

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D & NADIA YUSUF,
Complainants

v.

DOCKET NO. 08-BEM-00974

EQUINOX DARTMOUTH
STREET, INC.,
Respondent

Appearances:

Jonathan D. Plaut, Esq. for Nadia Yusuf

Patrick T. McPartland, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 3, 2008, Nadia Yusuf filed a complaint with this Commission alleging Respondent Equinox and its president Harvey Spevack discriminated against her on the basis of sex and sexual harassment. Specifically, Complainant, who was hired as a personal trainer for Respondent's fitness club, alleged after she rejected the sexual advances of two supervisors, Respondent began to reduce the amount of client referrals to her and ultimately terminated her employment. The Investigating Commissioner issued a probable cause determination against the corporate Respondent, and dismissed the claim against the individual Spevack for lack of probable cause. Attempts to conciliate the matter failed and the case was certified to public hearing. A public hearing was held before me on January 16-18, 2013. After careful consideration of the entire record before me and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Respondent Equinox is an international fitness company with headquarters in New York. Respondent operates high end fitness clubs, including a club located at Dartmouth Street, Boston that opened to the public in May, 2007 and employed over 100 people, including 20 to 25 personal trainers, at the time of Complainant's employment. (Tr. 211; 433) Personal Training is approximately 25% of Respondent's business. (Tr. 230)

2. Complainant Nadia Yusuf resides in Dorchester, Massachusetts. Complainant was employed by Respondent at its Dartmouth Street club as a personal trainer from March 2007 to October 2007. Prior to her employment at Respondent, Complainant worked as an administrative assistant and trainer at several local fitness clubs.¹ She is a licensed Pilates instructor and is certified to teach spinning. On or about March 22, 2007, Joshua Harrison hired Complainant for the position of personal trainer. Personal trainers earned commissions based on the number of clients they obtained. (Tr. 26-30; 217-218)

3. In 2007, Jay Herson was General Manager of Respondent's Dartmouth Street club. Herson was responsible for overseeing the club's operation, including the personal training department, which was headed by a personal training manager. Herson had no direct supervisory role over Complainant and had little involvement in the day-to-day operations of the personal training department. His primary role was to oversee membership sales. (Tr. 433-435)

4. Joshua Harrison has worked for Respondent for nine years and is Respondent's area personal training manager. Harrison has opened multiple clubs for Respondent. He arrived in Boston in February 2007 to oversee the opening of the Dartmouth Street club and to train Victor

¹ Complainant testified she was fired from a previous employer, under circumstances similar to this case. In that case she made an internal complaint to human resources. She alleged that a general manager behaved inappropriately toward her and subsequently terminated her employment for a "decision she made with a client." (Tr. 127-8; 113-114)

Meservey and Judy Gettner to become the club's personal training manager and fitness manager, respectively. While in Boston, Harrison ran the personal training department at Dartmouth Street while gradually ceding control of the department to Meservey. Harrison supervised the personal trainers, including Complainant, following the club's opening in May, while training Meservey and Gettner for the positions of personal training manager and fitness manager. Gettner and Meservey supervised Complainant as well. During the summer 2007, Harrison reduced his time spent at the Dartmouth Street location and in late September 2007, Harrison left Boston for Tyson's Corner, Virginia where he prepared to open another club. (Tr.292-294; 298-299)

5. Victor Meservey was hired by Respondent as the Dartmouth Street club's fitness manager, in training for the position of personal training manager, which he assumed in September 2007. His position involved training and development of trainers as well as administrative duties, such as assigning new club members to personal trainers and ensuring that personal trainers met Respondent's standards. Meservey is currently the General Manager of the Dartmouth Street club. (Tr. 358-361)

6. Judy Gettner was hired as personal trainer, in training for the fitness manager position, which she assumed in September 2007, when Meservey moved into the personal training manager position. While training for the fitness manager position, Gettner worked full-time as a trainer and spent an additional 15 to 20 hours a week performing managerial duties. When she became fitness manager, Gettner's time as a personal trainer was reduced to 10 hours per week and the remainder of her time was spent on administrative duties. Gettner was in charge of generating fitness plans and assigning new clients to personal trainers. In addition, she

supervised personal trainers. Meservey and Harrison were her supervisors. (Tr. 210-216)
Gettner and Complainant were friendly with one another (Tr. 228)

7. Respondent required all personal trainers to conduct a minimum of 42 hourly personal training sessions for each two-week pay period, or 90 personal training sessions per month. (Tr.223-224; Ex. F)²

8. In any pay period in which personal trainers failed to meet the minimum requirements, they were required to work a certain number of paid floor shifts. For example, if a personal trainer conducted only 20 paid personal training sessions in a two-week period, he or she would be required to work five floor shifts. During floor shifts, personal trainers assisted club members who were not already working with personal trainers as a way of prospecting for new clients. (Tr. 223-224; Ex-F)

9. Respondent ran in-house educational classes (“EFTI”) by which trainers are promoted. Attendance at such classes is required. (Tr. 245-246) Respondent also held required personal training forums.

10. Respondent’s policy stated that the personal trainer has 80% of the responsibility for maintaining the required number of personal training sessions. Personal trainers were expected to meet the requirements by providing excellent customer service, working floor shifts, networking with club members, creating personal training programs and physical evaluations for their clients and attending all mandatory trainings and classes. Respondent met its 20% of the

² Complainant’s Exhibits are numbered 1-10 and Respondent’s Exhibits are lettered A-O

responsibility by providing paid floor shifts, trainings and classes and providing personal trainers with referrals from new club members. (Tr. 219-220)

11. Respondent allowed personal trainers three months to meet its productivity requirements of conducting 90 paid personal training sessions per month at a newly opening club such as Dartmouth Street. (At a pre-existing club, personal trainers would have a six-month “ramp-up” period.) The reason for the shorter ramping up period for a newly opened club was that such clubs opened with a large number of pre-sold memberships and the opportunity for personal trainers to obtain clients is much greater than it would be at a pre-existing club. (Tr. 223-224)

12. When new members joined the club they completed a written “profile” containing their name, goals and preference for either a male or female trainer, times available to train and medical history. These “profiles” were given by the sales staff to the fitness manager who distributed the profiles or “leads” to the personal trainers. (Tr.232)

13. When the Dartmouth Street club opened in May 2007, it had pre-sold 845 memberships. During the pre-sale period Joshua Harrison distributed the leads equally to all trainers, based on the new members’ preferences. At that time, Complainant received 38 leads. At the end of the pre-sale period, Harrison turned over the duty of distributing leads to Gettner and Meservey. (Tr.232; 239)

14. Complainant testified that in May 2007, while she performed floor shifts, Harrison told her he had dated black women and liked their bodies. She stated that Meservey was present on many of these occasions. Harrison’s comments made Complainant, who is black, feel very uncomfortable. (Tr. 55, 61) I credit her testimony that Harrison made such comments to her.

However, I do not credit her testimony that such remarks were made in Meservey's presence. It is inconsistent with her sworn affidavit stating that no one was ever present when Harrison made offensive comments to her. Harrison denied making such comments but I do not credit his testimony. Meservey denied being present or ever hearing Harrison make such comments to Complainant. However, Meservey testified that Harrison told him that he liked black women and stated that the subject arose because Meservey was married to an African-American woman at the time. I credit Meservey's testimony.

15. Complainant testified that on occasion Harrison called her into his office in Meservey's presence and would look her up and down. On one such occasion, Harrison showed Complainant pictures of himself wearing only a bikini. (Tr. 57, 61-62) Harrison testified that he often showed employees pictures of himself when he was modeling and in top physical condition. (Tr.317-19; Tr.356-8) I credit his testimony, which was corroborated by Meservey and Gettner. (Tr. 264, 319) Several such photos of Harrison were entered into evidence and I find that they were not objectively inappropriate or sexually explicit. (Ex.N; Ex.7) Meservey denied witnessing Harrison looking Complainant up and down in Harrison's office. I credit Meservey's testimony, which is consistent with Complainant's sworn affidavit that there were no witnesses to any incidents of inappropriate behavior by Harrison. (Ex. L)

16. The Dartmouth Street club held a grand opening party in May or June on the fitness floor of the club. Approximately 300 to 400 people attended the party, including Herson, Meservey, Harrison, staff, employees, members of the general public and Equinox' CEO. (Tr. 436-8) Complainant testified that during the party³ Harrison was mingling with the trainers and

³ There was conflicting testimony as to whether some of the events testified to by the witnesses happened at the grand opening party or at a later social gathering. I find that there were at least two social events attended by

when he spoke to her he placed his hand on her buttocks for a few seconds. She moved away from him and told him she felt uncomfortable. She stated that Meservey was nearby and observed this incident, asked Complainant if everything was okay and offered her a ride home, which she declined. (Tr. 55-56) I do not credit Complainant's testimony in this regard because it contradicts her sworn affidavit that no one observed any incident of inappropriate behavior toward her. Meservey denied witnessing such an incident and stated he once drove Complainant home because she had no car and lived some distance from the club and not because she was upset about anything Harrison had done. (Tr.393) I credit his testimony.

17. Complainant testified that at a work-related social event at a restaurant, Herson approached her and after inquiring about her job and goals, asked her if she would like to sleep her way to the top. Complainant was shocked, told him she wasn't interested and backed away from him. I do not credit her testimony. (Tr. 57-58) Herson denied that this incident occurred. (Tr. 464) I credit his testimony. When it came time to leave the restaurant, Complainant could not find her coat, containing her keys and phone.⁴ Harrison, who lived with his then girlfriend near the club, offered to let Complainant sleep on his couch, so she could walk to work in the morning in time for her 6:00 a.m. client appointment. Complainant testified that when they arrived at Harrison's apartment, he went upstairs with his girlfriend, returned to the living room with a pillow and blanket for Complainant went back upstairs. According to Complainant, after she went to sleep, Harrison returned downstairs, woke her up, told her that he had always been attracted to her and wanted to sleep with her. Complainant said she felt uncomfortable, pointed out that his girlfriend was upstairs and that she was only there because her coat and keys were

Complainant. Meservey drove her home from one event and Complainant slept on Harrison's couch after another event.

⁴ Herson picked up the coat at the restaurant after people had left and brought it back to the club. He believed the incident took place the night of the opening party. The next day he learned the coat belonged to Complainant when she picked it up at the club. (Tr.439-441) I credit Herson's testimony.

lost and she wanted to be on time for work the next day. (Tr. 58-60) I do not credit her testimony that Harrison propositioned her for sex. Harrison acknowledged offering to let Complainant sleep on his couch; however, he denied propositioning Complainant for sex. (Tr.314-317) I credit his testimony.

18. Gettner stated that the day after the opening party⁵, which she did not attend, Complainant told her that she had misplaced her coat, keys and phone and had stayed at Harrison's home. Complainant did not tell Gettner that Harrison had made sexual advances to her that evening, notwithstanding that she and Complainant were "buddies." She stated there was nothing out of the ordinary about Complainant's demeanor the next day. (Tr. 225-226, 228, 240) At the public hearing, Complainant downplayed her friendship with Gettner and stated she did not mention the incident to Gettner because Gettner was not a supervisor. She stated that she told Meservey about the incident because he would become her boss when Harrison left Boston. (Tr.67) I do not credit Complainant's testimony, which contradicts her sworn affidavit that she was friendly with Gettner and they talked about personal matters. (Ex. L) Meservey denied that Complainant ever told him about this incident and I credit his testimony.

19. In May 2007, Complainant was given six leads. The average number of leads given to trainers that month was 5.59. In June 2007, Complainant received six leads. The average number of leads for that month was 4.27. (Ex. J)

20. Complainant testified that after she rebuffed their advances, Harrison and Herson no longer talked to her and sometime around July her leads began to decrease. Complainant

⁵ There was confusion among the witnesses regarding at which social event the incident occurred.

received only three leads in July, but this was above the average number of leads given to trainers that month. (Ex. J)

21. Complainant stated that she approached Harrison and told him that she was not interested in him romantically, and just wanted the same treatment as the other trainers. I do not credit her testimony. Harrison denied having such a conversation with Complainant and stated that he never instructed Meservey or Gettner not to provide new member leads to Complainant. I credit his testimony.

22. Also in July, according to Harrison, Gettner and Meservey, Complainant took up a collection to purchase a workout shirt for Harrison's birthday, (Tr. 319, 375-76, 231). Complainant denied any involvement in purchasing a gift for Harrison and stated that Meservey took up the collection and Harrison's girlfriend purchased the shirt for him. (Tr. 106-107, 484-485) However, I do not credit Complainant's testimony and it is contradicted by her prior sworn affidavit that she participated in the collection of money for a shirt for Harrison and delivered the group gift to him along with another trainer. (Ex. L)

23. In July, there were seven personal trainers who received no leads at all, including Luke P. and Karen B, who were terminated because of their failure to build a client base. (Testimony of Gettner; Ex. J)

24. Complainant testified that she complained to Meservey about not getting referrals and Meservey told her that when he became manager, he would make sure that Complainant got the same number of referrals as other trainers. Meservey corroborated Complainant's testimony that she asked him for more referrals, but denied telling her that her referrals would increase when he became manager. I credit Meservey's version of this conversation.

25. In August 2007, Complainant completed only 33 of the required 90 personal training sessions. (Ex. H)

26. Gettner testified that by August she and Meservey had established their management roles and they distributed all of the new member leads to personal trainers. By that time Harrison was spending less time at the Boston club and no longer had a role in distributing leads. (Tr. 232-3) I credit her testimony.

27. Gettner stated that during the summer, Complainant had very little increase in the number of clients, was frequently late for work and missed a forum and other educational programs. In addition, a client complained to Gettner that Complainant was often late to training sessions. (Tr. 243) I credit her testimony.

28. Gettner testified that she distributed the leads in September 2007 and she did not provide Complainant with any leads that month because she had not recruited enough clients and therefore would not be rewarded with new leads. (Tr. 249-230) I credit Gettner's testimony.

29. Complainant testified that in September she notified Gettner that she would not be able to attend a required personal training forum because of a conflict with a college class that she was taking⁶ and that Gettner told her not to worry and that she would inform Harrison. (Tr. 90-92) I do not credit Complainant's testimony that she informed Gettner in advance that she could not attend the personal training forum and Gettner denied learning this in advance. I credit Gettner's testimony.

⁶ Complainant testified that the time she was taking classes toward a B.A. in English at UMass Boston, which she received in 2010. Her testimony contradicts her resume submitted to Respondent at the time of her hire, which states she received a BA in English in 2004. (Ex. 1) With respect to other discrepancies in her resume regarding the dates of previous employment, Complainant suggested at the public hearing that it was Respondent's duty to discover such discrepancies by calling her former employers.

30. On September 5, 2007 Complainant received a written “Corrective Action Notice” for being a “No call. No show” for the personal training forum. The notice also stated that Complainant was “not availing herself of Respondent’s resources and not increasing her personal training hours.” She was directed to “attend every meeting and training session and communicate in advance if unable to attend.” The notice stated if Complainant failed to increase her number of training sessions, missed training or failed to communicate with Respondent her employment would be terminated. In the comments section of the corrective action notice, Complainant stated only that she was “handled professionally.” She did not protest that she was considered “no call no show” for the training. The corrective action notice was signed by Harrison, Complainant and Gettner. (Ex. G)

31. On September 11, 2007, Complainant emailed the director of group fitness to inquire about teaching a Pilates class. The manager responded that there were no current openings, but would be glad to meet with her to discuss the issue. On September 20, 2007, the manager emailed Complainant, reversed course and told Complainant that group fitness would not be a “good fit” for her and they could discuss her teaching a Pilates class once her personal training performance was up to full-time. (Ex. M) Meservey and Gettner testified that they were not involved in the decision not to allow Complainant to teach Pilates. Gettner testified that a trainer would not be allowed to teach classes if she did not have the required number of training hours. Harrison did not recall Complainant asking to teach a class, but stated that he would not have been opposed to it.

32. On October 10, 2007, Complainant received another corrective action notice from Meservey for failure to meet ramping schedule and continued under-performance and because her activities and availability were extremely limited and negatively affecting business.

Meservey stated that he gave Complainant this notice because she was not spending enough time on the floor and her numbers were going in a negative direction. (Ex C-9) I credit his testimony.

33. Meservey testified credibly that in October 2007, multiple trainers who had been hired for the opening were placed on action plans and received corrective action notices. At this time, there was turnover in trainers and Respondent began hiring new trainers to whom they assigned new leads. (Tr. 386-7)

34. On October 16, 2007, Complainant was suspended indefinitely for “failure to meet productivity requirements.” (Ex. I) She was told not to return to the club until scheduled to meet with a manager to receive her last paycheck and termination notice. Meservey believed that Gettner and Stacy Dube, the assistant general manager, had this final meeting with Complainant. (Tr. 415-419)

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B, s. 4 (1) prohibits discrimination in the workplace on the basis of sex. Section 4(16A) of c.151B specifically prohibits sexual harassment in employment. Sexual harassment is a form of sex discrimination actionable under G.L. s. 4 (1) and (16A). See College-town, Division of Interco, Inc. v. MCAD, 400 Mass.156 (1987). To establish a claim of quid pro quo sexual harassment Complainant must show that Respondent’s managers made "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, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions.” Complainant alleges that after she rejected the sexual advances of

Harrison and Herson, Respondent reduced the number of her referrals and terminated her employment because of her refusal to submit to their advances.

Complainant has failed to establish that Respondent subjected her to quid pro quo sexual harassment. I found Complainant's testimony to be generally contradictory and not credible. While Harrison may have made an occasional inappropriate comment to Complainant about liking black women's bodies, I conclude that these remarks, absent other credible evidence of quid pro quo harassment or a sexually hostile work environment, do not support a finding of sexual harassment. I determined that Complainant fabricated the other allegations of sexual advances by Herson and Harrison in order to advance her claims before this Commission. Complainant's testimony regarding the allegations and when they occurred was vague and inconsistent. For example, she testified at hearing that Meservey witnessed incidents of inappropriate behavior by Harrison and Herson; yet in an earlier sworn affidavit, she stated that there were no witnesses to any acts of alleged sexual harassment. This and other inconsistencies in her statements lead me to conclude that Complainant's allegations are not credible and that she has failed to establish quid pro quo sexual harassment.

Moreover, Respondent has set forth legitimate, non-discriminatory reasons for terminating Complainant's employment; her failure to meet the required number of personal training hours set forth by Respondent. She did not put in enough time at the club and was often tardy and missed meeting and trainings. Complainant was given written warnings about her poor performance and her employment was ultimately terminated because of her poor performance.⁷ There was un rebutted evidence that other trainers who were hired along with Complainant were

⁷ Because I did not credit Complainant's testimony, I conclude that Complainant did not establish a claim of hostile work environment sexual harassment.

also terminated for failure to meet Respondent's requirements, further undermining Complainant's allegations that she was singled out because of her refusal to accede to managers' requests for sexual favors. Finally, the evidence was that by the summer, when Complainant's referrals were diminishing, Harrison was no longer assigning referrals and had delegated that duty to Meservey and Gettner. Therefore I conclude that Complainant has failed to establish that Respondent engaged in unlawful sexual harassment, in violation of M.G.L.c.151B§4(1) and (16A)

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 20th day of May 2013

JUDITH E. KAPLAN,
Hearing Officer