

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
LEDAMA OLEKINA,

Complainant,

v.

DOCKET NO. 05-BPA-01177

MR. ALAN CLOTHING, INC. &
ALAN SWARTZ,

Respondents

Appearances: C. Max Perlman, Esq., for Complainant
Peter J. Muse, Esq., for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On April 28, 2005, Complainant Ledama Olekina, filed a Complaint alleging that Respondent, Alan Swartz, owner of Respondent clothing store, Mr. Alan Clothing, Inc. discriminated against him based on his race in a place of public accommodation in violation of G.L. c. 272 § 98 ¶ 1. Complainant specifically alleged that when he entered Respondents' store seeking information about the nearest cell phone store, Mr. Swartz swore at him using racial epithets, threatened him with a baseball bat and ordered him to leave the store. Respondent Swartz denied the allegations. The Investigating Commissioner found probable cause to credit the allegations of the complaint and conciliation efforts were unsuccessful. The matter was certified for a hearing and a

hearing in this matter was held before the undersigned hearing officer on May 24, 2010. Neither party filed a post-hearing brief.

Having reviewed the record in this matter, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Ledama Olekina, is a black male who grew up in Kenya. He first came to the United States in 1995 to study and pursue a career in journalism. He established, and is the president of, a non-profit organization called MAASAI Education Discovery, with a mission to educate Kenyan students. The organization has built schools and libraries throughout Kenya. Its offices are next to the Four Seasons Hotel at Park Plaza in Boston. Complainant currently resides in Concord, Massachusetts and is running a campaign for President of Kenya in 2012. Complainant speaks with an accent.

2. Respondent Alan Swartz was the owner for 33 years of a clothing store, Mr. Alan's Clothing, on lower Washington Street, in the area once known as Boston's Combat Zone. The store was closed in November of 2007 for reasons related to Swartz's poor health and lack of business. He testified that during the years he owned and operated the store, approximately 80% of the store's clientele was African American. Since the incident in question, Swartz has had a leg and part of his hip amputated and currently uses a wheelchair. He testified that his wife of 24 years, Gwen, who accompanied him to the hearing, is African American and that he lives with her and raised and educated her son Ryan, who is also African American.

3. Complainant testified that on April 28, 2005 around mid-day, he was looking for a phone store to repair his cell phone. He stated that he was dressed in shorts and a T-

shirt and was anxious to get his phone repaired because he was traveling back to Kenya on a flight through London that evening. Some colleagues suggested to him that there was a phone repair store near Downtown Crossing, but when he could not locate a store, he entered Respondents clothing store.

4. Complainant testified that as he entered Respondent's store, he encountered Swartz who was seated and had just gotten off the phone. Complainant testified that when he asked Swartz if he knew where he could get a phone fixed, Swartz responded, "what kind of a f'g question is that," and then stated "get out of my store, stupid f'g ignorant nigger." Complainant testified that he wondered if something about his manner may have provoked Swartz who then walked over to the cash register, picked up a baseball bat and threatened to break Complainant's "f'g neck." Complainant testified that he felt very threatened at that point and thought Swartz was going to kill him. He asked "what did I do?" and asked Swartz to apologize to him. According to Complainant, Swartz responded, if I apologize will you leave," but he was not "remorseful." While I credit Complainant's testimony that Swartz spoke to him in a brusque and unfriendly manner, and may have even said "what kind of question is that," I do not believe that Swartz called him racial epithets or threatened him with a baseball bat.

5. Swartz testified that Complainant entered his store in a hurry, seemingly anxious, and asking about a phone store. Swartz testified that he responded, "this is a clothing store, not a phone store." He stated that Complainant continued to inquire about a phone store, and he repeated, "this is a clothing store, I have no phones." Swartz testified that Complainant was agitated and began yelling at him for not giving him the information he wanted, but that Swartz did not know of any phone store nearby. I credit

Swartz' testimony that he responded his store was not a phone store and that Complainant became agitated by his response and his tone. Swartz denied brandishing a baseball bat and threatening Complainant and stated he does not have a baseball bat in the store. I credit this testimony; however I believe he was brusque with Complainant and told him to leave the store as Complainant continued to argue with him. Swartz admitted that he asked Complainant to leave the store because Complainant had raised his voice and was yelling. He stated that in the past, he has asked customers to leave the store if he suspected them of shoplifting, but he does not yell at customers or have physical confrontations with them as that would not be good for business. Swartz testified that he ran a very successful business with a large minority clientele for 33 years. He testified that he does not use the word "nigger" and it would make him angry if someone referred to his wife in those terms. I credit this testimony.

6. Complainant testified that during his altercation with Swartz, a man wearing a white London Fog jacket (later identified as Francis Walsh) walked into the store and Swartz' attitude immediately changed as he addressed Walsh. Complainant testified he was relieved that Walsh would be a witness if Swartz tried to kill him. Complainant asked Walsh if he knew Swartz and Walsh responded that he was a good friend of Swartz. Whereupon Complainant implored Walsh to ask Swartz why he was discriminating against him and insulting him. When Complainant threatened to call the police, Swartz stated that Walsh was a police officer and Complainant asked him for identification, which showed he was a retired police officer. According to Complainant, both men then began talking on their phones.

7. Complainant left the store and saw a police officer at a construction site on the street and relayed to him what had just happened. The officer advised him to return to the store to obtain names and to proceed to a police station to file a report. Complainant testified that he returned to the store to get names, but the door was locked. He then went to a police station and filed an incident report that was admitted into evidence over Respondents' objections. (Ex. C-1) Complainant returned to his office where his secretary encouraged him to file a complaint at MCAD which he did that day.

8. Complainant testified that he was devastated by the incident, did not want to live in the U.S. any longer and cancelled his flight to London that evening. As a result he had to pay approximately \$250 and had to pay for a hotel room in London for one night. He stated that the incident destroyed his good feelings about our society and what it means to be American. He lived in Brighton at the time and his roommate suggested he move. He has since moved to Concord, Massachusetts, where he purchased a home and lives currently.

9. Francis Walsh is a retired Boston Police officer who lives in Dorchester. He was a police officer for over 33 years, having retired in 2003. He testified that he has known Respondent Swartz since 1988 because Swartz' store was in his precinct and he went in the store on a regular basis when he was a police officer and also shopped in the store. He confirmed that Respondent's store had a significant minority clientele and that Swartz employed African American sales people.

10. Walsh testified that on the day in question he entered Respondent store and encountered Swartz and Complainant, who he described as aggravated and antagonized. Walsh testified that he thought Complainant had "mental problems." He heard

Complainant say he didn't like the way he was being treated. Walsh thought Complainant wanted to use the store phone and he directed him to a bank of pay phones. Swartz told him that there was a "nut" in the store who didn't want to buy anything and didn't want to leave. He heard Swartz say to Complainant words to the effect of, "you don't want to buy anything, why won't you leave my store?" Walsh testified that Complainant left the store saying he was going to get a policeman and Walsh told him that he was a retired policeman and showed him his I.D. He stated that Complainant left and did not return to the store and he denied that Swartz locked the store. Walsh also testified that he has never seen Swartz with a bat in the store and described Respondent as a "gentleman." He stated he has never heard Swartz use the word "nigger." I credit Walsh's testimony that Complainant was upset and agitated and that Swartz said he was a "nut." I also credit his testimony that he never witnessed Swartz brandish a bat or threaten Complainant. While I do believe that Swartz may have locked the door after Complainant left the store, such an action would be consistent with his and Walsh's perception that Complainant suffered from "mental problems."

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 272, s.98 prohibits any distinction, discrimination, or restriction relative to the admission of any person to a place of public accommodation based on race.¹ The definition of public accommodation includes retail stores. The

¹ The statute provides in pertinent part: Whoever makes any distinction, discrimination, or restriction on account of race...relative to the admission of any person to, or his treatment in any place of public accommodation, resort, or amusement as defined in section ninety -two A...shall be liable to any person aggrieved thereby for such damages as are enumerated in section five of chapter one hundred and fifty-one B.

Commission is authorized to enforce the public accommodations statute under the terms of c. 151B, s. 5. *Ekhtator v. Stop & Shop Supermarket Co.* 24 MDLR 147, 149 (2002)

The Commission analyzes a public accommodations complaint in accordance with the disparate treatment standard set forth in *Wheelock v. MCAD*, 371 Mass. 130, 134-136 (1976); *Lipchitz v. Raytheon Company*, 434 Mass. 493, 495 (2001); *Reese v. May Dept. Store*, 24 MDLR 395, 399 (2002). To establish a prima facie case of discrimination in a place of public accommodation, the Complainant must demonstrate that he was 1) a member of a protected class, 2) denied access to, restricted, or treated differently from others not in his protected class, and 3) in a place of public accommodation. *Yu v. Li*, 28 MDLR 212, 221 (2006).

Complainant is member of a protected class by virtue of his race and national origin. He claims that when he entered Respondent clothing store asking about where to get his phone repaired, he was treated in an adverse manner by Respondent Swartz because of his race. He alleges that Swartz yelled racial epithets at him, called him ignorant, and threatened him with a baseball bat. Complainant states that he did nothing to provoke such a confrontation, other than ask about where to get his phone fixed. He testified that he has questioned himself about whether there was something in his manner that provoked Swartz.

Once Complainant has established a prima facie case of discrimination, Respondent must articulate a legitimate non-discriminatory reason for its actions. Respondent Swartz claims that Complainant was agitated when he entered the store and Swartz did not understand why he was talking about phones in a clothing store. He denied using racial epithets and threatening Complainant with a bat. According to

Swartz, he stated that his store was not a phone store, but that Complainant would not accept his answer and became confrontational.

Complainant has not persuaded me that Respondent's explanation for what occurred is false or a pretext for racial discrimination. While I can believe that Swartz may have acted in a gruff manner towards Complainant, and may have even been rude to him, there was no apparent reason for him to confront Complainant in a racist and violent manner. I do not find Complainant's account of racial epithets and threats with a baseball bat to be credible given the circumstances. The evidence supports a conclusion that a confrontation ensued between Complainant and Swartz, that voices were raised, and that Swartz asked Complainant to leave the store, but I am not persuaded that this altercation was motivated by discriminatory animus on Swartz's part. Complainant ran a business with primarily minority customers for many years, employed African Americans, married an African American woman and raised and educated a son who is black with her. He clearly bears no discriminatory animus toward black people and his life and life choices make it difficult to conclude otherwise. Given Respondent's lengthy and close association with African Americans, both in his professional and personal life, I cannot conclude that he would have engaged in such racist and violent conduct out of discriminatory animus toward Complainant, particularly absent any provocation. I do believe that Swartz treated Complainant in a gruff and brusque manner, but that he would have done so regardless of Complainant's race, given Complainant's inquiry about phone repair. Swartz's response to Complainant, "I don't sell phones, I sell clothes," is also plausible, given Swartz's apparent gruff, somewhat unpolished exterior. Moreover, Complainant speaks English with a heavy accent which could have led Swartz to believe

that he was confused. Once Complainant became angry, accusing Swartz of discrimination, it is plausible that Swartz, too, would have gotten upset and demanded he leave the store. Given Swartz's and Walsh's testimony that Complainant was anxious, aggravated and agitated, it is not unreasonable that they might have perceived him to be mentally disturbed. While this does not excuse Swartz' brusque behavior, it provides a reasonable explanation that does not implicate racial animus.

Complainant is an erudite and sophisticated individual who clearly perceived the confrontation with Swartz as an affront to his dignity and his race. I believe he found Swartz' tone and manner to be offensive and rude and was extremely disturbed by their encounter. However, it is not Complainant's perception, but Respondent's motive that governs the outcome of such a delicate matter. Regardless of Complainant's perception of racist animus, I remain unpersuaded that Swartz was motivated by discriminatory animus or that he treated Complainant adversely on account of his race. Ultimately, I am left to conclude that the encounter was an extremely unfortunate incident which escalated beyond the intent of either party and was distressing to Complainant, but was not discrimination.

Given all of the above, I conclude that Complainant was not treated differently in a place of public accommodation on account of his race and color and that the above referenced complainant should be dismissed.

So Ordered this 26th day of January, 2011.

Eugenia M. Guastaferrri
Hearing Officer