

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and STOLI KAPXHIU,
Complainants

v.

Docket Nos.: 10-BEM-01908

ROCHE BROS.,
Respondent

Appearances: Vanessa St. Leger and Galen Gilbert, Esqs. for Complainants
Vanessa Gilbreth and Laura Deck, Esqs. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On July 27, 2010, Stoli Kapxhiu (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that Roche Bros. (“Respondent”) retaliated against her in violation of M.G.L. 151B, section 4 (4).

A probable cause finding was issued by the Investigating Commissioner on May 26, 2012. The case was certified for a public hearing on July 13, 2013. A public hearing was conducted on April 7 and 8, 2014.

The following witnesses testified at the public hearing: Complainant, Anna Kapxhiu, Robert DiMarino, Elizabeth Costigan, Robin Salvatore, Kenneth Arnott, Sharon Aldoupolis, Richard Perry, and Richard Broderick. The parties submitted fourteen (14) agreed-upon exhibits.

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, Stoli Kapxhiu, began working for Roche Bros. Supermarkets in Westwood, MA in 2003. She was hired as a part-time bagger and was later trained to work in the bakery and deli departments. Complainant is fluent in Albanian and speaks English. Her daughter describes her mother's English as mediocre. Complainant admitted that she has some difficulty understanding English.
2. Roche Bros. is a retail supermarket chain with eighteen stores located around greater Boston, MA.
3. Upon hire, Complainant attended an orientation and received an associate's handbook which includes a sexual harassment policy. Joint Exhibit 1. She watched a video entitled, "Steering Clear of Sexual Harassment." Complainant signed acknowledgments of receiving and understanding the company's sexual harassment policy. Joint Exhibit 2.
4. In June of 2010, Complainant was working in the bakery department under the supervision of bakery manager Richard Perry. She worked a split shift several days a week from 5:00 a.m. to 8 a.m. and again from 3:00 p.m. to 6:00 p.m.
5. On Saturday, June 5, 2010, Complainant was working an early morning shift in the bakery. She was stationed in the front of the bakery. The bakery is adjacent to the deli department where deli manager Betty Costigan and deli clerks Robin Salvatore and Kenneth Arnott were working on the morning of June 5, 2010.
6. Shortly before 8:00 a.m. on June 5, 2010, Complainant participated in a joking conversation with deli department employees in which Costigan said, "ever since Robin went full-time, she's gotten very slow." Costigan made the remark as a good-natured response to Complainant's offer to help out.

7. Shortly after the joke was made, Complainant began to yell at deli employee Ken Arnott saying that he knew what he did, he knew what he said, and that he should be transferred. Salvatore looked at Arnott and asked, "What did you do?" Arnott replied that he didn't know and asked Complainant what he did. Complainant did not explain but continued to yell and call him an "idiot." Complainant then said that she was going to "shoot and stab" Arnott.
8. Arnott asked Complainant to repeat what she said because he has a hearing problem. Complainant repeated that she was going to "shoot and stab" him. As she made the comment a second time, bakery employee Sharon Aldoupolis was passing through the area and heard the threat.
9. Neither Arnott nor Aldoupolis believed that Complainant would carry out her threat and went back to work. As they did so, Complainant continued to yell at Arnott and flail her arms.
10. Costigan, hearing the yelling, asked Complainant what had happened. Complainant responded that Arnott was a "bad man, he needs to go." Costigan took Complainant behind a bread rack in order to speak to her privately. Complainant repeated that Arnott was a "bad man" and "needed to go." Complainant then added that Arnott had slapped Robin [Salvatore] on the "butt." When Costigan asked Complainant to explain, Complainant grabbed Costigan by her shoulder, forcefully spun her around, and slapped Costigan on the buttocks. Costigan responded by saying that Complainant was not permitted to touch her.
11. Costigan next spoke to Arnott, Salvatore, and Complainant in the deli back room. She asked store manager Richard Broderick to join them. Complainant repeated her

accusation, grabbed Salvatore by the shoulders, spun her around, and attempted to smack her buttocks. Salvatore forcefully denied that she had been sexually harassed by Arnott, saying “absolutely not . . . that’s not true.” Salvatore described herself as shocked and horrified by Complainant’s accusations against Arnott.

12. Broderick reported the incident to Director of Operations Aimee Morgida. Morgida directed Broderick to collect statements from witnesses.
13. Early on the morning of June 7, 2010, Aldoupolis told deli manager Costigan that Complainant had threatened to shoot and stab Arnott on June 5th. Costigan asked Arnott for confirmation, and he acknowledged that Complainant had threatened to shoot and stab him but said that he hadn’t reported the threat because he didn’t take it seriously, wanted to mind his own business, wanted to just do his job, and didn’t want to get Complainant into trouble. Costigan reported the threat to store manager Richard Broderick.
14. On Monday, June 7, 2010, Broderick asked for statements from Complainant, Salvatore, Arnott, Costigan, and Aldoupolis. Complainant dictated her statement because she has difficulty writing in English. After dictating her statement, Complainant read and signed it.
15. The statements were sent to Respondent’s Human Resource Department on Tuesday, June 8, 2010. Complainant was suspended, effective Tuesday afternoon, pending an investigation.
16. On the evening of June 8th, Complainant called bakery manager Richard Perry at home to ask why she was “fired.” Perry explained that he did not know anything about the

matter and would look into it. After he hung up, Perry received two more phone calls from Complainant which he did not answer.

17. On Wednesday morning, June 9, 2010, Complainant called bakery manager Perry at the Westwood store. She spoke to Perry twice, but she attempted to speak with him five to seven more times at the store that day and called his personal cell phone approximately eight times that night. For the rest of the week, Complainant continued to call Perry at the store and on his personal cell phone. Perry answered a few of the calls. During one call Complainant said that she was “going to get” Perry.
18. Perry reported Complainant’s calls to store manager Richard Broderick who, in turn, reported them to Roche Bros. Director of Operations Aimee Morgida.
19. Perry started walking Aldoupolis and Salvatore to the parking lot at the end of their shifts as a safety precaution.
20. As part of the investigation into Complainant’s conduct, store manager Broderick was asked to draft a statement about the events of Saturday, June 5, 2010 and review the security cameras to locate footage of the events on that day. Broderick determined that the cameras were not pointing towards the area where the alleged incidents occurred.
21. Members of Respondent’s Human Resource Department interviewed Broderick, Costigan, Arnott, and Aldoupolis on Thursday, June 10, 2010; Salvatore during the morning of Friday, June 11, 2010; and Complainant during the afternoon of June 11th. Prior to Complainant’s interview, Director of Operations Morgida tentatively concluded that termination was warranted and instructed the interviewers to terminate Complainant at the end of her interview if no new information came to light.

22. At her interview, Complainant did not provide any new details concerning her charge that Arnott inappropriately touched Salvatore. Complainant did not deny threatening to shoot and stab Arnott, but she attempted to deflect questions about the threat.

23. Complainant's Human Resource interviewers concluded that because no new information was presented, they should terminate Complainant. When they informed Complainant that she was being terminated, she became very emotional. She began yelling and sobbing. She put her head down on a desk and then laid down on the conference room floor. Assistance was sought from Complainant's daughter and the local police. Complainant eventually left via ambulance.

III. CONCLUSIONS OF LAW

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000), *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). In the absence of direct evidence of a retaliatory motive, the MCAD must follow the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). *See also* Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655 (2000).

To prove a prima facie case of retaliation, Complainant must demonstrate that: (1) she engaged in protected activity; (2) Respondent was aware that she had engaged in protected

activity; (3) Respondent subjected her to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. See MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996), *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996).

Protected activity may consist of internal complaints as well as formal charges of discrimination but regardless of the type of complaint, the charges must constitute a reasonable and good faith belief that unlawful discrimination has occurred. See Guazzaloca v. C.F. Motorfreight, 25, MDLR 200 (2003) *citing* Trent v. Valley Electric Assn Inc., 41 F.3d 524, 526 (9th Cir. 1994); Santiago v. Trel Lloyd and Lupi's Enterprises, Inc., 66 F. Supp. 2d 282 (1999); Kelley v. Plymouth County Sheriffs Department, 22 MDLR 208 (2000). There need not be a successful underlying claim of discrimination in order to give rise to a viable retaliation complaint, but a fabricated charge of sexual harassment will not give rise to a viable claim of retaliation. See Guzaazloca, 25 MDLR at 204.

The claim of sexual harassment in this case is utterly lacking in credibility. There is no support for Complainant's allegations that Ken Arnott verbally harassed and touched Robin Salvatore in a sexual manner nor did Complainant present her version of what occurred in a convincing or credible manner. The charges were credibly denied by both the alleged perpetrator and the alleged victim and were not corroborated by any fellow employees. Rather than constitute a reasonable claim, the accusation against Arnott appears to be one of several irrational outbursts involving Complainant on or around June 5, 2010. She not only

accused Arnott of sexual harassment, she threatened to shoot and stab him, placed her hands on the shoulders and buttocks of co-workers in a misguided attempt to convince them of her bizarre accusation, harassed the bakery manager with continuous phone calls, and became hysterical when fired. These events support my conclusion that Complainant's accusation against Arnott was fabricated and should not be deemed protected activity.

Since there is no underlying protected activity, Complainant cannot prove that her termination was motivated by unlawful retaliation. Complainant was not fired for engaging in protected activity; she was fired for making wild and unfounded accusations against a co-worker, threatening him with bodily harm, grabbing the buttocks of co-workers, and subjecting the bakery supervisor to harassing phone calls. Since Complainant has failed to make out a prima facie case, there is no violation of G.L. c. 151B, section 4(4).

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 7th day of January, 2015.

Betty E. Waxman, Esq.,
Hearing Officer