAD filed on October 20, 2011, which states the violation date as October 15, 2011. This supports Respondent's position that it was not September, but rather October, when Complainant's hours were reduced, after she took a second vacation. The narrative in her complaint to the MCAD merely states that after she notified Respondent of her pregnancy, her

hours were cut, but does not state when, with any specificity. Complainant has the burden of proof to establish when the adverse action commenced. Her testimony contradicts the date cited in her MCAD complaint. I conclude that had her hours been reduced in September, she would have noted that as the violation date in her complaint. Therefore, Complainant has not established that the timing of the adverse employment action was directly related to notice of her pregnancy.

Respondent asserts that it allowed Complainant to take sick time for pregnancy-related doctor's appointments and illness with no adverse consequence to her employment. I credit Respondent's testimony that it was Complainant's request for time off for a second vacation that caused Respondent to give her hours to another driver. She was informed that if she chose to take vacation, there would be a consequence, and she made the decision to take vacation knowing this.

Complainant has not proven that Respondent's reason was a pretext for discrimination by showing that Respondent acted with discriminatory intent or state of mind when it reduced her hours. See Lipchitz v. Raytheon, 434 Mass. 493, 504 (2001). There is insufficient evidence that Respondent acted out of a discriminatory motive related to Complainant's pregnancy when it reduced her hours. Instead, the credible evidence supports the conclusion that her hours were cut because she sought additional time off and took a second vacation without sufficient notice in violation of Respondent's policy. As a result, Respondent chose to give her hours to a more reliable employee. There was evidence that several other pregnant employees had continued to work at Respondent without any adverse consequences. Given all of the above, Complainant has failed to prove that Respondent's reason was a pretext for pregnancy discrimination or that it acted out of gender bias.

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 may establish a *prima facie* case of retaliation by proving that (1) she engaged in protected activity; (2) her employer was aware of the protected activity; (3) she subsequently suffered an adverse employment action; and (4) the adverse employment action followed her protected activity within such time as retaliatory motive can be inferred. Since the causal link between protected activity and the adverse employment action is not always explicit, a causal connection may be inferred where the timing of events makes such an inference reasonable.

Complainant asserts that her employment with Respondent was terminated after an altercation with Josephine Mekhaeil just a few short weeks after she filed a complaint with MCAD charging Respondent with discrimination on account of her pregnancy. Given the contradictory testimony, it is not entirely clear exactly what gave rise to the altercation that occurred on November 5, 2011, Complainant’s last night of work. What is clear is that there was some dispute about the receipts and proceeds from deliveries which Complainant refused to turn over. Respondents’ stated reason for the altercation, i.e., that Complainant refused to turn over the proceeds of her deliveries and her credit card receipts, is more credible than Complainant’s assertion that she was not permitted to cash out because she did not have certain purchase orders.

Once the police arrived, and the officer spoke with George Mekhaeil, Complainant gave the officer her receipts and the proceeds. It is entirely unclear why she refused to do so initially and why police intervention was required to resolve this dispute.

It is likely the Mekhaeils were upset with Complainant for filing a complaint charging them with pregnancy discrimination. They made it clear that they viewed Complainant as family and it is not surprising that they felt betrayed by her actions. But I do not believe they orchestrated a dispute with Complainant to retaliate against her because of her discrimination complaint. Officer Nummela wrote in his Incident Report that George Mekhaeil told him Respondent was considering terminating Complainant's employment because of the complaint she had filed. I do not believe that George Mekhaeil understood the import of his statement or that to undertake an adverse employment action based on such motive would be unlawful. While ignorance of the law is not a defense, I conclude that Mekhaeil made this statement to the officer more to explain Complainant's animus against Respondent, rather than as an expression of Respondent's discriminatory motives.

Respondent denies that Complainant's employment was terminated, but asserts that Complainant was disgruntled about her delivery duties having been reduced and developed a bad attitude and unwillingness to perform certain duties. I conclude that Complainant was indeed told not to return to work on November 5, 2011 largely for this reason. I find credible Respondent's assertions that Complainant's attitude suffered after her hours were reduced, that she was unhappy performing other tasks in lieu of deliveries, and that her actions alienated a long-time customer. The evidence supports a conclusion that even if there was a dual motive for Complainant's termination, the change in her attitude and behavior was the primary motive for Respondent's actions. In mixed- motive cases, where there is some direct evidence of an

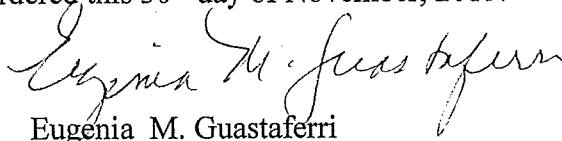
illegitimate motive, Respondent must prove that the lawful motive was the but-for reason underlying the action. Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 666-668 (2000). Despite George Mekhaeil's statement to Officer Nummela evidencing retaliatory animus, I conclude that Respondent provided credible evidence that Complainant's performance had deteriorated and that other employees and customers complained about her poor attitude, rude behavior and unwillingness to pitch in. I am persuaded that the latter issues and the argument that ensued on November 5, 2011 resulting in the involvement of the police were largely what motivated Complainant's termination.

Given that Respondent has demonstrated lawful reasons as the primary motive for Complainant's termination, I conclude that it did not act in violation of G.L. c. 151B sec. 4(4).

IV. ORDER

Given the forgoing Findings of Fact and Conclusions of Law, it hereby Ordered that the Complaint in this matter be dismissed. This represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. 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 30th day of November, 2015.


Eugenia M. Guastaferrri
Hearing Officer