

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
KATHERINE GIOVANNI,

Complainant

v.

DOCKET NO. 07-BEM-01613

BROCKTON AREA
MULTI-SERVICES, INC.

Respondent

Appearances: Sol J. Cohen, Esq. for Complainant
J. Michael Conley, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On July 2, 2007, Complainant Katherine Giovanni, filed a complaint with this Commission charging her former employer, Respondent, Brockton Area Multi-Services, Inc. (“BAMSI”), and her supervisor Luis Villanueva, and with discrimination on the basis of sexual harassment and gender harassment and retaliation in violation of G.L. c. 151B §4(16A) and (4). Complainant alleged that she was retaliated against and constructively discharged after complaining to her employer of sexual/gender harassment by Villanueva. Complainant’s claim of retaliation also named the Director of Operations, Jean Kammer.

The Investigating Commissioner found probable cause to credit the claim of sexual/gender harassment against Respondents BAMSI and Villanueva, and found lack of probable cause as to the claims of retaliation and constructive discharge. Lack of Probable Cause was also found as to the retaliation charges against the individuals, Villanueva and Kammer. Conciliation efforts were unsuccessful and a hearing was held on the remaining claim before the undersigned Hearing Officer on July 12, 2010.

The parties submitted post-hearing briefs. Having reviewed the record of the hearing and the post-hearing briefs, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Katherine Giovanni, began working for Respondent, Brockton Area Multi-Services, Inc., in April of 2005, as an administrative assistant and split her work week so that she worked in two separate day habilitation programs. Complainant worked at the Brockton Day Hab Center on Thursdays and Fridays. (Tr. 23)

2. Respondent, Brockton Area Multi-Services, Inc. (“BAMSI”), is a private, not-for-profit agency providing human services in communities throughout Massachusetts. BAMSI operates group homes for mentally ill and developmentally disabled persons, day habilitation centers, community counseling centers, after school programs, and an alternative secondary school, and also provides services for women and infant children, the elderly and families. (Tr. 192-193) The client population at the Brockton Day Hab included adults with developmental disabilities and mental health concerns having varying levels of skills and development. (Tr. 164)

3. Respondent, Luis Villanueva, was the Program Director of BAMSI'S Brockton Day Hab Center. He was hired by BAMSI in December, 2006. He has a career in human services and a long history of working with individuals with mental disabilities and mental health issues. He has a Bachelor's Degree in psychology and is working on a Master's Degree in health care administration. (Tr. 157-158, 162) Villanueva is a gay man who lives in a committed relationship with his partner. (Tr. 157)

4. Complainant's duties as an administrative assistant at BAMSI included answering the phone and other receptionist duties, typing up reports, and ordering office supplies. Her salary was \$12 per hour. (Tr. 24)) Villanueva was Complainant's direct supervisor at the Brockton Day Hab. (Tr. 26)

5. Complainant had a good relationship with her supervisors at BAMSI, including Villanueva, and she received positive evaluations. (Tr. 25, 26; Exs. 1, 6). Complainant testified that she enjoyed her work at BAMSI, and particularly enjoyed her interaction with the clientele. (Tr. 27)

6. Prior to March of 2007, Complainant claims she had no problems with Villanueva and "liked him just fine." (Tr. 61) I find that Complainant generally had a friendly relationship with Villanueva. However she had a litany of complaints about him including: that he would take his shoes off at work, which she found unprofessional; would wear T-shirts which she believed was against BAMSI rules; was condescending to clients on a routine basis; always came in late and left early; pawned work off on staff members; was obsessed with his title of Program Director; was condescending to both male and female staff; and listened to his iPod in his office. She claims to have found much of this conduct obnoxious and annoying. (Tr. 61-67)

7. Complainant agreed that among the staff there were a lot of conversations of a personal nature as well as joking mixed with sarcasm. Complainant knew that Villanueva was gay and he discussed his relationship with his fiancée openly. (Tr. 68, 72) Complainant's desk was situated where she could hear Mr. Villanueva from her office. She claims that on or about March 7, 2007, Villanueva came over to her desk to talk with her and must have thought she was "cranky" because he asked her if she was having her "monthly." Complainant claims that she told Villanueva it was none of his business and claims that she was offended by the comment. She later claimed she was traumatized by this comment for several months. (Tr. 75-76) Complainant stated that Villanueva just walked away and laughed. I find that Villanueva thought he was being funny and I do not believe Complainant was traumatized by the comment.

8. Complainant also testified that Villanueva would hover over her closely in a manner that made her uncomfortable, but admitted there was nothing sexual about this conduct. (Tr. 74) She stated that on April 19, 2007, she confronted Villanueva about this conduct, because she felt it was an invasion of her personal space. (Tr. 31) According to Complainant, he responded that he missed Complainant on the days she worked at the North Brockton Day Hab. (Tr. 32) I believe that this comment was sarcastic and intended in jest.

9. Complainant testified that on May 3, 2007, while she was working at her desk a low functioning female client who was upset, was crying and screaming. When Complainant asked her what was wrong, Villanueva said to Complainant, "You'd sound like that too, if you didn't get laid." Complainant testified she was very offended by this comment because as a program director Villanueva was supposed to set an example and

not be talking about clients in a vulgar way. She told him he should not talk like that and shook her head in disgust. (Tr. 32-33)

10. Complainant testified that on May 10, 2007, Villanueva came over to her desk laughing and stated that she would not believe what he had just witnessed. He told her that a low functioning female client had put her hand down the front of her pants, pulled it out and smelled it, and that he asked the client, “does it smell like chicken?” Complainant testified that she was extremely offended and disgusted by this comment and found this as well as his earlier comment about another client to be degrading to female patients who could not speak or advocate for themselves. (Tr. 33-34, 39) I credit Complainant’s testimony that she was upset by Villanueva’s treatment of clients on these two occasions, and that she found his comments to be offensive.

11. Respondent acknowledged that from the standpoint of patients’ rights, Villanueva’s comments were inappropriate and should have been reported. All BAMSI employees are mandated reporters and are trained annually that if they witness any neglect, omission, humiliation, or mistreatment of a client, they are required by law to report it to the Disabled Persons Protection Commission (DPPC). Complainant expressed outrage at the manner in which clients were treated in her letter of resignation and stated that she requested to speak to the Human Rights Officer of the Brockton Day Hab, but felt she was thwarted from reporting her concerns to the proper authority by Villanueva’s boss, Jean Kammer, who Complainant felt did not want the incidents to become public. (Ex. 2) Complainant did not report the matter to the person she understood to be the human rights officer for the Day Hab program. (Tr. 84-85)

12. On May 3, 2007, the same day he is alleged to have made the above comment, Villanueva purportedly made two comments to Complainant feigning surprise that she was wearing a purple bra with a white shirt and that her purple bra strap was showing. She stated that he made this comment sarcastically suggesting that she had committed a fashion “faux pas.” Complainant responded that this was none of his business and that he should not be looking at her bra strap. (Tr. 35-36) Villanueva testified that he questioned whether Complainant’s attire was appropriate for the workplace and reminded her of the dress code. I credit Complainant’s version that the initial comment was made in jest; however, upon informing Villanueva that she wanted to consult with her other supervisor in North Brockton about whether her attire was appropriate for work, Villanueva became more serious and told her, that as the Program Director, he had the right to comment about her attire being inappropriate. (Tr. 95-97) Complainant stated that this conduct so infuriated her that her blood pressure began to rise and she decided to file an internal complaint of sexual harassment.

13. On or about May 15, 2007, Complainant filed an internal complaint of sexual harassment with Respondent. (Ex. 3) Complainant stated that she felt that Villanueva’s conduct was serious enough to merit his termination. In the alternative, she asked that she be transferred so that he no longer supervised her.

14. Christopher Mundy, BAMSI’s Vice President for Quality Management, received Complainant’s sexual harassment complaint and reviewed it with the Chief Operations Officer, Vanessa Tierney. He investigated Complainant’s allegations with the assistance of a Human Resource representative, Sue Montani. (Tr. 198) He also reported the alleged remarks made about clients to DPPC. (Tr. 198-199) As part of the

investigation, Complainant, Villanueva, and a witness Complainant identified were interviewed. The witness volunteered that she had never heard Villanueva make comments about clients that could be perceived as humiliating or negative. Respondent found there was insufficient evidence to corroborate Complainant's allegations except for those concerning her attire and it determined that there was no official basis for formally disciplining Villanueva under its policies. (Tr. 199-200) BAMSII leadership did recommend that Villanueva be re-trained regarding issues of appropriate boundaries and relating to his staff on a personal level. DPPC conducted its own investigation into the alleged comments made about clients, and could not substantiate the remarks. DPPC was satisfied with BAMSII's investigation and recommendations. (Tr.199)

15. After the investigation, Complainant was informed that she would remain under Villanueva's supervision for the two days per week she worked at the Brockton Day Hab program or she could transfer to a different program, or resign. At the time there were no administrative assistant positions available in other Day Hab programs. Complainant testified that she was upset by BAMSII's response to her complaint and informed Respondent that she did not wish to return to work under Villanueva. (Tr. 43-44)

16. Complainant returned to work under Villanueva's supervision on or about May 31, 2007. She claims to have suffered severe anxiety and increased blood pressure at the prospect of returning to work with Villanueva as her supervisor. Complainant left work early on May 31 and saw her physician who prescribed Valium (Lorazepam) for anxiety, and increased her dosage of medications she was already taking, Paxil for depression, and Atenolol for high blood pressure, from which she had suffered for

sometime. He also recommended that she speak to a counselor about the events at work. (Tr. 77, 114, 116, Ex. 9) Complainant did not follow through on this recommendation. (Tr.116-117) While I find that Complainant felt uncomfortable returning to work for Villanueva after she had complained about his behavior, I do not believe her testimony that she was traumatized by his behavior or that she was too emotionally upset to work at that location any longer.

17. Complainant left work on a leave of absence on June 19, 2007. She secured other employment shortly thereafter at a higher rate of pay and did not return to work at BAMSI. She submitted a letter of resignation on July 9, 2007, citing as her reasons, Villanueva's offensive conduct. (Tr. 52; Ex. 2) Complainant testified that Villanueva did not engage in any behavior that could be characterized as sexual harassment after she returned to work, but that he created a hostile work environment in the way he treated her and retaliated against her for her having complained about him. There was no evidence to substantiate these allegations. From May 31 until June 19, 2007, Complainant worked only four shifts with Villanueva. (Tr. 112-114)

18. Manuel Quiles, a co-worker at BAMSI and a witness for Complainant testified that Villanueva behaved inappropriately towards him by feeling his shirt collar, smelling his cologne and complimenting him on both. Quiles, who is Puerto Rican, also claimed that on another occasion Villanueva referred to him as "Papi," claiming that this term was offensive to him because in his culture, it is a name only a woman would call a man. Villanueva denied that his behavior with Quiles was sexual and stated that his use of the word "Papi" was benign, and is a term of endearment in Puerto Rican culture that is not reserved for use by women and has no sexual or romantic connotation. After

Quiles complained to Director of Operations, Jean Kammer, Villanueva apologized to Quiles for offending him in any way.

III. CONCLUSIONS OF LAW

General Laws Chapter 151B §4(1) prohibits discrimination in employment based on gender, which includes gender based sexual harassment, and §4(16A) specifically prohibits the sexual harassment of any employee. M.G.L.c. 151B; *Ramsdell v. Western Bus Lines, Inc*, 415 Mass 673, 677 (1993); *Doucimo v. S & S Corporation*, 22 MDLR 82 (2000). Sexual harassment is defined as "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; (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or sexually offensive work environment." G.L. c. 151B § 1(18); *Collegetown Division of Interco v. Massachusetts Commission Against Discrimination*. 400 Mass. 156, 165 (1987).

The determination of whether conduct constitutes sexual harassment depends upon the severity and frequency of the conduct, and whether it is unwelcome and offensive to the reasonable person. The conduct must be sufficiently severe and pervasive to interfere with a reasonable person's work performance. *Muzzy v. Cahillane Motors, Inc*. 434 Mass. 409 (2001). The alleged conduct must be both objectively and subjectively offensive. *Ramsdell, supra*. at 677. The objective standard means that

evidence of harassment is to be considered from the “view of the reasonable person in plaintiff’s position.” *Muzzy, supra.* at 411-412.

Complainant in this case has alleged that she was subjected to a sexually hostile work environment as a result of certain sexually offensive and intrusive comments made by her supervisor, Luis Villanueva. Two of the comments she complains of were concerning clients of the Day Habilitation program where Complainant was employed. Complainant justifiably felt that the comments were disrespectful of the clients and demonstrated a lack of concern for their dignity and rights. While I concur that these comments showed great disrespect for Respondent’s clients and were extraordinarily unprofessional and inappropriate, I do not believe that they created a sexually hostile work environment for Complainant or that they had the effect of interfering with her ability to do her job.

While it is apparent that Villanueva thought he was being “cute” when he relayed these comments to Complainant, she indicated that she did not find his behavior amusing. Complainant was justified in complaining about Villanueva’s puerile and adolescent remarks made at the expense of severely disabled clients who had no apparent understanding of the import of his comments. I believe that she was legitimately offended for the clients but that she, personally, did not feel intimidated, threatened or harassed by these comments. In fact the outrage Complainant expressed in her letter of resignation speaks more to her concern about disrespectful treatment of clients. The fact that Respondent did not credit her complaints of Villanueva’s misconduct toward clients and failed to discipline him for this behavior is more disconcerting than her allegations that Respondent was dismissive of charges that she was sexually harassed.

The remainder of Complainant's charge of sexual harassment involves a vague allegation that Villanueva sometimes "hovered" over her and that he made comments about her "monthly," and her purple bra. There was no evidence that Complainant considered Villanueva's "hovering" sexual, intimidating or threatening. The comments Villanueva made were clearly inappropriate in the workplace. However, the purple bra comment was admittedly Villanueva's sarcastic attempt to express his view of Complainant's fashion "faux pas." And while his earlier comment about Complainant's purported sour mood can be viewed objectively as demeaning to women, I believe Complainant dismissed it as annoying and sophomoric. I do not believe that Complainant was more particularly offended by these comments than she was by much of Villanueva's behavior generally as a supervisor, which she found to be annoying and obnoxious.

However unprofessional and immature Villanueva's behavior, given the context, I conclude that it did not rise to the level of actionable sexual harassment because it did not create a sexually hostile work environment for Complainant. Nor do I believe that Complainant was targeted because of her gender, as Villanueva appeared to approach at least one male employee in a similar fashion, behaving with a familiarity for which he was made to apologize. Management was aware of Villanueva's conduct having received at least two complaints about him, and might have undertaken a more forceful approach to addressing his failings generally as a supervisor, despite its determination that his behavior did not constitute sexual harassment.

Given all of the above, the evidence does not support a finding that Villanueva's behavior was intimidating, threatening or sexually hostile to Complainant. Therefore, I

conclude that Respondents are not liable for subjecting Complainant to a sexually hostile work environment in violation of G.L. c. 151B, and hereby order the Complaint dismissed.

IV. ORDER

The Complaint in this matter is hereby dismissed. This constitutes the final order of the Hearing Officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten (10) days of receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 29th day of July, 2011.

Eugenia M. Guastaferr
Hearing Officer