

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD & BLANCA VALDES,

Complainants,

v.

DOCKET NO. 07-BEM-02666

TRUSTED OUTSOURCE, LLC.,

Respondent

Appearances: Caitlin Sheehan, Esq., Commission Counsel

Erico Jorge Valera, pro se, for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 16, 2007, Blanca Valdes filed a complaint with this Commission charging Respondent with discrimination on the basis of gender. 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 July 13, 2011. After careful consideration of the entire record and the post-hearing submission of Commission Counsel, I make the following findings of fact, conclusions of law and order.¹

¹ Complainant's emergency motion for sanctions against Respondent requesting, in part, that it be barred from participating in the public hearing was denied at the public hearing. Complainant's post-hearing request for reconsideration of that ruling is hereby denied.

II. FINDINGS OF FACT

1. Complainant Blanca Valdes is female and resides in Everett, Massachusetts. She is a native of Honduras.² Complainant currently works as a cleaner.

2. Respondent Trusted Outsource was a cleaning company owned and operated by Erico Varela. At the time of Complainant's employment with Respondent, it had a contract with the cleaning company UNICCO, by the terms of which Respondent's eight employees performed cleaning duties at the Hynes Convention Center in Boston, alongside UNICCO employees. Valera testified that his involvement with various other business ventures at the time prevented him from always being on site and therefore, his employees were supervised by UNICCO employees.

3. Complainant was hired by Respondent in or about September 2005. She worked 25 hours per week. Complainant testified that there were no complaints about her job performance and she was never disciplined until the day her employment was terminated on June 4, 2007. Valera corroborated Complainant's testimony that the quality of her work was good.

4. Complainant testified on or about June 1, 2007, at the end of her shift, she left the Hynes Convention Center and travelled by train to Sullivan Station, where she waited for a bus, along with cleaners Cosme Melendes and Faustino Blanco, who worked the same schedule and travelled the same route home. Complainant was first in line to board the bus; however, when the bus arrived, Melendes walked in front of her, pushed her out of the way and boarded the bus. When Blanco asked Melendes why he had pushed Complainant, Melendes told him to mind his

² Elke Perkins and Vanessa Davilla provided Spanish translation for Blanca Valdes at the public hearing.

own business. The three of them boarded the bus and continued on to their respective stops, without further incident.

5. Complainant testified that on June 4, 2007, when she arrived at work, a UNICCO supervisor directed her to meet with Varela, who then told her that she could no longer work for Respondent because there was a pending court case against her, arising out of the bus stop incident. According to Complainant, Melendes had not yet filed any complaint against her and Blanco. However, Valero would not listen to her version of events, and instructed her to leave the premises.

6. Complainant testified that about a week later, she and Blanco received notice of a court action against them brought by Melendes. Complainant testified that she and Blanco eventually appeared in court with respect to Melendes' complaint, which was dismissed. Complainant's testimony regarding the date of the court case was unclear and the date that the matter was resolved cannot be determined, based on the evidence adduced at hearing.

7. The witnesses' testimony regarding the nature of the court case was confusing, as well. Complainant and Valera stated there was a civil rights suit filed against Complainant by Melendes, alleging discrimination based on his sexual orientation. However, Complainant also testified that in the court case arising out of the bus stop incident, Melendes charged her and Blanco with assault. No documents related to any court proceedings were offered into evidence by either party.

8. Complainant claimed that she attempted to call Valero to ask for her job back but he never answered the telephone. According to notes of a visit to her medical provider, she attended a

meeting in late June or early July with her “boss” and her union representative, at which she rejected Respondent’s offer of a “lay-off” because she wanted her job back. (Ex. C-2)

9. Varela denied firing Complainant on the basis of her gender. He testified that, like Complainant, he and his parents were immigrants and his mother worked in a cleaning job to put him through school. He testified that because of his background he would not discriminate against a woman who was in the same shoes as his mother.

10. Varela testified that prior to the bus stop incident he had received several complaints from Melendes accusing Complainant of harassing Melendes because of his sexual orientation. One of Melendes’ allegations was that Complainant said he spent his paycheck on sex with other men. I credit Valera’s testimony.

11. Valera testified that while he did not know whether Melendes’ allegations about Complainant were true, Complainant had nonetheless caused a lot of “drama” in the workplace because of her conflicts with Melendes. Valera believed that Melendes had taken out a restraining order against Complainant. He was concerned that matters would deteriorate and thought it prudent to remove Complainant from the work place until legal matters were resolved. He believed that if he did not separate Complainant from Melendes, he would risk a harassment lawsuit by Melendes. In addition, he knew that UNICCO wanted Complainant out of the workplace because she was disruptive and he believed that Respondent’s contract with UNICCO would be jeopardized if she remained on the job. I credit Valera’s testimony regarding the reasons for removing Complainant from the workplace; however, while Valera characterized his action as a temporary lay-off, I find that it was tantamount to a termination. Given Respondent’s concerns about Complainant’s effect on its relationship with UNICCO and possible liability, I

believe that Respondent was highly unlikely to re-hire Complainant. Valera testified that he had no authority to remove Melendes from the workplace because Melendes had been begun working for UNICCO months before the bus stop incident and no longer worked for Respondent.³ According to Valera, Respondent had no control over Melendes' employment. With respect to Faustino Blanco, Valero testified that he did not fire Blanco because he had never received any complaints against Blanco prior to the bus stop incident. I credit Valero's testimony.

12. Valero testified that within months of Complainant's leaving Respondent, he reduced his staff to four employees. He has since shut down the company, which has not done business since February 2009. The corporation was dissolved in April 2009. (Ex. J-1) I credit his testimony.

III. CONCLUSIONS OF LAW

M.G.L. c. 151B, s. 4(1) prohibits discrimination in the terms and conditions of employment based on gender. Absent direct evidence of gender discrimination, Complainant must establish that: (1) she is a member of a protected class; (2) she was performing her position in a satisfactory manner; (3) she suffered an adverse employment action; and (4) similarly-situated, qualified person(s) not of her protected class were not treated in a like manner in circumstances that give rise to an inference of gender discrimination. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000)

Complainant was performing her position as a cleaner in a satisfactory manner, when she was terminated following the incident that occurred at a bus stop after work hours, while the two

³ In her MCAD complaint, Complainant states that Melendes worked full-time for UNICCO and part-time for Respondent.

male employees involved in the incident were not punished. I conclude that Complainant has established a prima facie case of gender discrimination.

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to offer legitimate, non-discriminatory reasons for its conduct. Abramian v. President and Fellows of Harvard College, 432 Mass 107(2000); Wheelock College v. MCAD, 371 Mass. 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc. 419 Mass 437 (1995). Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986).

Respondent's articulated reasons for terminating Complainant's employment are that it received numerous complaints of harassment against her by fellow cleaner Melendes that was causing turmoil in the workplace. In addition, Respondent's client, UNICCO, wanted Complainant out of the workplace because of the disruption she was causing, and in order to retain his contract with UNICCO, Respondent complied with their wishes. Valero also testified credibly that Melendes was employed by UNICCO and not Respondent at the time of the bus stop incident and he therefore had no control over Melendes' continued employment. Finally, Respondent was concerned that if Complainant remained in the workplace, it would be subjected to potential liability from a discrimination complaint filed by Melendes for sexual orientation discrimination caused by Complainant's conduct. Respondent did not terminate Blanco, despite his involvement in the bus stop incident because there were no previous complaints against him. I conclude that Respondent has established legitimate, non-discriminatory reasons for Complainant's termination.

Once Respondent has set forth evidence of legitimate, non-discriminatory reasons for its actions, the Complainant must show that Respondent's reasons were a pretext for unlawful discrimination. Complainant need not disprove all of the non-discriminatory reasons proffered by the employer for its decision-making, only 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).

There is no evidence in this case that the reasons Respondent articulated for Complainant's termination are a pretext for unlawful gender discrimination. Nor is there any evidence that Respondent was motivated by discriminatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass. 493, 503 (2001). The evidence portrayed a workplace where an on-going personal dispute between Complainant and Melendes was disruptive and disconcerting to Respondent, who sought to maintain good relations with its client, UNICCO, and to minimize its exposure to a potential discrimination lawsuit by Melendes based on Complainant's harassing conduct. Complainant has failed to persuade me that Respondent's termination of her employment was motivated in any way by considerations of her gender. "The law does not protect against personality conflict, cronyism, favoritism, or other acts of harassment or unfair conduct unrelated to a protected class." DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997); See also Placide v. B & B Towing Co., 22 MDLR 257 (2000); MacNeal v. Boston Public Schools, 25 MDLR 132,138 (2003). The evidence suggests that Complainant's disruption of the workplace caused Respondent legitimate concerns and that the steps it took to end her employment were motivated by those concerns and not discriminatory animus.

Therefore, I conclude that Respondent did not engage in unlawful discrimination on the basis of gender when it terminated Complainant's employment and I hereby order that this matter be dismissed.

IV. ORDER

For the reasons stated above, the complaint in this matter is hereby dismissed. This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal within ten days of receipt of this order and a Petition for Review within 30 days of receipt of this order.

SO ORDERED, this the 15th day of November, 2011

JUDITH E. KAPLAN,
Hearing Officer