

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and MICHELLE ROBICHAUD,
Complainants

v.

Docket No. 06 BEM 01255

GERVAIS COMPANIES and
MARK FERMANIAN,
Respondents

Appearances: Matthew A. Haymer, Esq., for Complainants
Scott A. Lathrop, Esq., for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 12, 2006, Michelle Robichaud (“Complainant”), filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that the Gervais Companies and Mark Fermanian, General Manager (“Respondents”) discriminated against her on the basis of sex in violation of M.G. L. 151B, secs. 4(1), (11A), and c. 149, sec. 105D. Complainant asserts that she was terminated from her position at the Ford dealership while she was on maternity leave.

The MCAD issued a probable cause finding on August 9, 2007 and certified the case for public hearing on February 18, 2009.

A public hearing was conducted on January 28, 2010. The parties introduced five (5) joint exhibits into evidence. The Complainant and Respondent Mark Fermanian testified as did Jennifer Tocci.

To the extent the parties' proposed findings are not in accord with or are irrelevant to the findings herein, they are rejected. To the extent the testimony of various witnesses is not in accord with or is irrelevant to my findings, the testimony is rejected. Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Michelle Robichaud was hired by Respondent Gervais Companies, d/b/a Gervais Ford, as a part-time rental clerk in February of 1999. She worked at the dealership from 1999 to 2006.
2. Respondent Gervais Ford is located at 5 Littleton Road, Ayer, MA. It is a car dealership and employs more than six individuals. At all relevant times, Respondent Mark Fermanian was the General Manager of the dealership. Fermanian testified that car sales in Massachusetts were "getting worse" in 2005 and 2006 and that the dealership was having weekly meetings at that time about cutting expenses.
3. Complainant's sister, Emily Babbin, has been employed by Respondent for twelve years. She has been the dealership's office manager since 2003. As of the date of public hearing, Babbin still held this position.
4. After working for Respondent for approximately two years as a rental clerk, Complainant became the body shop receptionist in 2000. In that capacity she answered the phone, called insurance companies, and prepared invoices. Approximately two years later, Complainant became a cashier in the service department. Complainant reported to Respondent Mark Fermanian.

5. Complainant became pregnant in 2005. She informed Fermanian and coworker Jennifer Tocci of her pregnancy in or around June of 2005.
6. Complainant was scheduled to deliver by caesarian section during the week of February 9, 2006. She told Fermanian that she anticipated taking a two-month maternity leave beginning on that date.
7. Complainant expressed concern to coworker Tocci that her job security would be adversely affected by her maternity leave. Complainant was concerned because in December of 2005, thirteen-year employee Dorothy Gauthier was laid off from her clerical position in the sales department. Prior to Gauthier's layoff, other clerical employees had been laid off in 2005, including Brittany Clark on April 27, 2005, Michael Talley on May 26, 2005, and Ashley MacNeil on July 26, 2005. Joint Exhibit 3.
8. Complainant testified that Tocci relayed her concerns to Fermanian and reported back that Complainant's position was safe. Tocci testified that she asked Fermanian about layoffs in general rather than Complainant's job in particular and was told not to worry. Fermanian testified that Tocci did discuss Complainant's concerns about her job, and he told Tocci that there were no layoff plans at that time. I credit Fermanian's testimony.
9. Complainant spoke directly to Fermanian about her job security after Tocci spoke to him. Complainant asked for confirmation that she would be able to return to work after her two-month maternity leave. Complainant testified that Fermanian said nothing about a layoff. Fermanian testified that he was "purposely vague,"

told her not to worry about her job status, and said that he didn't know what was going to happen at the dealership.

10. Fermanian testified that he spoke to Complainant's sister, office manager Emily Babbin, in December of 2005 or January of 2006 about whether Babbin had a job opening for Complainant and that Babbin said she didn't have a job for Complainant.
11. Complainant had emergency caesarian section surgery on January 29, 2006. Before going to the hospital, Complainant called Fermanian to let him know that she was delivering earlier than scheduled.
12. While Complainant was out of work on maternity leave in January of 2006, Fermanian asked Tocci to perform Complainant's job as well as her own. After Tocci did so for a week or two, Fermanian asked her if she could handle both jobs, and Tocci said that she could.
13. Fermanian determined that there was no need for a cashier position because Tocci was able to perform Complainant's job as well as her own. Fermanian eliminated the cashier's position. As of the date of public hearing, the cashier's position has not been re-filled.
14. Fermanian testified that he had considered laying off receptionist Tracy Rust and moving Complainant into Rust's position, but decided not to do so even though Rust had less seniority than Complainant. Fermanian decided to retain Rust because she was already functioning as receptionist, Complainant would have required training in order to perform Rust's position, and Rust had better people

- skills than did Complainant. According to Complainant, she was qualified to perform Rust's job. I credit Fermanian's testimony over Complainant's.
15. Tocci testified that she was surprised that Complainant was laid off because Complainant was a good employee who had worked for the dealership a long time.
 16. On February 9, 2006, Complainant received a call from Fermanian. Complainant told him that she missed work and was looking forward to returning to her job. Fermanian told Complainant that she was being laid off and that she could collect unemployment. Fermanian testified that he laid off Complainant while she was on maternity leave rather than after she returned to work so that she could begin to collect unemployment benefits.
 17. Approximately two months after her layoff, Complainant found another job at Nashoba Air in North Chelmsford. She was hired as a customer service representative for \$15.00 per hour and subsequently received a raise to \$16.00 per hour. Complainant did not obtain unemployment compensation for the two-month period she did not work.
 18. Following Complainant's layoff, Respondent hired three part-time clerks in 2006: Megan Roberge in May of 2006 as a part-time rental clerk; Gail Rust in September of 2006 as a part-time night file clerk; and Jessica Jones in September of 2006 as a part-time night biller. Joint Exhibit 4. These positions, which paid \$8.00 per hour, did not exist at the time of Complainant's layoff. Fermanian testified credibly that he knew, when he filled these positions, that Complainant

had obtained full-time employment at Nashoba Air and was earning \$15.00 per hour.

19. The average number of employees working for Respondent in 2005 was fifty-nine. The average number of employees working for Respondent in 2006 was fifty-one. Joint Exhibit 2. Fermanian testified that Respondent laid off seventeen employees in 2006 consisting of twelve car washers, four car mechanics, and one support person (Complainant). Immediately after Complainant's layoff there were only two employees performing administrative support services for the dealership -- Tracy Rust and Jennifer Tocci.

20. According to Complainant, she was distraught and shocked that she was laid off. Complainant testified that following her layoff and a two-week period in which her newborn son was in intensive care, she had headaches and cried everyday. Complainant did not seek psychological counseling. She visited Respondent's work site in March of 2006.

III. CONCLUSIONS OF LAW

M.G.L. Chapter 151B, sec. 4 (1) makes it an unlawful practice to discriminate against an employee because of her sex. Since pregnancy and childbirth are sex-linked characteristics, actions by an employer which "unduly burden" an employee because of pregnancy or childbirth may amount to sex discrimination under M.G.L.c.151B. See MCAD Guidelines on the Massachusetts Maternity Leave Act (2000) *citing* School Committee of Braintree v. MCAD, 377 Mass. 424, 430 (1979) and White v Michaud Bus Lines, Inc., 19 MDLR 18, 20 (1997) *quoting* Lane v. Laminated Papers, Inc., 16 MDLR 1001, 1013 (1994); see also, Gowen-Esdaile v. Franklin Publishing Co., 6 MDLR 1258

(1984) (termination of complainant during troubled pregnancy because of fears of additional absences deemed unlawful sex discrimination). Further, M.G.L. c. 151B sec. 4 (11A) makes it unlawful for an employer to refuse to restore a female employee to employment following a maternity leave under M.G.L. c. 149, sec. 105D.

In the absence of direct evidence, a prima facie case of sex discrimination 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 4) the circumstances of the removal raise a reasonable inference of discrimination. See Sullivan v. Liberty Mutual Ins. Co., 444 Mass. 34, 41 (2005) (retention of lower-rated, similarly-situated male attorneys rather than a female attorney during a reduction in force is sufficient to satisfy fourth prong of prima facie case); Weber v. Community Teamwork Inc., 434 Mass. 761 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000).

There is no dispute that the first three requirements of a prima facie case are satisfied by Complainant's layoff. The evidence is also sufficient to raise a reasonable inference of discrimination based on Complainant's status as a competent, long-term employee who was laid off while on maternity leave while other support employees were retained and whose lay-off was followed by the hiring of three new clerical employees a few months later. This evidence is sufficient to establish a prima facie case of discrimination.

Once Complainant establishes a prima facie case, the three-part burden shifting paradigm of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) requires that Respondents, at stage two, articulate a rationale and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. See Lipchitz v. Raytheon Company,

434 Mass. 493, 504 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116-117 (2000). Respondents cite the need to reduce costs as the rationale for their action. Respondents' cost-cutting rationale is supported by credible evidence that just two months prior to Complainant's layoff, the dealership also laid off Dorothy Gauthier, another long-term administrative employee and earlier in 2005 laid off three other clerical employees -- Brittany Clark, Ashley MacNeil, and Michael Talley. These reductions in force, together with the layoffs of employees handling cars, reduced the workforce from an average of fifty-nine employees in 2005 to fifty-one employees in 2006. General Manager Fermanian testified credibly that even after the 2005 reductions in staff, he anticipated the need to take additional cost-cutting measures in 2006, but told Complainant and Tocci not to worry about Complainant's job status because he wasn't sure what he was going to do and didn't want to cause premature worry. I credit Fermanian's reason for not discussing Complainant's contemplated layoff prior to eliminating her position.

While Fermanian was uncertain about how to trim costs prior to Complainant's maternity leave, following her departure it became clear that Jennifer Tocci could perform Complainant's job while continuing to perform her own. Fermanian determined that a consolidation of the two positions would promote the dealership's goal of reducing expenses. By laying off Complainant during her maternity leave, Fermanian sought to make her eligible for unemployment benefits following the birth of her baby as opposed to being on an unpaid eight-week maternity leave. I credit this rationale.

Complainant focuses on the existence of other options aside from her own layoff as justifying an inference of discrimination. She notes that she was laid off despite

having more seniority than Tracy Rust who was retained. However, Fermanian testified that he retained Rust in lieu of Complainant because Complainant would have required re-training in order to perform Rust's job and because Rust was better at working with people. I accept this testimony as credible.

Complainant also relies on the following evidence to support an inference of discrimination: 1) the dealership hired eighteen employees in 2006 despite claiming financial troubles; 2) Complainant was the sole clerical employee laid off in 2006; and 3) Complainant's layoff was followed by the hiring of three clerical employees in 2006. This evidence, unrefuted by Respondents, simply reflects the reality that a car dealership has more mechanics, salespeople, and car washers than clerks, that such employees come and go, and that the dealership has clerical needs unrelated to the cashier's position. Even with the hiring of eighteen employees in 2006, the dealership still downsized its workforce from a 2005 level of fifty-nine employees to fifty-one employees. There is no evidence that the cashier's position was revived and re-filled after Complainant's departure. Instead, Complainant's duties were folded into the job of Jennifer Tocci who was already on the payroll as the dealership's warranty administrator.

There were, to be sure, three clerical employees hired after Complainant was laid off, but they were hired on a part-time basis at a significantly lower hourly rate than that paid to Complainant. By the time they were hired, Fermanian was aware that Complainant had already secured permanent, full-time employment elsewhere, earning \$15.00 an hour. His assumption that Complainant would not be interested in a part-time job with the dealership at \$8.00 an hour does not support an inference of sex discrimination.

Turning to Complainant's claim under the Massachusetts Maternity Leave Act, G.L.c.149, section 105D requires employers to grant non-probationary female employees eight weeks of unpaid maternity leave, provided that they give at least two weeks notice of their anticipated date of departure and of their intention to return. In this case, however, the eight weeks of unpaid maternity leave was cut short by the elimination of Complainant's position for non-discriminatory reasons. Thus, there is no violation of the Massachusetts Maternity Leave Act.

IV. ORDER

The case is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. 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 April, 2010.

Betty E. Waxman, Hearing Officer

