

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & TIYANNA POPE,
Complainants

v.

07-BEM-02674

BOSTON HOUSING AUTHORITY,
Respondent

Appearances:

John W. Davis, Esquire for Tiyanna Pope

Jay Koplove, Esquire for the Boston Housing Authority

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On September 20, 2007, Tiyanna Pope filed a complaint with this Commission charging Respondent Boston Housing Authority with discrimination based on gender and disability. The investigating commissioner issued a probable cause determination. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on September 28 and 29, 2010. After careful consideration of the entire record in this matter and the post-hearing submissions of Respondent,¹ I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Complainant, Tiyanna Pope, is a woman residing in Boston, Massachusetts. Complainant was in her second trimester of pregnancy in March 2007.
2. Respondent Boston Housing Authority (“BHA”) is a public housing agency that manages numerous public housing developments throughout the city of Boston.

¹ Pope did not file a post-hearing brief.

3. On or about March 7, 2007, Complainant became employed by Ace Employment Agency, (“Ace”) a temporary employment agency, and was assigned to work as a management aide at Respondent’s 132-unit South Street housing development, located in the Jamaica Plain section of Boston.² Complainant testified that she sought temporary employment because she was pregnant and needed the money. Although Complainant was paid by Ace, she worked for and under the direct supervision of Respondent’s South Street property manager Judith Pralour. Her last day of work at BHA was June 14, 2007.

4. Judith Pralour has been employed by the BHA since 1994. At the time of Complainant’s employment, she was the property manager of the South Street housing development, and of Archdale, a larger housing development located in Roslindale, which was a short drive from South Street.

5. As property manager of South Street, Pralour oversaw the operations of the development, including supervising maintenance and administrative staff, leasing vacated units, completing work orders, collecting rents, conducting yearly reviews of tenant files and inspecting units. Pralour was responsible for “lease enforcement” when tenants failed to pay rent or were involved in prohibited activities, a process that could possibly end in eviction. Pralour also attended housing court on a weekly basis to handle evictions.

6. June Mustafa is a long time BHA employee. For the past ten years, she has been the management aid at the Archdale development where she handles the daily operation of the office.

² Complainant filed a claim against Ace, which was dismissed for lack of probable cause.

7. Diane Love has resided at the South Street housing development for 16 years. She is president of the tenants' task force and one of her responsibilities is to relay tenant complaints to the property manager. Love makes frequent visits to the management office.

8. Complainant worked in the South Street management office. She was the only person whose job required her full-time presence in the office. Her scheduled hours of work were Monday through Friday, from 9:00 a.m. to 5:00 p.m. Other BHA employees at South Street included maintenance supervisor John Quigley, whose office was on the other side of the building from the management office. There was also an on-site custodian and a laborer/groundskeeper. On her first day of work, Pralour told Complainant that her job was to clean up after her predecessor, whom Pralour described as a "nightmare." Pralour had fired Complainant's predecessor, a BHA probationary employee, in December 2005.

9. Complainant's duties were to monitor the office, greet tenants, accept tenant documents, file work orders, organize tenant files, answer phones and page maintenance workers. On her first day of work, Pralour gave Complainant the BHA's written protocol, which set forth the documents and the order of their placement in tenants' files. She showed Complainant how to navigate tenant files in accordance with the file organization protocol, how to page maintenance workers and she explained other office procedures. Pralour testified that she also emphasized the importance of following Respondent's dress code(R-1) and told Complainant to make sure she was neat, clean and did not wear sneakers or jeans. Pralour instructed Complainant that if she needed help she was to call Pralour, or to ask Quigley for help.

10. The management office was busy with tenants calling in to request repairs to their units. This required Complainant to call in work orders to a central location and fill out written work orders that were maintained in separate files. Tenants also frequently dropped off documents relative to their financial status and living arrangements. It was important to keep track of such documents because tenants' rents varied depending on their financial and family circumstances. Complainant testified when she began the position, the files were disorganized, with misfiled and missing documents and there was an overwhelming amount of paperwork.

11. Complainant testified that on her first or second day of employment, Pralour asked her if she had a child "on the way." Complainant said that she did and Pralour responded that she could tell because Complainant had "a look." Pralour testified that she did not know that Complainant was pregnant until several weeks after she began working. I credit Complainant's testimony with respect to when Pralour asked about her pregnancy.

12. During Complainant's first week of work, Pralour was present at the South Street office for three full days. Thereafter, Pralour came to South Street for two or three partial days per week. The remainder of Pralour's work week was spent at either at the Archdale project, at off-site meetings or in housing court.

13. Complainant testified that on one occasion, a tenant came to the office to complain about her high rent and Pralour later commented that if the tenant did not have so many children her rent would not be an issue. I credit this testimony, which was not disputed. However, Complainant acknowledged, and I find, that this remark was meant

as a criticism of individuals having more children than they could support financially, and I find that Pralour was not referring to Complainant's pregnancy.

14. In late March 2007, Complainant learned that the baby she was carrying had a condition known as CCAM,³ characterized by excess fluid in the lungs and causing a shift in the heart that could potentially be fatal to the fetus. Complainant testified that she informed Pralour of her condition and stated she would require frequent medical appointments. Complainant testified that Pralour appeared sympathetic to her problem and advised her to document her appointments in writing and make copies of all documents. I credit this testimony.

15. Complainant testified that she was supposed to attend two appointments per week for various tests and check-ups. In order to minimize the impact on her job, she sometimes skipped appointments and, whenever possible, scheduled appointments in the late afternoon or early morning. She always informed Pralour or Quigley when she was leaving for a medical appointment.⁴ Complainant estimated that she left work early less than a dozen times during her employment, and that she worked some full weeks, but she could not recall how many or whether she was paid for time she was absent. She testified that if tenants brought paperwork to the office when she was not there, they would slide their papers under the door. Complainant filled out a weekly timesheet for Ace, which was then signed by Pralour. Pralour never credited Complainant with the time she

³ CCAM is short for congenital cystic adenomatoid malformation.

⁴ Complainant was not permitted to offer certain medical records into evidence because she had not produced the records to Respondent in response to its discovery request.

worked through lunch but did not testify as to whether she signed Complainant out for days she left early.⁵

16. Complainant testified that Pralour became frustrated with her absences and repeatedly told her that she needed someone present in the office at all times. I credit this testimony.

17. Pralour testified that at the time of Complainant's employment, in accordance with the written protocol, Respondent was in the process of purging tenant files by removing older documents and placing them in separate files.

18. Pralour testified that within a week after Complainant began working at South Street, a tenant called Pralour to say that she had delivered a document to the South Street office, but Pralour was unable to find the document in the tenant's file where Complainant should have placed it. At the same time, Complainant was having difficulty purging the tenant files. Pralour thought that perhaps she had not fully explained the tenant files protocol to Complainant, so she sent her to Archdale for a day of training with Mustafa. Pralour also asked Mustafa to help Complainant with the files on another occasion when Mustafa was at South Street. I credit Pralour's testimony.

19. Pralour testified that she assumed Complainant was adequately performing her job, after training with Mustafa. However, in approximately mid-April, Pralour learned that Complainant was not properly tending to the tenant files, and she told Complainant to cease working on tenant files. Instead, Complainant was to receive tenant documents, stamp them, place them in a file folder and leave them for Pralour to file when she had the time. I credit her testimony.

⁵ Complainant's and Pralour's testimony was vague with respect to Complainant's time records and whether her absences were recorded or reported to Ace. Neither party submitted the time records into evidence.

20. Pralour instructed Complainant to answer the telephone, accept tenant information and maintain work order files. Pralour testified that despite Complainant's poor work performance, she allowed Complainant to stay on because she needed someone in the office to answer phones and because she knew that Complainant was pregnant and needed the money. I credit this testimony.

21. Pralour testified that she was aware that Complainant had doctor's appointments and that she made up time by not taking lunch. She testified that Complainant's medical appointments were not her main concern. Pralour did not recall Complainant informing her about her pregnancy complications and noted that Complainant never sought to modify her work schedule in any formal way. I do not credit Pralour's testimony that she did not recall Complainant informing her about her pregnancy complications, as it does not comport with Complainant's credible testimony that Pralour requested documentation for all of her appointments. I otherwise credit this testimony.

22. Pralour testified that because she was frequently away from the South Street location, she did not know exactly how often Complainant missed work. However, she knew that Complainant was not attending to her duties because residents were unable to reach the South Street office by telephone and would instead call June Mustafa. Mustafa testified that tenants complained to her that papers they had left at South Street had not been acknowledged as received. According to Pralour, the tenant calls put pressure on Mustafa, who was doing both her job and Complainant's. I credit the testimony of Pralour and Mustafa.

23. Diane Love testified that a month into Complainant's employment, Love began receiving complaints from concerned tenants that documents they had provided to the office had not been acknowledged, which caused them concern because their rent was calculated in accordance with the documentation they provided to Respondent. Tenants also complained to Love about not being able to reach the management office by telephone and Love reported the tenant complaints to Pralour. I credit Love's testimony.

Dress Code Issues

24. Pralour testified that as Complainant's pregnancy progressed, she continued to wear the same clothes that became too small and exposed Complainant's bare belly and her backside. She testified that Complainant's clothes were often dirty and stained. Diane Love testified that Complainant's stomach was visible, that she was dressed inappropriately for work in a government office, and that tenants complained about the way she was dressed. I credit their testimony to the extent that Complainant wore clothes that were too small and that did not cover her stomach. However, I find that the testimony that Complainant frequently wore dirty clothes and that tenants complained about her clothes was exaggerated.

25. Complainant denied that she came to work with her bare skin exposed and stated that she always wore clean clothes, dressed professionally, and bought larger clothes as her pregnancy progressed, however she acknowledged having several conversations with Pralour about her clothing over the course of her employment. On one occasion, when she remarked that she could not afford maternity clothes, Mustafa and Pralour recommended stores that carried inexpensive clothing. By her last day of employment, Complainant weighed 175 pounds, up from her usual weight of 120 pounds.

Termination

26. On Thursday June 14, 2007, Pralour grabbed some tenant files from Archdale and South Street that she needed for an appearance in the housing court. Because she was in a rush to get to court, Pralour did not review the files beforehand. Pralour testified that when she arrived at court and discovered that documents were missing from the files, she was “kicking herself” for not checking the files beforehand. The files did not contain the required paperwork and she was not prepared for court. She called Mustafa to inquire if she had left any of the pertinent paperwork at Archdale, but she had not. Pralour testified that she became angry with Complainant for not having organized the files as she had been hired to do and decided that Complainant was not working out. She instructed Quigley to send Complainant back to Ace. I credit her testimony.

27. Complainant testified that on June 14, 2007, she was present at the office organizing files, talking with Quigley and was about to leave for a doctor’s appointment, when Quigley informed her that it was her last day of employment with Respondent. Pralour testified that she did not notify Complainant of her termination personally, because she was so angry, she did not want to approach Complainant. She later called Ace and asked them to send another person because she was not satisfied with Complainant’s performance.

28. Pralour testified that Complainant’s manner of dress was not a factor in her decision to terminate Complainant’s employment, and I credit her testimony.

29. After Quigley informed Complainant that she was terminated, Complainant called an employee of Ace Employment to ask why Respondent no longer wanted her, but she did not recall his response. She was offered her another assignment, which she

declined, telling Ace she no longer wanted to work because of her pregnancy. At the Hearing, she claimed that the statement to Ace about not wanting to work because of her pregnancy was an excuse, and the real reason she declined another assignment was that Ace did not back her up in her claim that she was terminated because of her pregnancy. I do not credit this testimony. I find it improbable that Complainant would not have remembered the reason Ace gave for her termination⁶ and believe that the real reason Complainant declined another assignment was because she no longer wanted to work because of her troubled pregnancy.

III. CONCLUSIONS OF LAW

A. Gender/Pregnancy Discrimination

M.G.L. Chapter 151B, section 4, paragraph 1 makes it an unlawful practice for an employer to discharge an employee because of her sex. I conclude that the BHA was Complainant's employer pursuant to §4(1) because it exercised substantial control over the terms and conditions of her employment, including her place of work, hours of work, and her job duties. She also reported directly to Respondent and Respondent had the authority to, and did in fact terminate her employment with BHA. See, e.g. Stanley v. The Gillette Company, 2 MDLR 1203 (1980). Burlamachi v. Dupont Merck, 22 MDLR 35, 39 (2000), aff'd, 24 MDLR 9 (2002) (while complainant received his paychecks and other work-related documents from the other company, respondent supervised and exercised substantial control over the manner and method of complainant's work, including his place of work, hours of work, and his job duties); Holdsworth v. Adcare

⁶ Complainant gave birth a month and a half later on July 27, 2007.

Educational Institute, 21 MDLR 178, 180 (1999) (respondent issued complainant's checks, managed her benefits, and ultimately terminated her employment); Robinson v. FM Management, Inc., 19 MDLR 57 , 58 (1997)

The complainant may prove a claim of discrimination by presenting direct evidence of discrimination or by utilizing the three-stage order of proof articulated in both federal and state court decisions. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wheelock College v. MCAD, 371 Mass. 130 (1976). In order to prove a claim of sex/pregnancy discrimination, Complainant must first establish a prima facie case.

In the absence of direct evidence, a prima facie case of sex discrimination based on gender/pregnancy 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/or her position was eliminated, and 4) was replaced or terminated under circumstances that would raise a reasonable inference of discrimination. See Weber v. Community Teamwork Inc., 434 Mass 761 (2001); Sullivan v. Liberty Mutual Ins. Co., 444 Mass. 34 (2005).

Complainant is a member of a protected class. It has been held that, "pregnancy and childbirth are sex-linked characteristics and any actions of an employer which unduly burden an employee because of her pregnancy or the requirement of a maternity leave are considered sex discrimination." School Committee of Braintree v. MCAD, 377 Mass. 424, 430 (1979); Massachusetts Electric Co. v. MCAD, 375 Mass. 160, 167 (1978); Carmichael v. Wynn & Wynn, 17 MDLR 1641, 1650 (1995); see also, Gowen-Esdaile v. Franklin Publishing Co., 6 MDLR 1258(1984) (termination of

complainant during troubled pregnancy because of fears of further absences and coverage during leave deemed unlawful sex discrimination).

However, Complainant has not established that she was performing her job at an acceptable level. Respondent established by credible evidence that Complainant's performance was sub-par and that there were many complainants from tenants and co-workers that she was not performing her job duties. Respondent gave specific examples of deficiencies in Complainant's performance. For one thing, Complainant's position required her to be present in the office during office hours to answer tenant calls, accept documents from tenants and to properly file documents in tenant files. Respondent presented credible testimony that Complainant was not adequately performing her job, was not available to answer the telephone or accept tenant documents and did not adequately perform her filing duties. I conclude that Complainant was not meeting the requirements of the job⁷ and thus failed to establish a prima facie case of discrimination based on her gender and pregnancy.

Even assuming that Complaint had established a prima facie case of gender and pregnancy discrimination, and that she was performing her duties in a minimally acceptable manner, Respondent met its burden of production at the second stage of proof to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). As stated above, Respondent's assertion that Complainant was

⁷ There was an inordinate amount of testimony regarding Complainant's improper attire. While Respondent argued in its opening statement and in its post-hearing brief that Complainant's unprofessional attire was a reason for her termination, Pralour testified credibly that this was not a factor in her decision to terminate Complainant's employment. By the same token, Complainant did not convince me that Pralour's counseling her about her clothing was evidence of discriminatory animus toward her pregnancy, but instead evidenced a concern that having her stomach exposed was unprofessional in a public office environment.

not adequately performing her job was amply supported by credible evidence that she was too often absent from the office, and was not available to answer the telephone, receive tenant documents and complaints, and timely process work orders. She also failed completely in the duty to file tenant documents properly and to purge outdated documents from tenant files, to the point where she was relieved of this duty. I credit the testimony of Complainant's supervisor, Pralour, that she ultimately made the decision to terminate Complainant's employment when she arrived at the housing court with incomplete files and documents necessary to proceed with evictions, because of Complainant's failure to properly perform her duties.

If Respondent articulates legitimate, non-discriminatory reasons for its conduct, Complainant must show that Respondent's reasons are a pretext for unlawful discrimination. She may do so by proving that Respondent acted with discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001) A fact finder may, but need not, infer that an employer is covering up a discriminatory intent, motive or state of mind if one or more of the reasons identified by the employer are false. Id. at 504 The employee need not disprove all of the non-discriminatory reasons proffered by the employer for its decision-making, but need only show that "discriminatory animus was a material and important ingredient in the decision making calculus." Chief Justice for Administration and Management of the Trial Court v. Massachusetts Commission Against Discrimination, 439 Mass. 729, 735 (2003).

I conclude that Complainant has failed to establish that Respondent's reasons for terminating her employment were a pretext for unlawful discrimination based on gender/pregnancy. Pralour's off-handed comments about the number of children a tenant

had and her questioning Complainant if she was pregnant are insufficient to prove pretext. Nor is her counseling Complainant because of her improper and unprofessional attire in the workplace sufficient to prove pretext. Complainant acknowledged that she was frequently out of the office and that Pralour expressed impatience with her absences because it was an essential requirement of the job that she be present in the office.⁸ Pralour knew of Complainant's pregnancy from the beginning of her employment and allowed Complainant to attend medical appointments, allowed her to continue working for four months despite her unacceptable performance and even relieved Complainant of an essential job duty of purging files. Complainant did not assert that her performance suffered because of her absences, and she offered no other evidence of discriminatory animus relating to her pregnancy. I conclude that just because Complainant was terminated while pregnant is insufficient to demonstrate discriminatory intent, given the facts and circumstances of this case.

B. Disability

Complainant also claims discrimination based on pregnancy-related disability. "Chapter 151B's prohibitions against disability discrimination protect employees who have a pregnancy-related disability. Generally, a normal pregnancy without complications will not be considered a disability even if the employee is unable to work for a period of time as a result of the pregnancy or childbirth. However, a female employee will be considered a "handicapped person," if she can show that she has a pregnancy-related physical or mental impairment that substantially limits a major life activity, or that she is regarded as having or has a history of such an

⁸ This admission only bolsters Respondent's claims that Complainant's presence in the office was an essential requirement of the job.

impairment. In such a case, the employee is entitled to the same protections under Chapter 151B as are other disabled employees.” Massachusetts Commission Against Discrimination, Maternity Leave Act Guidelines, §VII. See, e.g. Darian v. Univ. of Mass. Boston, 980 F. Supp. 77 (D. Mass. 1997) (severe pelvic bone pain, uterine contractions, irritation and pain of uterus, and back pain constituted disability)

I conclude that Complainant failed to establish that she was disabled within the meaning of M.G.L. c. 151B§1(17). While Complainant had a complicated pregnancy that required monitoring to determine the viability of her fetus, this did not result in any impairment that limited any major life activity. She was, however, required to attend frequent medical appointments. Even assuming that Complainant had been disabled within the meaning of the statute, in order to establish that she was a qualified handicapped person, Complainant would have had to prove that she was capable of performing the essential functions of her job, with or without a reasonable accommodation. M.G.L.c.151B§1(16) Complainant acknowledged that Respondent reasonably accommodated her disability by granting her time off for medical visits.⁹ However, Complainant was not able to perform the essential functions of the job with this accommodation. Complainant failed to adequately attend to the telephone, failed to properly handle documents received from tenants and failed to properly maintain tenant files to the point where this task was removed from her. Therefore I conclude that Complainant was not a qualified handicapped

⁹ The Commission’s probable cause determination states, in part: “Even if Complainant’s pregnancy related medical issues rise to the level of a disability under M.G.L.c. 151B ... Respondent allowed Complainant time off from work to attend medical appointments thereby providing her with a reasonable accommodation.”

person and that Respondent did not violate G.L. c. 151B§4(16) when it terminated her employment.

For the reasons stated above, I conclude that Respondent did not engage in unlawful discrimination and order that this matter be dismissed.

IV. ORDER

Based upon the above foregoing findings of fact and conclusions of law, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, it is hereby ordered that this matter be dismissed.

This constitutes the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this decision may file a Notice of Appeal with the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 15th day of April, 2011

JUDITH E. KAPLAN
Hearing Officer